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Condo Alert!

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Common element washrooms are open for business

Andrea Lusk

The *Occupational Health and Safety Act* ("OHSA") recently saw a new section come into force, dealing with access to washrooms. Section 29.1 came into force March 2022 and reads, in part: "the owner of a workplace shall ensure that access to a washroom is provided, on request, to a worker who is present at the workplace to deliver anything to the workplace, or to collect anything from the workplace for delivery elsewhere."

Note that this new section does not impose washroom access on an "employer", but on the "owner" of a workplace. These have different definitions under the OHSA – an "employer" employs a worker or contractor for services and an "owner" is the occupier of the lands or premises used as the workplace (or the owner's agent). Under section 26 of the Condo Act, condos are deemed the "occupier" of the common elements in this scenario.

A "worker" includes any person who is performing work or supplying services for monetary compensation and some unpaid positions where services are supplied and the "workplace" is any land, premises, location, or thing at, upon, in or near which a worker works.

In many condo scenarios, these definitions will capture a person working on site to provide common element maintenance, repair, construction, inspection or other services to the condo (or to the owners, in case of delivery to a common element location such as a mailroom, main desk or hallway in front of a unit).

The exceptions to washroom access are if it would be unreasonable or impractical for reasons relating to worker or workplace health and safety or having regard to the nature of the workplace, the type of work at the workplace, the conditions of work at the workplace, the security of any person at the workplace and the location of the washroom within the workplace or if the washroom is in, or can only be accessed through, a dwelling.

This new section will have different implications on different sites, but if a request for access to a common element washroom is received, nature's call should be answered (if safe and reasonable).

Rule enforcement and the CAT's jurisdiction

Andrea Lusk

An owner placed an 18'" removable wooden barrier in her common element backyard in 2014. Intended to keep her dogs in, it closed off the existing fences separating backyards but could be moved to allow for landscaping, etc. The owner and corporation discussed the barrier over the years. In 2022, the condo alleged it was placed there without board approval and demanded it be removed pursuant to its rules prohibiting storing garbage on the common elements and, later, the rules prohibiting installation of fencing or landscaping on the common elements without board approval.

After demands from the condo's manager and lawyer (and a chargeback of $475.52 for the lawyer's letter) the owner removed the barrier under protest, and brought the matter to the Condominium Authority of Ontario ("CAT") for an order affirming her use of the barrier (or "pile of wood" as the condo initially called it).

Since the condo classified the barrier as garbage, the matter was initially considered as a storage issue. As the matter progressed, it became apparent that condo's argument actually fell under s. 98 of the Condo Act, dealing with an alleged alteration to the common elements. The CAT cannot consider s. 98 issues, as they are outside of its jurisdiction. The CAT determined that the wooden barrier was clearly not garbage, refuse or debris under any definition of the word and the owner moved it regularly and had not set it aside to be retrieved - therefore it wasn't stored. The condo abandoned reliance on this rule at the application and, instead, argued the unauthorized alteration aspect. The CAT could not make a determination on whether the barrier was an unauthorized alteration only that it wasn't storage under the rules. The owner was reimbursed her filing fee.

It's important to frame and bring disputes in their proper context and forum. It is also important to enforce reasonably. Whether the condo decides to pursue enforcement under its declaration and s. 98 is unknown. The Ontario Court of Appeal declined to find a hot tub an alteration, therefore the movable barrier's fate remains to be seen.

Editor:
Andrea Lusk