

Due Process is the Order of the Day

Publication / Date: The CHOA Journal-Summer 2016

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When enforcing bylaws or rules strata councils must follow the due process scheme set out in s. 135 of the *Strata Property Act* (the "Act") before imposing a fine, requiring a person to pay the costs of remedying a contravention or denying a person the use of a recreational facility.

This scheme requires a strata corporation to give an owner or tenant details of a complaint and an opportunity to answer the complaint, including a hearing if requested, before council makes a decision regarding the allegations and takes steps to remedy the infraction if a violation has occurred.

S. 135 of the Act states:

135 (1) The strata corporation must not

- (a) impose a fine against a person,
- (b) require a person to pay the costs of remedying a contravention, or
- (c) deny a person the use of a recreational facility

for a contravention of a bylaw or rule unless the strata corporation has

- (d) received a complaint about the contravention,
- (e) given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant, and
- (f) if the person is a tenant, given notice of the complaint to the person's landlord and to the owner.

(2) The strata corporation must, as soon as feasible, give notice in writing of a decision on a matter referred to in subsection (1) (a), (b) or (c) to the persons referred to in subsection (1) (e) and (f).

(3) Once a strata corporation has complied with this section in respect of a contravention of a bylaw or rule, it may impose a fine or other penalty for a continuing contravention of that bylaw or rule without further compliance with this section.

Consequences:

The case law addresses the consequences of failing to comply with this statutory scheme. The Court will strike down fines on grounds of a breach of the duty of fairness where the defaulting owner is not provided with notice of the complaint and an opportunity to be heard: *Schoffield v. Strata Corp. N.W. 73* [1983] B.C.J. No. 2471 (B.C.C.A.).

Continuous fines for keeping a cat in a strata lot contrary to a pet prohibition bylaw (a continuous bylaw violation) were struck down by the Supreme Court where the fines were imposed without giving the owner an opportunity to be heard contrary to s. 135 of the Act. A procedural defect is not cured by providing a notice inviting the owner to meet with the council to discuss the fines: *Dimitrov v. Summit Square Strata Corp.* [2006] B.C. J. No. 1532 (B.C.S.C.).

The Supreme Court denied the legal costs of a strata corporation seeking relief against an owner who installed flooring contrary to the bylaws where the strata corporation failed to give the owners an opportunity to be heard: *Strata Plan VR19 v. Collins*, [2004] B.C.J. No. 2757 (B.C.S.C.). This is a harsh result since these legal costs could be substantial. This means that owners who not in violation of the bylaws must pay the legal costs of the persons who are in violation. This outcome places the cost burden on the wrong party at the end of the day.

The above cases underscore the importance of complying with the due process requirements set out in s. 135 of the *Act*. There is a risk that owners could proceed against council to recover their losses based on a breach of statutory duty.

Recent case law suggests that the principles of procedural fairness and due process are integral, but they are not limitless.

A recent decision held that it is not significantly unfair to exclude the complainant from the investigation process regarding a nuisance from cigarette smoke: *Chorney v. Strata Plan VIS770*, [2016] B.C.J. No. 164 (B.C.S.C.).

The 8 unit strata complex was originally constructed as a single family dwelling in 1912. It was converted into a strata corporation in the 1970's. The building failed to meet modern standards for soundproofing and air flow between strata lots or between a strata lot and common property.

The complainant took issue with the procedures followed by council during the investigation phase of the complaint. The offender sold and left after the complaints started.

The complainant argued that it was significantly unfair for council not to provide her with notice before addressing the alleged complaint with the alleged perpetrator on grounds that these discussions constituted a hearing.

The complainant (petitioner) argued that:

1. the investigation and questioning of the perpetrator by a council member was a hearing and the complainant was not given proper notice;
2. the strata corporation was attempting to force the complainant to withdraw the complaint;
3. the strata corporation was biased;
4. the strata corporation had prejudged the matter; and,
5. the process lacked even-handedness and adherence to law.

The Court disagreed and held that the council acted in a reasonable manner by attempting to resolve the problem without further proceedings given the lack of

modern amenities and conflicting evidence between the complainant and the perpetrator. The Court found that the actions of council did not rise to the level of significant unfairness.

The Court concluded that the informal discussion formed part of council's investigation. It was not a hearing and s. 135 of the *Act* did not apply.

The Court took judicial notice of the hazard created by second hand smoke. However, the perpetrator had sold. The Court refused to recommend a particular procedure for council to follow in the future in addition to those procedures set out in s. 135 of the *Act*. Therefore, a strata corporation can deal with complaints as it sees fit, as long as it complies with s. 135 of the *Act* (principles of procedural fairness) and does not act in a manner that is significantly unfair to any person.

The Court reviewed s. 135 of the *Act* and concluded that it refers to the procedural requirements that a strata corporation must undertake if it intends to impose sanctions against a person who has violated a rule or bylaw. The provision refers to a person who is *alleged* to have breached a bylaw and, prior to imposing any penalties, mandates the strata corporation to first provide the alleged offender with particulars of the complaint in writing, and then provide that person with a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or the tenant.

The following summarizes some best practices council may wish to adopt:

- 1) The strata council can issue a self-complaint.
- 2) The infraction letter should:
 - a) set out the details of the complaint including when, where, how, what and why;
 - b) reproduce the relevant bylaws or rules and the wording of s. 135 of the *Act*;
 - c) provide a date for an answer or a request for a hearing;
 - d) indicate the consequences if council determines that the bylaws or rules have been violated.
- 3) The infraction letter should provide the alleged offender with 20 days to answer the allegations and to request a hearing.

- 4) If the alleged perpetrator is a tenant, the strata council should also give notice of the complaint to the landlord, to the owner, or to the owner's representative.

Once the notice date has passed, the council should meet as soon as feasible and make a decision regarding whether the bylaws or rules have been violated and this decision must be recorded in the minutes.

The council must promptly give notice in writing of the decision, including the proposed remedy if a violation was found, to the tenant and/or owner, including

- 5) The remedy should fit the crime. The remedies may include any one or more of the following:
- a) issue a warning;
 - b) assess a fine;
 - c) assess a continuous fine pending compliance;
 - d) do work on the property;
 - e) remove objects from the common property;
 - f) collect the reasonable costs of remedying the contravention;
 - g) take legal proceedings to compel compliance; and/or,
 - h) exercise any other rights or remedies available under law.
- 6) If the strata council determines that a person is in continuous contravention of a bylaw or rule, then it may impose a fine for contravention of that bylaw or rule every 7 days without further compliance with the due process requirements set out in s. 135 of the *Act*.
- 7) Whether or not the bylaw contravention is continuous is a question of fact. A rental bylaw contravention is more obvious. A noise bylaw contravention is not. If in doubt, a letter pursuant to s. 135 of the *Act* should be provided for each alleged infraction.
- 8) The due process requirements should be repeated for every new bylaw violation.
- 9) Council should only consider applications, complaints or notices provided to council in writing and delivered pursuant to s. 63 of the *Act*. A specific email address may be provided by the strata corporation for this purpose. The council should clarify that will not deal with a matter brought to its attention in any other manner. A bylaw addressing this issue should be considered.

The above is not intended to constitute an exhaustive code of conduct when there is an alleged bylaw contravention. If the council has questions regarding this process, it should seek legal advice.