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## The Case of the Too Low Railing

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In the recent decision of *Frank v. The Owners, Strata Plan LMS 355*, the British Columbia Supreme Court was required to consider whether an alteration request submitted by an owner was, in fact, a repair that must be carried out and paid for by the strata corporation. The issue was considered in the context of the installation of higher railings around a roof deck.

### Background Facts

The strata plan identified that each of the three penthouses within the strata development had the use of a roof deck designated as limited common property.

Some time after purchasing a penthouse, Mr. Frank discovered that the parapet walls framing the roof deck were lower than required by the Building Code. Mr. Frank advised the strata corporation that he wished to install railings and received strata corporation permission to obtain the necessary permits.

Before the permits were issued, the strata council discovered that, notwithstanding the reference on the strata plan to "roof deck", the roof was not intended by the developer to be used for recreational purposes. The designation of limited common property was to facilitate the installation of custom HVAC equipment for use by each penthouse strata lot. The original developer's plans submitted to the City and the development permit from the City did not contemplate recreational use. As a consequence, the height of the parapet walls was adequate.

Mr. Frank proceeded with his application to the City however, in addition to obtaining a building permit, Mr. Frank was also required to obtain a development permit to permit the use of the roof deck to be changed to recreational use. Mr. Frank requested that the strata corporation provide written consent for the application

as required by the City however the strata corporation refused.

The strata corporation required that various structural concerns be addressed with respect to the change in use.

Subsequently, the City issued an order requiring Mr. Frank and the other penthouse owners to cease occupying the roof and to restore it to comply with the original plans approved by the City. Mr. Frank complied with the City's request.

In the meantime however because Mr. Frank wished to use the roof as a "roof deck", Mr. Frank proceeded to obtain opinions to address the structural concerns raised by the strata corporation. Mr. Frank also developed three alternative proposals after receiving advice from the City to permit the roof to continue to be used as a roof deck. The opinions and proposals were provided to the strata corporation. At this time, Mr. Frank advised the strata corporation that in his view the strata corporation was responsible for the engineering and architect's costs as falling within the strata corporation's obligation to provide and maintain safe and secure common property.

Subsequently the strata corporation provided its consent to the installation of new railings in a form acceptable to the City however the matter of costs was not resolved.

Mr. Frank provided the strata corporation with the architect's drawings and later with the further documents that had been requested by the City. The strata corporation raised no further concerns. On March 9, 2016, the City granted a development and building permit for the installation of the new railings.

When Mr. Frank requested access to the roof in order to proceed with the work, the strata corporation refused as a result of the parties' disagreement over costs. At that time, the strata corporation advised that it had some concerns with respect to the drawings and documents submitted to the City. The strata council also advised that the installation of the railings represented a significant change in the use or appearance of common property and thus must be approved by a 3/4 vote before the work could proceed. The 3/4 vote resolution to approve the change was subsequently defeated by the owners.

### **Issue**

The issue for the Judge was whether the installation of the railings constituted a significant change in the use or appearance of common property or whether the installation was a necessary repair. If the installation of the railing was a significant change, Mr. Frank would be required to obtain approval by means of a 3/4 vote and may be required to pay the costs of the design and installation. If the installation was a necessary repair under section 72 of the *Strata Property Act* (the "Act"), or was required to ensure safety and prevent significant loss or damage, a 3/4 vote would not be required and the strata corporation would be responsible for the costs.

### **Analysis**

Mr. Frank argued that the strata plan designating the area as "roof deck" is paramount and that the installation of the railings for safety purposes is a duty of the strata corporation under section 72 of the Act which section requires the strata corporation to repair and maintain common property. Mr. Frank submitted that the strata corporation's refusal to perform its duty to repair the railing effectively deprived him of the use and enjoyment of limited common property and was a form of expropriation or wrongful denial of his equitable rights.

The strata corporation argued that the inability to use the roof as a roof deck was consistent with the building's original design and with the original development permit. The installation of railings therefore constituted a significant change in the use or appearance of the limited common property and required approval by means of a 3/4 vote. The strata corporation also argued that even if the change is not

significant, it is nonetheless an alteration which must be paid for by Mr. Frank and not a repair.

### **Proper Use of the Roof Deck**

The first issue the Judge was required to determine was whether Mr. Frank was entitled to use the roof as a deck or whether the use of the roof was restricted in accordance with the original drawings submitted to the City and with the original development permit.

The Judge noted that the designation of "limited" common property conferred on the owner a substantial degree of control and something approaching a beneficial or equitable interest. The Judge refused to accept the strata corporation's argument that the original intention of the developer, which was implicit in the development permit, should control how the roof was used. Instead the Judge relied on the strata plan. The Judge noted that the strata plan is the document that establishes title to each strata lot and each indefeasible title for a strata lot must contain a reference to the owner's share in the common property. The Judge further noted that not only did the strata plan designate the roof area for the exclusive use of Mr. Frank's unit, it also specified the area as a roof deck with no indication of any restrictions on that use.

The Judge held that the fact that a development permit was required by the City in order to install the railings does not, in itself, render the installation of the railings to be a significant change.

The Judge found that the railings would restore the use of the roof to recreational use and that the railings would be consistent with the design of other railings on the building. The railings would only be visible to the penthouse owners and not to members of the public. The Judge concluded that the installation of the railings was not a significant change in the use or appearance of the common property and that a 3/4 vote was not required.

When considering the matter of repair, the Judge accepted that the obligation to repair extends to making good or sound something that may never have been good or sound and that the fact that the parapet walls had been constructed by the developer intentionally at that height did not mean that the strata corporation was not obligated to carry out the repair to

bring the height of the wall into compliance with the Building Code.

The Judge also rejected the strata corporation's argument that the addition of the railing was not a necessary repair. The Judge held that the repair was necessary in order to bring Mr. Frank's roof deck into compliance with the strata plan.

### **Conclusion**

The Judge concluded that the installation of the railings was a repair which was the responsibility of the strata corporation. The Judge also held that the costs associated with the repair were the responsibility of the strata corporation.

The Judge ordered the strata corporation to perform its duty to repair the work which had been authorized by the development and building permits issued by the City.

Strata corporations should consider the *Frank* decision when determining whether a request for alterations are significant changes in the use or appearance of common property and more significantly, whether what the owner is seeking is, in fact, a repair that is the responsibility of the strata corporation to carry out.