

Eligibility To Serve On Council When Suing the Strata Corporation

Publication / Date: The CHOA Journal Winter 2018

Written by: CHOA

CHOA is frequently asked if a person who is suing, or is being sued by the strata corporation (whether at the Civil Resolution Tribunal (CRT), Human Rights Tribunal or before the courts), should be allowed to stand for election to strata council at an upcoming general meeting or to remain on council if previously elected? Also, if the *Strata Property Act* is silent, would the strata corporation be permitted to pass a bylaw prohibiting such participation in the face of a lawsuit or other form of dispute?

Eligibility to Stand for Council:

Strata Property Act (SPA) section 28 sets out the criteria for eligibility to stand for strata council.

Eligibility for council

28 (1) *The only persons who may be council members are the following:*

- (a) owners;*
- (b) individuals representing corporate owners;*
- (c) tenants who, under section 147 or 148, have been assigned a landlord's right to stand for council.*

(2) Despite subsection (1), the strata corporation may, by a bylaw passed at an annual or special general meeting held after the first annual general meeting, allow classes of persons, other than those referred to in subsection (1), to be council members.

(3) Despite this section, a strata corporation may, by bylaw, provide that no person may stand for council or continue to be on council with respect to a strata lot if the strata corporation is entitled to register a lien against that strata lot under section 116 (1).

It should be noted in subsection (3) the Act only permits a bylaw be considered when restricting or limiting the election, appointment or entitlement to continue to remain on council. The Act does not permit other types of conditions to determine council eligibility.

Things to consider:

When considering if an owner, who is pursuing legal action against the strata corporation, should be elected to strata council there are a few things for owners to think about:

- the nature of the suit that has been lodged by the individual,
- the extent to which that suit places the individual in conflict with the standard of care imposed on council members by section 31 of the *Strata Property Act* “to act honestly and in good faith with a view to the best interests of the strata corporation”, and
- if this person’s participation on strata council may create complications, conflicts or problems.

A few scenarios:

Example 1: What if an individual has initiated a suit against the strata corporation for the purpose of preventing, or correcting, an unlawful act of the strata council? Specifically, what if strata council spent strata funds without the required approval of the owners or refused to hold an annual general meeting (or a petitioned special general meeting)? Should an owner be punished for attempting to compel compliance with the legislation? If an owner is trying to do the right thing should they be deemed ineligible for strata council? In fact, if an owner is knowledgeable about the SPA and other legislative requirements, is this not the type of

person owners would *want* to represent their interests on council?

Example 2: By way of contrast, if an owner is constantly suing the strata corporation to challenge, intimidate and derail council's compliance with the SPA, Regulations or bylaws - often at a cost to all other owners to defend the claim under section 167 of the SPA - should this individual be eligible for strata council? Or, what if an owner is being sued by the strata corporation for his/her repeated failure to comply with the SPA or the strata's bylaws. Is that owner - whether as claimant or defendant - a person the other owners within the strata complex would want representing their interests on council?

The problem in answering the preceding questions is that the validity of any lawsuit, arbitration or claim brought by or against a strata corporation can rarely be determined by strata owners and tenants (who have been assigned their landlord's voting rights) on the strength of the allegations made in the dispute alone. Such determination usually rests with the Tribunal or the court after an extensive review of the evidence (oral and documentary) produced by all parties to the action and assessed by a trier of fact who is knowledgeable in legal principles and their application.

Some strata corporations believe that the answer lies in passing a bylaw prohibiting participation on council.

Should a strata corporation consider a bylaw that limits eligibility for strata council?

There is nothing in the SPA that permits a strata to limit eligibility beyond what is permitted in SPA section 28.

Subsection 28(3) the Act permits only the following bylaw be considered when restricting or limiting the election, appointment or entitlement to continue to remain on council:

(3) Despite this section, a strata corporation may, by bylaw, provide that no person may stand for council or continue to be on council with respect to a strata lot if the strata corporation is entitled to register a lien against that strata lot under section 116 (1).

The Act does not permit other types of conditions to determine council eligibility.

So, while owners may believe that the simple fact of being involved in a lawsuit with the strata corporation should negate an individual's right to stand for or remain on strata council, the complexities associated with each suit suggest the need for some other measures to be applied.

Existing Protective Measures:

The SPA does offer owners a few protective measures when responding to an action, including:

- access to information,
- voting rights (including limiting participation at a general meeting and a conflict of interest at a strata council meeting), and
- procedures for the removal of a strata council member.

Access to information: For example, some owners have questioned whether an owner who is suing the strata should have access to all of the information available to strata council members. Think about it, strata council members have access to various strata records needed to carry out their duties, including the personal information of owners, enforcement proceedings and decisions, financial information regarding the strata's ability to bear the cost of the suit and/or legal advice received on outstanding actions. The fear expressed has, however, already been addressed in section 169 of the SPA which prevents an owner who is suing or being sued by the strata corporation from having the right to review *any* information or documents *relating* to the suit (which could be broadly interpreted) including – *meaning in addition to other examples* - legal opinions noted in section 35(2)(h) and further excludes such a member from attending those portions of a general meeting at which the suit is being discussed or subject to vote.

Voting rights: As per section 171(3) the approval of a $\frac{3}{4}$ vote resolution is required to commence a lawsuit. This section of the SPA also prevents the person who is being sued by the strata corporation from participating in that $\frac{3}{4}$ vote.

Section 31 of the SPA requires each council member to act honestly and in good faith with the best interest of the strata corporation in mind. As well, to address possible conflicts of interest section 32 requires council members to declare a direct or indirect interest in a matter being considered at a council meeting and abstain from voting on such issues. For example, a council member who repeatedly flaunts the strata's bylaws by bullying owners or by parking in visitor parking spaces and then refuses to pay the fines or to enforce those same bylaws against others would be in a conflict of interest and prevented from participating in council's discussion or vote regarding these governance issues.

By way of contrast, an owner who is on council and takes the strata corporation to the CRT, for failure by the majority of elected council members to comply with the SPA, would be in a conflict of interest under section 32 whenever council was discussing or voting on matters related to that member's suit. However, the member should otherwise still be able to proactively vote on all other matters under council's purview unrelated to the specific compliance issue (including the calling of general meetings, the preparation of annual budgets, the renewal of service contract, the need for and funding of major repairs, bylaw enforcement, renovation requests, rental exemptions, and the like).

Removal of a strata council member: If the nature of the lawsuit or dispute is considered by the remaining council members to be all encompassing as to render the council member who is suing or being sued by the strata corporation incapable of performing any council duties without conflict, then those remaining council members have the ability to use the strata's equivalent to Standard Bylaw #12(1) to remove and replace the disenfranchised council member. If council fails or refuses to do so, and the owners are upset with the council member's flagrant disregard of the legislation and their strata's bylaws, then they have the ability to petition council to call an SGM under section 43 of the SPA to pass a resolution by majority vote under Standard Bylaw #11 to remove and replace the errant council member.

In much the same way, owners control the nomination and election of council members by majority vote at an

annual or special general meeting. If an owner's conduct in suing the strata corporation is viewed as being a problem, a form of harassment or intimidation, or simply a frivolous waste of the strata's money, then they have the ability to lobby against the individual's election to council. Conversely, if council is seeking to keep an individual who has sued the strata to compel compliance with the legislation by refusing to nominate that individual for council at a general meeting, then the owners can nominate that individual from the floor and vote to elect the person to council so that he/she might continue that fight for compliance on their behalf from inside the strata's governing mind.

Vote or Bylaw Prohibition:

In the context of council elections and eligibility, it is the owners who must assess the apparent motives behind a lawsuit or dispute and determine by their vote whether those motives indicate an intention to act in the best interests of the strata corporation or in the best interest of the individual involved. Trying to pass a broad bylaw prohibiting engagement on council in the event of a suit or dispute by or against the strata corporation, would deprive owners of that assessment (and the possible *benefits* of having an individual elected to or remain on council) in circumstances where other, adequate protections already exist within the legislation.

Tips/best practices: To ensure that owners have the knowledge required to make informed decisions, regarding the retention or appointment of council members in the face of lawsuits brought by or against the strata corporation, it is important for the strata corporation to:

- inform the owners (as soon as feasible after a suit has been commenced by an owner, as per section 167(1) of the Act or in council meeting minutes of any decision made by council to commence an application to the CRT or to call a general meeting to secure the requisite $\frac{3}{4}$ vote of owners to commence a suit under section 171(2) of the Act), including providing a brief description of the allegations made; and
- disclose any ruling, decision or judgment in such proceeding (as contemplated in section 36 & section 35(2)(h)) that gives rise to an obligation for owners to contribute to the cost

of such proceeding and/or to any award made against the strata corporation.

By providing such disclosure to owners in a timely manner, they will be informed about the reasons behind the suit or dispute and can better determine if the individual who is suing or is being sued by the strata corporation is advocating for the legislated rights and interests of the strata corporation and its owners at large or is only promoting that individual's own self-interest and personal agenda.