

## How Do I Figure What Is Common Property In My Strata Plan?

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Determining what makes up the common property within your strata plan will depend on the filed strata plan, the definitions of “common property” and “strata lot” set out in the *Strata Property Act* (the “SPA”), and the physical boundaries of a strata lot as determined in accordance with the SPA, all as may be interpreted by the BC Courts and the Civil Resolution Tribunal.

Under the SPA, there are three primary types of property within a strata plan:

- common property (with limited common property<sup>i</sup> being a subset of common property)
- strata lot
- common assets<sup>ii</sup>

The distinction between each of these types of property has significance in a number of respects under the SPA.

For example:

- Under section 72(1) of the SPA, the strata corporation must repair and maintain the common property. The SPA<sup>iii</sup> further provides that an owner cannot be made responsible for the repair and maintenance of common property unless that common property has been designated as limited common property that the owner has the right to use. (The inability of a strata corporation by bylaw to make an owner responsible for the repair and maintenance of common property that has not been designated as limited common property is a significant departure from the position under the *Strata Titles Act* and the *Condominium Act* – under both Acts, such bylaws were permissible. As a result of the transition provisions of the

SPA, any bylaws adopted by a strata corporation under the earlier legislation that conflicted with the SPA ceased to have any effect as of July 1, 2002).

- Under section 71 of the SPA, the strata corporation must not make a significant change to the use or appearance of common property or common assets unless:
  - the change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or
  - there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage

Determining what is common property within any particular strata complex requires a review and understanding of the following:

- the filed strata plan<sup>iv</sup> for the particular strata complex
- the definitions of “common property”<sup>v</sup> and “strata lot”<sup>vi</sup> in section 1 of the SPA
- section 68<sup>vii</sup> of the SPA, which defines the boundaries of a strata lot where the boundaries have not been expressly defined on the strata plan
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The definition of “*common property*” in section 1 of the SPA has two primary parts. Paragraph (a) defines “*common property*” by reference to what is not part of a strata lot as shown on a strata plan. Paragraph (b) identifies as “*common property*” services-related facilities that are physically located within a strata lot under certain circumstances.

#### **Paragraph (a) – Land and Buildings Not Part of a Strata Lot**

Paragraph (a) provides that “*common property*” is any part of the land and buildings shown on a strata lot that is not part of a strata lot. Section 1 of the SPA defines the term “*strata lot*” to mean “*a lot shown on a strata plan*”.

As a result of paragraph (a) and the definition of “*strata lot*”, any area within the boundaries of a strata plan that is not specifically identified on the filed strata plan to be part of a strata lot is, by default, part of the common property. As a result:

- Any areas of a building that are not depicted on a strata plan will be common property. For example, on a strata plan that is not a bare land strata plan, if a townhouse unit has an attic space, but the attic space is not depicted in any way on the strata plan, the attic space is, by default, part of the common property.
- Any land in a strata plan (which includes any airspace within the boundaries of the strata plan) that is not identified as being part of a strata lot is part of the common property.

A strata lot does not exist in isolation within a strata plan, but exists next to other strata lots and/or areas of common property. To understand the physical limits of a strata lot, one must refer to section 68 of the SPA, which defines a strata lot’s boundaries.

Section 68(1) provides that where a strata lot is separated from any of the following:

- another strata lot (such as two apartment units in the same stack on Floors 8 and 9 of a building, or two townhouse units next door to each other)

- the common property (such as a common hallway, an elevator shaft or the roof of the building, or the land around the building)
- another parcel of land (such as a separate airspace where the strata plan was created out of a remainder parcel)

by a wall, floor or ceiling, the boundary of the strata lot is midway between the surface of structural portion of the wall, floor or ceiling facing the strata lot and the structural portion of the wall, floor or ceiling facing the other strata lot, the common property or the other parcel of land. Where this midpoint exists will depend on the nature of wall, floor and ceiling assemblies constructed in the development and may, in the event of a dispute, require the input of a surveyor and/or an engineering consultant to confirm. It is as a result of the default boundaries of a strata lot established by section 68(1) of the SPA that the exterior-facing windows and doors of a strata lot may, depending on the construction of the exterior wall assembly, be “*common property*” and not part of the strata lot itself.

Note, however, that the “default” strata lot boundary delineation set out in section 68(1) does not apply:

- Where the strata plan itself identifies different boundaries. The identification of different boundaries will typically (but not always) show up as a note included by the surveyor that prepared the strata plan on the front page of the filed strata plan. In some cases, the note will provide that the boundaries of the strata plan extend to the outer face of the building – where a note to this effect occurs, the exterior cladding, windows and doors of a strata lot will form part of the strata lot, and not part of the common property.
- Where the strata lot is not separated from another strata lot, the common property or another parcel of land by a wall, floor or ceiling, the boundary of the strata lot will be as shown on the strata plan as a result of section 68(3) (this typically arises where the strata lot as depicted on the strata plan includes areas of land – such as a yard area)

- Where the strata lot is in a bare land strata plan as a result of section 68(4) (the boundaries of a strata lot in a bare land strata plan are typically determined based on survey markers)

#### Paragraph (b) – Facilities for Services

Paragraph (b) of the definition of “*common property*” operates to expand the concept of “*common property*” and to limit what would otherwise be defined to form part of a strata lot by providing that services-related facilities that are physically located within the boundaries of a strata lot will be common property when:

- The services-related facility is located in a wall, floor or ceiling that separates a strata lot from another strata lot, from the common property or from another parcel of land (paragraph (b)(i))

OR

- The services-related facility is wholly or partially located in a strata lot *if* the facility is capable of being and intended to be used in connection with the enjoyment of another strata or the common property (paragraph (b)(ii))

The concept of “*common property*” has not remained static under the strata-related legislation in British Columbia. This is evident in the evolution of the definition of the “*common property*” to include services-related facilities:

- Under the *Strata Titles Act* (which was first brought into force in 1966) “*common property*” was defined in relation to what was not identified as part of a strata lot on the filed strata plan (i.e. what is now paragraph (a) of the SPA definition)
- The *Condominium Act* (which replaced the *Strata Titles Act* in 1979) expanded the definition of “*common property*” to include services-related facilities located in a shared wall, ceiling and/or floor between strata lots, between a strata lot and the common property, and between a strata lot and another parcel of land (i.e. what is now paragraph (b)(i) of the SPA definition). Note that there is no limitation

on this definition – as a result, even if a services-related facility benefits only one strata lot, it is still common property as long as it is located in a shared wall, floor and/or ceiling.

- The *Strata Property Act* (which was first brought into force as of June 1, 2000) has further expanded the definition of common property to include services-facilities located wholly or partially in a strata lot “*if capable of being and intended to be used in connection with another strata lot or the common property.*”

In determining whether a services-related facility (such as a pipe or duct) located within a strata lot forms part of the common property, the fact that the particular facility may benefit only that strata lot is not relevant based on the wording of paragraph (b)(ii) – rather, one has to look at whether the facility is “*capable of being and intended to be used in connection*” with another strata lot or the common property. To date, the phrase “*capable of being and intended to be used in connection with... the common property*” has been considered in two decisions of the BC Courts<sup>viii</sup>: *Taychuk v. Strata Plan LMS 744*<sup>ix</sup> and *Fudge v. Strata Plan NW 2636*<sup>x</sup>.

In *Taychuk*, the court was asked to decide on who, as between the strata corporation and the strata lot, was responsible to address a hot water discoloration problem related to a high-iron content experienced only in connection with the taps of the bathtub and vanity sinks in the ensuite bathroom of the Taychuk strata lot. The problem had been ongoing for many years and although the strata corporation had tried a number of methods to address the problem, the source of the problem was not confirmed or resolved by the time that the matter ended up in court.

Prior to the commencement of the BC Supreme Court proceeding, the strata corporation had proposed the installation of an under-fixture water filtration system but with the expectation that the owner would arrange and pay for the filter replacements. In ruling for the owner and finding that the strata corporation had breached its duty to repair and maintain the common property, the court held that the pipes in the strata lot were connected to the pipes that serviced all strata lots

and as such were intended to be used in connection with the enjoyment of another strata lot.

In *Fudge*, the issue was whether the strata corporation had been negligent in repairing and maintain the waste water drainage system, resulting in a backup into the owner's strata lot that damaged the floor in the owner's unit. A number of years before the backup occurred into the owner's strata lot, the strata corporation had received advice from its plumbing contractor that the waste water drainage related pipes were undersized and should be replaced to handle the volume of waste water generated in the ordinary course by the residents of the strata complex. Despite the identified problem, no steps were taken to carry out the replacement until after the backup in the Fudge unit had occurred.

In finding for the owner, the court wrote (emphasis added):

[44] Recall that the [wastewater piping infrastructure (WPI)] is a network of pipes whose purpose is to conduct wastewater away from individual units within the [Quayside (QT)] Complex and, ultimately, carry it from the buildings out and into the municipal sewer system. As such it communicates, and is integrated, with the washing discharge pipes in the individual units (including the Discharge Pipe in Ms. Fudge's unit [being a pipe installed in a wall in the owner's unit during original construction]). The WPI is thus properly seen as a network of pipes that connects individual units with one another. It constitutes a piping infrastructure whose components penetrate and pass through walls and structural elements throughout the QT Complex buildings. The WPI accumulates wastewater originating in individual units and carries it out of the building and, ultimately, via a common line, into the municipal sewer system.

...

[47] For all of these reasons, for the purposes of the statutory definition of common property, I

find that the WPI comprises "pipes ... and other facilities for the passage ... of ... drainage ... located ... within ... wall[s] ... that form ... boundar[ies] ... between ... strata lot[s] ... [and] between ... strata lot[s] and the common property." Similarly, I find that the Discharge Pipe in Ms. Fudge's unit, being integrated with and thus a part of the WPI, is a pipe "...for the passage ... of ... drainage ... located wholly or partially within a strata lot ... [which is] ... capable of being and intended to be used in connection with the enjoyment of ... the common property [that is, the other components of the WPI]".

[48] There is nothing novel or surprising about these findings. The definition of "common property" found in s. 1 of the *Strata Property Act* simply recognises the reality that the WPI is an integrated whole. Discharge pipes and other lines that handle wastewater all feed into the network for the purpose of aggregating that wastewater and then feeding it out to the municipal sewer system for final disposal.

As a result of the expanded definition of "*common property*" in section 1 of the *SPA*, as well as the decisions in *Taychuk* and *Fudge*, a strata corporation cannot refuse to maintain and repair a service-related facility solely on the basis that the facility is located within a strata lot and only benefits that strata lot. Instead, it is necessary to have an understanding of how each of the services such as water, sewage, electricity and gas) work within the strata plan, including identifying whether a facility (such as a pipe or wire) within a strata lot interacts with or integrates with those portions of the services clearly located on and within the common property, such that the services-related facility within a strata lot is itself part of the common property.

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<sup>i</sup> Section 1 of the *SPA* defines the term "*limited common property*" to mean common property designated for the exclusive use of the owners of one or more strata lots. The

*SPA* provides that limited common property designations may occur in one of 4 ways: (1) on the strata plan, at the time of filing by the owner developer; (2) by amendment to the

strata plan made by the owner developer in respect of parking stalls before the first annual general meeting of the strata corporation; (3) by amendment to the strata plan approved by the owners by way of unanimous vote resolution; or (4) by way of 3/4 vote resolution, with the filing of the resolution and a sketch plan in the Land Title Office.

<sup>ii</sup> Section 1 of the *SPA* defines the term "*common asset*" to mean:

(a) personal property held by or on behalf of a strata corporation, and

(b) land held in the name of or on behalf of a strata corporation, that is

(i) not shown on the strata plan, or

(ii) shown as a strata lot on the strata plan;

<sup>iii</sup> Section 72(2)(b) of the *SPA* contemplates that an owner could be made responsible for the repair and maintenance of common property but only if identified in the *Strata Property Regulation* and subject to the restrictions in that regulation. However, to date, no provisions have been included in the *Strata Property Regulation* identifying any such areas of common property.

<sup>iv</sup> In this article, the "filed strata plan" refers to the strata plan filed in the Land Title Office by the owner developer to establish the strata plan (including any phases thereof). The copy of the strata plan included in the disclosure statement issued by the owner developer is typically a draft only and designations may have changed before it was filed in the Land Title Office.

<sup>v</sup> Section 1 of the *SPA* defines "common property" to mean:

(a) that part of the land and buildings shown on a strata plan that is not part of a strata lot, and

(b) pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located

(i) within a floor, wall or ceiling that forms a boundary

(A) between a strata lot and another strata lot,

(B) between a strata lot and the common property, or

(C) between a strata lot or common property and another parcel of land, or

(ii) wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property;

<sup>vi</sup> Section 72(2)(b) of the *SPA* defines "strata lot" to mean a lot shown on a strata plan;

<sup>vii</sup> Section 68 of the *SPA* states as follows with respect to strata lot boundaries:

68 (1) Unless otherwise shown on the strata plan, if a strata lot is separated from another strata lot, the common property or another parcel of land by a wall, floor or ceiling, the boundary of the strata lot is midway between the surface of the structural portion of the wall, floor or ceiling that faces the strata lot and the surface of the structural portion of the wall, floor or ceiling that faces the other strata lot, the common property or the other parcel of land.

(2) If a strata lot is not separated from another strata lot, the common property or another parcel of land by a wall, floor or ceiling, the boundary of the strata lot is as shown on the strata plan.

(3) A boundary shown on the strata plan must be shown in a manner approved by the registrar.

(4) Despite subsections (1) to (3), but subject to the regulations, in the case of a bare land strata plan, the boundaries must be shown on the strata plan

(a) by reference to survey markers, and

(b) in compliance with rules, if any, made under section 75 of the *Land Surveyors Act* for the purposes of this section.

<sup>viii</sup> The BC Civil Resolution Tribunal has also rendered several decisions in which a determination of whether a services-related facility located within a strata lot was "*common property*" or part of the strata lot (see, for example, *Theil v. Strata Plan VIS 6763*, 2019 BCCRT 1065, a heating related fan coil unit in a strata lot; *Punta Del Mar Estates Ltd. v. Strata Plan LMS 483*, 2019 BCCRT 1020, a shut off valve in a bare land strata lot; *Hampton v. Strata Plan LMS 1609*, 2019 BCCRT 532, a water supply line within a strata lot; *Strata Plan EPS 3335 v. Extol Developments Ltd.*, 2019 BCCRT 29, a blocked drain within a strata lot; and *Wilchek v. Strata Plan VR 55*, 2017 BCCRT 67, a plumbing stack running through a strata lot). The *Taychuk* and *Fudge* decisions have not consistently been referred to in the CRT decisions. As well, in instances where a services-related facility has been held not to be part of the common property, the analysis may employ a test that does not exist within the definition of "*common property*" (such as in *Theil*, where the fan coil unit was found "*not to impact other strata lot or the common property*").

<sup>ix</sup> 2002 BCSC 1638

<sup>x</sup> 2012 BCPC 409