

---

## Electronic Council Meetings & Hearings

**Publication / Date:** The CHOA Journal Summer 2020

**Written by:** Cora Wilson / Wilson McCormack Law Group

Bylaw amendments that authorize council meetings and hearings be held by electronic means can be very useful during these difficult times.

### Can a council meeting be held electronically?

Standard Bylaw 17 permits council meetings by electronic means as follows:

- 17(1) At the option of council, council meetings may be held by electronic means, as along as all council members and other participants can communicate with each other.
- (2) If a council meeting is held by electronic means, council members are deemed to be present in person.
- (3) Owners may attend council meetings as observers.

This bylaw permits electronic council meetings as long as everyone can communicate with each other. This bylaw should be amended to clarify that electronic means includes telephone conference, skype, zoom or any other electronic means. Moreover, bylaw amendments permitting email voting in certain circumstances should be considered.

### What is the procedure for holding a hearing?

Section 34.1 of the *Strata Property Act* (the "Act") addresses hearings, as follows:

- 34.1(1) By application in writing stating the reason for the request, an owner or tenant may request a hearing at a council meeting.
- (2) If a hearing is requested under subsection (1), the council must hold a council meeting to hear the applicant within 4 weeks after the request.

- (3) If the purpose of the hearing is to seek a decision of the council, the council must give the applicant a written decision within one week after the hearing.

A hearing is an effective tool to address grievances and resolve issues short of legal proceedings.

There are numerous questions regarding hearings and in particular, how to hold a hearing during extraordinary circumstances when in person attendance is not feasible. How should the council conduct the electronic hearing from a procedural and substantive perspective? What subject matter may be addressed during a hearing? Who can be present at the hearing? Are there any limitations on the hearing process? Can the hearing be recorded? When is a decision required? What are the mechanics of a decision?

The requirement to hold a hearing is mandatory. The purpose of the hearing process is to provide due process for owners and tenants. An owner or tenant must request a hearing before council before bringing an application for dispute resolution in the Civil Resolution Tribunal ("CRT"), unless waived by the CRT. However, the hearing process should not be abused or used for an improper purpose.

Standard bylaw 17 permits council meetings by electronic means and council members are deemed to be present in person. Moreover, observers are permitted. This scheme does not work for hearings since Strata Regulation 4.01 defines "hearing" as an opportunity to be heard in person at a council meeting and observers should be excluded. The bylaws should be amended to address hearings before council.

A hearing must be held at a duly convened council meeting. The Standard Bylaw 17 deems council members to be present in person, but does not refer to the applicant and others. The bylaws should be amended to deem authorized persons approved by the applicant and council to be present in person. However, observers should be excluded.

There are procedural and substantive differences between a hearing convened pursuant to 34.1 of the *Act* and a hearing to address alleged bylaw or rule contraventions pursuant to section 135 of the *Act*. Legal advice should be sought from a qualified strata lawyer if there is any doubt regarding how to address these provisions.

There are no statutory limitations on the subject matter which may be addressed during a hearing or how often a hearing on the same subject matter may be held. This leaves the door open for potential abuses, such as multiple requests for a hearing to address the same subject matter or to address issues which cannot properly be addressed as part of a hearing. For example, the hearing process should not be used to address matters cloaked by legal privilege, to circumvent privacy or other improper purposes. Owners and tenants understand that council is generally made up of volunteer owners.

As noted above, there are limitations on who can apply for a hearing. Only an owner or tenant can request a hearing. Occupants, who are neither an owner nor a tenant, are not included in the class of applicants. Therefore, if a non-owning spouse makes an application, the council is not under a legal obligation to hold a hearing and provide a decision.

If a written application is received by the strata corporation, then who must hold the hearing? As noted above, Strata Regulation 4.01 of the *Strata Property Regulations* states that “hearing” means “an opportunity to be heard in person in a council meeting”.

This raises procedural and substantive constraints for electronic hearings. The bylaws should be amended to deem electronic attendances at a hearing before council by zoom, skype or telephone conference meet the

requirement for being “heard in person in a council meeting”. This raises numerous complex questions.

### **What is the procedure for calling and holding a hearing at a council meeting?**

The procedure for calling a duly convened council meeting may be summarized as follows:

1. Regulation 4.01 requires that the application be addressed at a “council meeting”. Therefore, this business should be placed on the Agenda for the council meeting.
2. The bylaws should be reviewed to determine the requirements for calling and holding a council meeting.
3. The statutory Schedule of Standard Bylaws provide that any council member may call a council meeting by giving the other members at least one week’s notice specifying the reason for the meeting.
4. When calculating the number of days required to call a council meeting, the day the notice is given and the last day of the notice period are added to the count. As a result, the council meeting must be held 9 days or later after notice is given.
5. The hearing at a duly convened council meeting must take place within 4 weeks from the date of delivery of the application or the deemed date of delivery.
6. A notice given to the strata corporation by an owner or tenant is conclusively deemed to have been given when it is left with a council member or 4 days after it is mailed, faxed, emailed or put through the mail slot or in the mail box (s. 63(2), *Act*).
7. Therefore, the council meeting must be held within 4 weeks after the delivery of the request. When calculating the number of days *within* the four week period (28 days), the day the application is received or deemed to have been received is not counted as one of those days. The hearing cannot take place on the last day of the 4 week period (the 28<sup>th</sup> day) since this date would be out of time. Therefore, the hearing must take place prior to the 28<sup>th</sup> day after the date that the notice is delivered or deemed to be delivered.

8. For instance, if the notice was delivered personally on September 30th, then the meeting must be held on any date prior to October 28 - it cannot be held on or after October 29. If the notice was delivered by any other method, such as fax or email, then 4 days must be added to the notice period.
9. The calculation of notice periods can be complex. A person with an issue regarding delivery dates or deemed delivery dates should obtain legal advice.
10. In order for a council meeting to be duly convened, the quorum requirements must be met and the council members must meet the eligibility requirements to sit on council and not be subject to early removal during the term. The bylaws should be carefully reviewed to determine quorum and the requirements for a council member to serve or to continue to serve on council.
11. The same procedure applies to council meetings held by electronic means.

#### **How should a council member address conflicts?**

A council member should refrain from acting as a council member if his or her personal interests conflict directly or indirectly with those of the strata corporation (see s. 32, *Act*). It is the member's duty to disclose and address such conflicts. This is a complex issue and if a council member is concerned that he or she may have a conflict, then he or she should seek independent legal advice.

A strata lawyer should avoid conflict allegations by clarifying that he or she solely represents the strata corporation. Individual council members and owners should seek independent legal advice.

As noted above, Standard Bylaw 17 permits council meetings by electronic means. Council members are deemed to be present in person and observers are permitted. This scheme does not work well for hearings since Regulation 4.01 defines "hearing" as an opportunity to be heard in person at a council meeting and observers should be excluded. The bylaws should be amended accordingly.

Standard Bylaw 17 only deems council members to be present in person at electronic council meetings to the exclusion of applicants and others. The bylaws should be amended to deem the applicant and other authorized persons to be present in person at an electronic hearing and to exclude observers.

There are differences between a hearing convened pursuant to 34.1 of the *Act* and a hearing to address alleged bylaw or rule contraventions pursuant to section 135 of the *Act*.

Section 135 of the *Act* states:

#### **Complaint, right to answer and notice of decision**

- 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.

Legal advice should be sought from a qualified strata lawyer regarding compliance with these provisions.

There are no statutory limitations on the subject matter which may be addressed during a hearing or how often a hearing on the same subject matter may be held. This leaves the door open for potential abuses, such as multiple requests for a hearing to address the same subject matter or to address issues which cannot properly be addressed as part of a hearing. For example, the hearing process should not be used to address matters cloaked by legal privilege, to circumvent privacy or for other improper purposes. Owners and tenants understand that council is generally made up of volunteer owners.

As noted above, there are limitations on who can apply for a hearing. Only an owner or tenant can request a hearing. Occupants, who are neither an owner nor a tenant, are not included in the class of applicants. Therefore, if a non-owning spouse makes an application, the council is not under a legal obligation to hold a hearing and provide a decision.

If a written application is received by the strata corporation, then who must hold the hearing? As noted above, Regulation 4.01 of the *Strata Property Regulations* states that "hearing" means "an opportunity to be heard in person in a council meeting".

This raises procedural and substantive constraints for electronic hearings. The bylaws should be amended to deem electronic attendances at a hearing before council by zoom, skype or telephone conference meet the requirement for being "heard in person in a council meeting". This raises numerous complex questions.

#### **How should the council members conduct themselves during a hearing?**

The purpose of a hearing is to hear from the applicant. Council members may ask questions. However, a hearing is not a forum for a debate. The council should *Act* in a quasi-judicial manner during the hearing. In other words, council members should *Act* in an objective, impartial and unbiased manner.

The hearing provides an owner or tenant with an opportunity to be heard at a council meeting and to provide information that council can consider when making a decision. There is no obligation on the council to respond to questions and the hearing is not intended to be a forum for an owner or tenant to grill the council, engage in abusive conduct or to otherwise use the hearing for another improper purpose.

#### **Who can attend a hearing?**

Standard Bylaw 17(3) indicates that owners may attend council meetings as observers. However, there is no reference to tenants. The bylaws should be amended to also exclude all observers, including tenants, from a hearing due to privacy and other considerations.

Can an owner or tenant bring other people with them to the hearing, including witnesses, agents, lawyers or other persons to assist them with the hearing? Subject to the bylaws or a council decision to the contrary, this is a reasonable course of action. Support people should not be unreasonably restricted or limited by the council. The council may refuse support people if the attendance is contrary to the *Act* or the bylaws, if there is an objection, a privacy concern, a safety concern, a violation of litigation privilege or if the attendance is viewed as an abuse of process or is otherwise improper.

We recommend that observers be excluded from hearings. An applicant may wish to have observers present for political purposes. This is not the purpose of a hearing. There are other more suitable procedures available to address political issues. The bylaws should be carefully reviewed and revised to address the conduct of owners, tenants and others at a hearing.

#### **Can council place time limitations on a hearing?**

The council may place a limit on the period of time available for an owner or tenant to state their case during the hearing. The time period restriction should be reasonable given the subject matter of the hearing.

What is reasonable depends on many factors including the complexity of the subject matter, the importance of the matter, the number of witnesses, electronic constraints and other considerations.

#### **What is the scope of council's discretion when making a decision?**

The strata corporation cannot interfere with the council's discretion regarding certain matters, including whether a person has contravened a bylaw or rule, whether a person should be fined and the amount of the fine, whether a person should be denied access to a recreational facility, whether a person should be required to pay the reasonable costs of remedying a contravention of the bylaws or rules and whether an owner should be exempted from a bylaw that prohibits or limits rentals (s. 27(2), *Act*).

Council decisions can be challenged due to, for example, significant unfairness, improper exercise of discretion, acting contrary to law or improper action while acting in a quasi-judicial capacity.

#### **What is the procedure for decisions?**

If a decision is required once the hearing is concluded, council must meet electronically and make a decision. Only authorized agents of the strata corporation may be present during the decision making phase, including legal counsel and the strata manager. Council should go in camera during this phase of the council meeting.

Section 27 of the *Act* does not permit the strata corporation to direct or restrict a council member's discretion regarding bylaw contraventions, fines, denial of access to a recreational facility, whether a person should be required to pay the reasonable costs of remedying a contravention of the bylaws or rules or whether an owner should be exempted from a rental bylaw. Further, Standard Bylaw 20(4) prohibits council from delegating power to make these determinations. However, council may seek guidance from legal counsel, strata managers and other professionals to assist it with such decisions.

The council must give the applicant a written decision within one week after the hearing if a decision is required. When calculating the number of days *within* the one week period (7 days), the day the hearing is held is not counted as one of those days and the decision must be delivered to the applicant before the 8<sup>th</sup> day.

A decision given to the applicant by the strata corporation is given when it is left with the applicant or is conclusively deemed to have been given 4 days after it is left with an adult occupant, put under the door, mailed, put through the mail slot or in the mail box, faxed or emailed (s. 61, *Act*).

There are concerns regarding whether delivery of a strata corporation decision to an owner or tenant by email is valid if the owner or tenant did not specifically provide the email address for that purpose: *Azura Management (Kelowna) Corp. v. Strata Plan KAS2428* (2009), 95 B.C.L.R. (4<sup>th</sup>) 358 (B.C.S.C.). The strata corporation should not deliver a decision to an owner or tenant by email unless it has first obtained the written consent from the owner or tenant to provide delivery by email for purposes set out in s. 61 of the *Act*.

#### **What is a decision?**

An applicant may seek a decision at a hearing. However, council is only required to address legitimate requests for a decision. The applicant should specify in writing the decision sought to avoid any misunderstandings. For example, the council is not under a legal obligation to make a decision on whether strata corporation operations are noncompliant, negligent or offside the governing legislation. Such matters relate to culpability and could prejudice directors and officers liability insurance coverage. The council is not under a legal obligation to address improper requests for a decision. Conversely, requests for a decision of the strata corporation to approve an alteration request, address hardship applications, waive fines and the like constitute proper decision requests.

The council should seek legal advice if there is any doubt regarding the legitimacy of a request for a decision from an applicant.

**Can a hearing be recorded?**

The hearing should not be recorded without the approval of the applicant and council. This is required to address privacy and confidentiality issues.

**How does a council member maintain privacy?**

Most council members attend electronic hearings from home. This raises a question regarding how to maintain privacy and confidentiality during such meetings. It is not uncommon to see kids, spouses and family pets invade the meeting at an inopportune time. Hearings are confidential quasi-judicial proceedings and, as such, require an additional degree of diligence on the part of each council member. Council members should secure a private place during these electronic hearings to mitigate against unwelcome interference and breach of privacy.

**Conclusion:**

The electronic council meeting and hearing process can be useful and powerful tools for owners and tenants to air certain matters and address disputes. It can also be a powerful tool to show a court that the council followed proper procedure in allowing the owner to state his or her case and that it made its' decision based on proper information. We envision that the electronic hearing process will be used more and more frequently in the future.