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Headline: **The Case of the Unfair Unit Entitlement**
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Written by: Adrienne M. Murray, Adrienne Murray Law Corporation

Under the *Strata Property Act* and the prior *Condominium Act* each strata lot's contribution to the common expenses is based on a strata lot's unit entitlement. Under the *Condominium Act* the unit entitlement was based on the habitable area of the strata lot. The *Strata Property Act* provides that either the habitable area or a whole number may be used to determine the unit entitlement.

It is likely that nothing has created as much controversy and discussion among strata lot owners as the topic of whether a basement should be included in the habitable area of a strata lot. Recently the Supreme Court of British Columbia considered this issue in the case of *Fenwick et al v. Parks et al (Strata Plan VIS 2014).*

VIS 2014 ("Pebble Beach") is a strata development consisting of 9 two-storey strata lots and 46 one-storey strata lots built over 13 phases. All but a small portion of each of the lower levels of the 9 two-storey strata units were excluded from the habitable area calculations. As a result, the unit entitlements of the two-storey units were approximately equal to the unit entitlements of the one-storey units. This meant that the contribution to the common expenses by the two-storey units was generally the same as the amount paid by those in one-storey units. The one-storey owners argued that the unit entitlement calculation was unfair.

The matter had been in dispute in the Strata Corporation for a number of years. The minutes of the July 2001 meeting of the Strata Council reflect a motion that potential buyers and their listing real estate agents be advised that the basement areas of the two-storey units had not been approved as habitable areas and might be the focus of a possible future challenge of the unit entitlement. In this way, the Strata Corporation was letting prospective purchasers know that the use of the basements was an issue for the Strata Corporation. After attempting to resolve the issues among themselves, and with the assistance of the Superintendent of Real Estate and the Registrar of Land Titles, a group of one-storey owners applied to the Court for an Order that the schedule of unit entitlement for Pebble Beach be amended and accurately reflect the habitable area of the strata lots.

At the time that the developer sold strata lots, the developer had developed the basement of one of the two-storey strata lots in order to show prospective purchasers the potential for development. Ultimately, since the development was first constructed, most owners had developed the basements by building games rooms, bathrooms, offices, bedrooms and storage areas of varying sizes.

The Judge considered whether the basements should be designated habitable or non-habitable. The evidence was that the Superintendent of Real Estate would accept a strata plan that designated the basements to be either habitable or non-habitable and that the decision often was made by the developer or the surveyor. The Judge considered the situations of some of the owners who owned the two-storey lots. In at least four cases the owners had purchased after the Minutes in 2001 indicated that an issue existed in relation to the unit entitlement of the two-storey units. In cases where the owners had bought the two-storey units from the developer, the

evidence was that the developer had indicated that the basement level could be finished either by the developer or at a future time.

The issue for the Judge was how to determine whether an area is "habitable" for the purposes of including that area in the unit entitlement of a strata lot. For example, should only an area that is already developed be considered habitable or should an area that could be developed in the future also be considered to be habitable. The Judge defined a habitable area as an area that can be lived in and not an area that is actually inhabited. A habitable area means that area within a residential strata lot, which can be, could be, or is capable of being lived in. The Judge further noted that the fact that an owner uses such an area for storage is not reason to exclude such an area from the habitable area of the strata lot. The Judge then considered that the underlying principle on establishing unit entitlement is to require that any formula be consistent and equitable. The Judge concluded that to exclude almost 50% of the potential habitable space of a strata lot merely because it happened to be on a lower floor area in a two-storey unit does not treat all owners consistently. The Judge further held that it would be inequitable for the owners of the one-storey units to continue to pay monthly strata fees roughly equal to the monthly fees paid by those owners whose units are almost twice as large. The Judge further noted that he could not conclude that any purchaser of a two-storey unit was of the belief that the basement could not be inhabited. Finally, the Judge stated that the fact that the Superintendent of Real Estate had approved the current unit entitlement schedule did not determine the matter for all time.

Because the lower floor area of the two-storey units could be lived in, and the owners knew at the time they purchased the strata lot that the area could be lived in, the Judge concluded that the lower floor should be included in the habitable area of the strata lot. The Judge ordered that the unit entitlement schedule be amended to include such areas in the revised schedule.

The case is noteworthy because it establishes that basements, if they can be lived in, must be included in the unit entitlement of a strata lot. A strata corporation in which there has been a dispute over the habitable areas and unit entitlements of strata lots should obtain legal advice to determine whether the *Fenwick* case is applicable to their circumstances.