

Headline: **What do a parking spot and a cell phone antenna have in common?**

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**Consider the following scenarios....**

*You place an ad on Craigslist looking for a spare parking stall near your condo. A stranger offers to sell you a parking stall in your strata complex.*

*A telecommunications company erects an antenna on your strata complex's roof. It offers to pay a monthly fee for this privilege. Your neighbor collects and keeps the fee without telling anyone.*

While these situations seem preposterous, they aren't that different from what happens every day in British Columbia.

Developers of strata complexes often "sell" parking stalls and storage lockers to condo purchasers. One of the most common sales processes is to register a lease to a related company over the common property parking for a nominal amount (usually \$10). For a price (usually thousands of dollars), the related company then sub-leases or provides a license to individual owners to use certain stalls.

And with that, the developer essentially sells owners their own property.

If that weren't enough, developers regularly enter into leases over common property with telecommunications companies for antenna towers and related equipment. The companies pay money for this privilege. None of that money is given to the strata corporation.

The developers' right to enter into these agreements has largely gone unquestioned. Perhaps it's because people are naturally trusting; if the developer is entering into these agreements, surely that's because it can. Right?

Not necessarily.

A strata corporation is a legal entity. It is separate and distinct from the individual owners. It is created upon the deposit of the strata plan. At that time, all the strata lots are owned by the developer. As such, the developer functions as strata council. Section 6 of the *Strata Property Act* (the "Act") states that the developer, in functioning as strata council, must "act honestly and in good faith with a view to the best interests of the strata corporation" (i.e. the owner has a fiduciary obligation to the strata corporation).

Leasing all of the common property for \$10 and then selling portions for thousands of dollars each is neither a good faith transaction nor in the best interests of the strata corporation.

Owner developers have attempted to get around this rather inconvenient fiduciary obligation by entering into and registering a lease prior to deposit of the strata plan.

The *Act* clearly stipulates that once a lease of over three years<sup>1</sup> is placed on common property, that property becomes a common asset. The *Act* also mandates that parking stalls and other specific property must be identified on the strata plan as common property or part of a strata lot; not a common asset). A pre-existing lease precludes the possibility of the parking stalls being common property and is therefore, in my view, not permissible.

This is supported by reference to s. 258 of the *Act*, which sets out how a developer may allocate parking stalls. In my view, s. 258 provides a complete code as to how the developer may deal with the parking. While s. 6 of the *Act* speaks to the developer's fiduciary duties when functioning as strata council, the fiduciary duties may arise before the deposit of the strata plan. The Ontario Court of Appeal<sup>2</sup> held that the fiduciary obligation between the developer and the owners arises at the time that the unit owner enters into purchase agreements with the developer. In that case, the developer "sold" extra stalls and kept the proceeds of sale. The strata corporation sued claiming entitlement to the proceeds of sale. The court held that the developer could not "deal with any part of the common elements so as to defeat the unit purchasers' equitable interests in them."

While the British Columbia Court of Appeal has referred to the Ontario decision as being "of assistance", it has not yet been adopted (or rejected) as the law in British Columbia. Whether an owner developer owes a fiduciary duty to the strata corporation prior to deposit of the strata plan remains an unanswered question.

Developers will undoubtedly defend any lawsuit by pointing to their disclosure of the parking arrangement through the required disclosure statement that all of the initial purchasers should have received. This defence has flaws.

A fiduciary (in this case, a developer) is obliged to "disclose all material facts, including the conflict itself, in order to obtain the informed consent of the principal."<sup>3</sup>

I have read many disclosure statements, for many developments. With respect to parking, none of the statements I have read refer to a conflict of interest. Most do not even disclose the nature of the legal arrangement that will be put in place. Anyone reading a typical disclosure statement would not know whether the parking had been leased or licensed or the terms of any such agreement.

The disclosure defence raises a more fundamental question about the nature of strata ownership: does disclosure to individual owners comply with the obligation of disclosure to the strata corporation?

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<sup>1</sup> The typical lease is for 99 years.

<sup>2</sup> *York Condominium Corp. No. 167 et al. v Newrey Holdings Ltd. et al*, 32 O.R. (2d) 458 (C.A.)

<sup>3</sup> Michael Ng, *Fiduciary Duties: Obligations of Loyalty and Faithfulness*, looseleaf (Aurora, Canada Law Book Inc., 2003) at 10:20.10.

In 2002, the BC Supreme Court<sup>4</sup> held that an individual owner had no right to sue a developer to challenge the validity of parking leases. Since the property in question was common property, the only party that could bring the lawsuit was the strata corporation. Conversely, in my view it is no defence for a developer faced with a lawsuit by a strata corporation to rely on disclosure to purchasers. Disclosure must be made to the strata corporation, which is usually not yet in existence at the time of disclosure to purchasers.

The disclosure defence also raises an issue of public policy concerning the enforceability of contracts. If the disclosure defence is valid, the developer has effectively created a false choice. Purchasers are not given a real option as to whether to accept the developer's breach of fiduciary duty. A purchaser can either accept the breach or not purchase at all. There is no middle ground. The courts have acknowledged that one of the purposes of the *Act* is protection of consumers.<sup>5</sup> Permitting such a scheme effectively negates the intent of the legislation and does little to protect the interests of purchasers.

Unless successfully challenged, developers' practice of leasing strata corporations' common property for a profit will continue. When this happens, strata corporations not only miss out on the revenue to be gained from the use of their property, they also lose the right to control its use.

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<sup>4</sup> *Ang v. v. Spectra Management Services et al.*, 2002 BCSC 1544

<sup>5</sup> *The Owners, Strata Plan VIS2968 v. K.R.C. Enterprises Inc.*, 2007 BCSC 774