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## The Case of The Invalid Rental Restriction Bylaw

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**Written by:** Adrienne Murray, Hammerberg Lawyers LLP

What provisions must a rental restriction bylaw include?

This question was recently considered by the British Columbia Supreme Court in *Carnahan v. The Owners, Strata Plan LMS 522*<sup>1</sup> (the "Strata Corporation").

A rental restriction bylaw had been in place since 1994. In 2010 the Strata Corporation amended its rental restriction bylaw. The bylaw stated:

9. RENTAL PROHIBITION
- 9.1 The maximum number of strata units that may be rented at any one time is five (5).
- 9.2 An owner shall obtain the written permission of the strata council before renting or leasing the strata unit.
- 9.3 Where hardship results to the owner, he may appeal to the council for permission to lease his strata lot, and the council shall not unreasonably refuse the appeal, all pursuant to the *Strata Property Act*, section 144 and amendments thereto.
- 9.4 Owners who have rental units must accompany or have an appointed agent accompany prospective renters when showing their unit.

- 9.5 Before an owner rents his strata lot, the owner must give the Strata Corporation the undertaking in *Strata Property Act* Form K, signed by the tenant, that the owner and the occupants of the strata lot will comply with the bylaws and rules of the Strata Corporation.

In 2010, the Carnahans applied and were granted a 1 year exemption from the rental restriction bylaw based on hardship. The hardship exemption was extended a number of times to January 31, 2014. The Carnahans were advised by the Strata Council that no further extensions would be granted.

Prior to the hardship rental deadline, legal counsel for the Carnahans wrote to the Strata Council and advised that the rental restriction bylaw was unenforceable because it failed to establish a procedure that the Strata Council must follow when it administered the rental limit. Subsequently on January 13, 2014 the Carnahans advised the Strata Council they intended to rent the strata lot as soon as possible. On February 27, 2014 the Carnahans provided the Strata Corporation with a Form K, signed by the tenant and on March 1, 2014, the strata lot was rented to the new tenant.

Beginning March 1, 2014, the Strata Corporation began fining the Carnahans \$300 every week, as permitted by the Strata Corporation's bylaws. At the date of the hearing, fines in the amount of \$10,500 had been levied against the Carnahans. The Carnahans applied to Court

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<sup>1</sup> 2014 BCSC 2375

to declare the rental restriction bylaw invalid and to cancel all fines.

The question that the Judge was required to decide was whether the Strata Corporation's bylaw 9 satisfied section 141(3) of the *Strata Property Act* (the "SPA").

Section 141(3) of the SPA provides:

A bylaw under subsection (2)(b)(i) [the subsection that permits a limit on the number of strata lots that may be rented] must set out the procedure to be followed by the strata corporation in administering the limit. (emphasis added)

The Strata Corporation argued that sections 9.2, 9.4 and 9.5 of its bylaw set out the procedure to administer the rental limit. The Strata Corporation asserted that a plain reading of section 141(3) of the SPA indicates that a Strata Corporation must only have a procedure in place. The procedure is not required to take a particular form.

In addition to the process set out in bylaw 9, the Strata Corporation advised the Judge that it maintained and administered a list of the five units rented and that it grants an exemption once a place on the list becomes available. The Strata Corporation argued that the Court should interpret the bylaws liberally especially since it is laypeople who read the SPA and administer the bylaws.

The first issue for the Judge was one of interpreting section 141(3) of SPA. The Judge noted that the proper approach to statutory interpretation was that:

The words of an Act are to be read in their entire context, in their grammatical and ordinarily sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Judge also considered section 29 of the *Interpretation Act* which provides that where the word

"must" is used in an enactment, it is to be construed as imperative.

The Judge noted that the SPA allows a strata corporation to subordinate a strata owner's individual property right to rent their strata lot to the communal rights of the strata corporation. The Judge further noted that although the SPA grants a strata corporation wide scope to limit the ability of owners to rent their strata lot, the SPA also contained several statutory protections for individual owners in certain circumstances. The Judge found that the requirement that a strata corporation set out a procedure to be followed when administering the rental limit was a statutory protection for owners. The Judge concluded that the section 141(3) of the SPA must be considered in the context of balancing the interests of the Strata Corporation and the owners.

The Judge held that section 141(3) of the SPA created two obligations for a strata corporation that intended to restrict the number of strata lots that could be rented, namely that the strata corporation have a procedure for administering the limit and that the procedure be set out in the strata corporation's bylaws.

Although the Judge agreed with the Strata Corporation that a particular procedure was not provided in section 141(3) of the SPA, the Judge stated that this does not leave a strata corporation with unfettered discretion to decide the content and scope of the procedure. The Judge interpreted section 141(3) of the SPA as requiring a strata corporation to "establish a process for administering the rental limit that is clear and logical, not ambiguous or arbitrary"<sup>2</sup>.

With respect to the procedure, the Judge held that it must be detailed enough that when a person, including a prospective owner, reads the bylaws they can clearly see how the Strata Corporation decides which owner is entitled to lease their strata lot when the rental limit is

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<sup>2</sup> Para 34

not reached and how an owner can attain that right. The purpose of requiring such a procedure was, according to the Judge, to protect owners from the application of an informal and arbitrary procedure.

The Judge concluded that the procedure in the Strata Corporation's rental restriction bylaw was inadequate. The only provision in bylaw 9 that related to the administration of the rental limit was section 9.2, which required owners to obtain the written permission of the Strata Council before a strata lot was rented. The Judge noted that the Strata Corporation's bylaw 38, which permitted the Strata Corporation to fine an owner for breaching the rental bylaw also related to the rental of a strata lot. Collectively, however, these bylaws did not establish a clear and logical process for administering the limit nor did they indicate which strata lot owners are entitled to be designated as rentals when the rental limit was not reached. The Strata Corporation submitted that its practical procedure was to maintain a waiting list. However, the Judge held that there was no ability in the SPA for a strata corporation to outline a deficit procedure in the bylaws and adopt a more expansive informal procedure.

The Judge also felt compelled to comment on the Strata Corporation's argument that the Court should adopt a liberal approach to the interpretation of bylaws because they are being administered by laypeople. The Judge stated:

It is precisely because strata bylaws are administered by, and affect laypeople, that a clear procedure must be outlined in the bylaws. Requiring that the bylaws set out a clear, predictable and non-arbitrary procedure for administering the rental limit ensures decisions on which strata owners have the right to rent their units will not be left to the unfettered discretion of the strata council, whose members could have ulterior motives.<sup>3</sup>

The Judge set out various procedural matters that could be addressed in the bylaw as follows:

- (a) Must the application to rent be in writing?
- (b) What information must be included in the application to rent?
- (c) Who receives applications to rent? Should applications be sent to the strata council or the strata management company?
- (d) Within what time frame will the strata corporation respond to an application? Must the strata corporation's response be in writing?
- (e) How much time does the owner have to find a tenant before permission to rent is revoked and another owner is given permission?
- (f) If the limit has been reached, is there a waiting list? If so, what is the procedure for use of the waiting list?
- (g) What is the penalty for renting a strata lot in contravention of a rental limit?
- (h) In what circumstances could the right of an owner to rent their strata lot be revoked? For example, when a renting owner sells, transfers, or takes occupancy of the strata lot? When a tenant vacates the strata lot? When a strata owner or tenant fails to comply with certain bylaws? When an owner fails to pay strata fees, and if so, in what circumstances?

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<sup>3</sup> Para 40

As a final matter, the Judge considered the Strata Corporation's argument that the equities did not favour the Carnahans for a number of reasons. As many strata councils often attempt to take into account various extraneous factors when considering a bylaw issue, the Judge's comments in this regard are worth considering.

The Strata Corporation argued that the Carnahans were attempting to circumvent a bylaw that had been successfully in place for 20 years; the Carnahans knew the Strata Corporation's informal procedure for processing rental requests; Mr. Carnahan, as a prior Strata Council president, had applied the procedure to other owners; and the Carnahans understood the procedure and partially complied with it when they submitted a Form K for their tenant after their right to rent on the basis of hardship ended. The Judge found that these arguments were red herrings. The Judge found that, as owners, the Carnahans had standing to challenge the bylaw. The Judge held that the Carnahans had not engaged in inequitable behaviour. The fact that the Carnahans had benefited from the hardship exemption had nothing to do with the interpretation issue. Additionally, the Judge was very clear in finding that an owner who knows the practical procedures and applies them as a strata council member is not barred from challenging the validity of the rental restriction bylaw in their capacity as an owner.

The Judge declared that the rental restriction bylaw did not comply with section 141(3) of the SPA and therefore was unenforceable. The Judge also cancelled the fines of \$10,500 that had been levied against the Carnahans.

Many may find the Judge's conclusion obvious, based on a plain reading of section 141(3) of the SPA. However, the Judge's analysis and comments with respect to section 141(3) of the SPA are important. The Judge stressed the fact that section 141(3) of the SPA provided a statutory protection for owners and that the actions

and decisions of the Strata Council in administering the rental restriction cannot be arbitrary. Further, section 141(3) of the SPA was necessary to prevent the Strata Council from exercising unfettered discretion which in the case of some Strata Council members may be influenced by ulterior motives.

The decision not only provides strata corporations with the procedural provisions that can be contained in a rental restriction bylaw, but it also provides strata councils and owners with an explanation as to why such procedural provisions are necessary.

As a result of *Carnahan*, it is important for strata councils to review their rental restriction bylaw. Legal advice should be obtained if the bylaw does not address the various procedural matters identified by the Judge.

The *Carnahan* decision specifically related to the procedure, required by the SPA, to administer a rental restriction bylaw. The case did not consider whether owners should be protected from arbitrary and capricious decisions with respect to other bylaws for which Strata Council permission is required such as placing items on a balcony or carrying out alterations. In view of the Judge's comments requiring the need to balance the interests of owners and the Strata Corporation and his concerns regarding unfettered discretion and possible ulterior motives of Strata Council members, it is possible that a similar approach may be taken by a future Court in respect of other bylaws for which Strata Council permission must be obtained. For this reason, Strata Councils may wish to review their processes and procedures regarding matters for which Strata Council approval must be obtained in order to ensure that the decision making is not arbitrary or influenced by ulterior motives.