

Condominium Home Owners Association

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Flooring Bylaws

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The following write up is about bylaws dealing with flooring in strata lots. A general consideration of when and why such bylaws are helpful is followed by an example of how flooring bylaws have been dealt with by both the Supreme Court of British Columbia and the Human Rights Tribunal. Some sample bylaws are included for your consideration.

1. “One Size Fits All” does not apply to Flooring Bylaws and Strata Corporations

The importance of having a bylaw that has been drafted with the nature of the strata complex in mind applies to flooring bylaws as well as other bylaws that govern alterations to a strata lot.

Some strata corporations require bylaws restricting the type of flooring allowed in individual strata lots because of noise transmission. For instance, in a three storey wooden structure, if any of the strata lots on the top two floors have hardwood floors installed, the sound of footsteps, moving chairs and dropping items such as cutlery can increase substantially for the residents living directly below. For councils in these strata corporations it is important to consider the history of the building before drafting a flooring bylaw. Some older strata complexes that are converted apartment buildings had hardwood floors installed originally and the hardwood floors are still lurking under a layer of shag, or what have you. A bylaw that provides that “No owner shall install hardwood flooring or allow it to be installed” will arguably not stop an owner from removing the carpeting and refinishing the hardwood floor underneath.

I am aware of one apartment style strata complex where the installation of hardwood floors by a restaurant located on the bottom floor of a mixed use complex, as well as the remodeling the restaurant did to the ceiling, greatly increased the amount of noise that emanated into the residential strata lot above. For these types of complexes, passing, registering and enforcing a flooring bylaw can be crucial.

The use of different types of flooring is often not restricted in townhouse developments, because no one is living below someone else, so noise transfer between strata lots is limited. However, even if noise transfer issues are not a concern, an owner installing hardwood floors in a townhouse can still give council members and strata managers a headache. I work for a Strata Corporation whose Council received a demand from a new owner remodeling his strata lot that he immediately be permitted to have his contractor shave off part of the concrete floor so that the floor would be even, making the installation of the hardwood floors easier and more aesthetically pleasing. The Council was asked to give permission for this structural change on the strength of representations made by an engineer in a one page fax on which the engineer wrote that structural damage caused by the removal of a certain amount of concrete was unlikely. Interestingly, the contractor wanted to remove more concrete than that approved by the engineer. The Strata Council required further engineering evidence before making a decision and in the end the owner agreed to use an installation technique that did not involve shaving the concrete.

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Some complexes do not have these types of noise transfer concerns and have little need for a bylaw that prohibits or limits the use of different types of flooring. For instance, bareland strata corporations should not include such restrictive bylaws. A bareland strata corporation is one where strata lots are defined on a horizontal plan by reference to survey markers and not one that references the floors, walls or ceilings of a building. In other words, each strata lot is comprised of a plot of land, and everything within that plot. Since there is little chance that installing a different type of flooring will either annoy neighbours because of noise issues or create repair expenses for the strata corporation involved, the best approach would be to not restrict an owner's choice of flooring in these complexes.

2. **What Happens When a Strata Corporation does not have a Flooring Bylaw and there is a Noise Problem caused by the use of Flooring other than Carpeting?**

The most common problems arise in apartment style complexes that have no specific bylaw about flooring. An owner of a strata lot does some renovations, including replacing the carpeting and underlay with hardwood floors and is very happy with the aesthetic look achieved. The owner of the strata lot below is then very unhappy, because all of a sudden she can hear noises from above, including chairs being dragged across the floor, cupboards being closed, children running and every other daily noise imaginable.

The owner of the strata lot below asks council to do something about the noise, but council members don't know what to do and the bylaw that they can rely on from the Schedule of Standard Bylaws is:

- 3(1) An owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that
- (a) causes a nuisance or hazard to another person,
 - (b) causes unreasonable noise,
 - (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot,

Since the noises are ordinary living noises and not noises from loud parties, it is very difficult to know whether or not they are unreasonable. Council is then stuck in the middle between the two owners. Perhaps because of the nature of the building the very act of removing the carpet and underlay is unreasonable? Council members don't know how to address these complaints. When they phone a lawyer they are faced with a barrage of technical advice about what legally constitutes a "nuisance".

The other option in these circumstances is for the council to consider relying on section 5(1)(g) of the Schedule of Standard Bylaws, which provides as follows:

- 5(1) An owner must obtain the written approval of the council before making an alteration to a strata lot that involves any of the following:
- (g) those parts of the strata lot which the strata corporation must insure under section 149 of the *Act*.

Since a strata corporation must insure original carpet installed by a developer it is possible to argue that any owner replacing such a carpet needs the strata corporation's permission to do so. This is rather a novel argument that has not been the subject of a reported legal decision yet.

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3. Supreme Court of British Columbia is willing to Enforce Flooring Bylaws

It appears from recent decisions made by the Supreme Court of British Columbia that Judges are willing to support strata corporations that are enforcing bylaws restricting the use of flooring in individual strata lots. As a result, strata councils in complexes with even the potential of noise transmission problems should consider enacting a bylaw that gives them control over flooring issues.

One recent decision is *The Owners, Strata Plan VR19 v. Collins et al*, [2004] B.C.J. No. 2757. In that case, Mr. Justice Melnick considered a flooring bylaw worded as follows:

All floors of strata lots on the second and third floors must have wall to wall carpeting, with the exception of kitchens and bathrooms and the first five feet of any entry hallway.

The purpose of the bylaw was to reduce the noise disturbances caused to the residents in strata lots directly below. The owners of the strata lot who installed hardwood floors admitted to receiving a set of the bylaws before purchasing, but advised that the page was missing that referenced the flooring bylaw. The listing realtor deposed that he had provided a full set of the bylaws to the purchasing realtor. It was argued in Court on behalf of the owners of the strata lot that the bylaw should not be enforced against them because there had been no complaints from any resident with respect to the noise. They also brought up the fact that the opportunity for a hearing before Council, as required under section 135 of the *Strata Property Act* was denied to them. Mr. Justice Melnick found that the owners of the strata lot had blatantly contravened the flooring bylaw and the Strata Corporation was certainly within their rights to take steps to remedy the contravention. The owners were ordered to replace the hard flooring with carpeting and to bear the financial burden of doing so. Since the Strata Council did not follow the hearing process pursuant to section 135, the Strata Corporation could not require the owners to pay for the costs of the action to enforce the flooring bylaw and each party had to bear their own legal costs.

4. The Human Rights Tribunal of British Columbia is willing to require Exceptions to Flooring Bylaws

Based on a recent case, The BC Human Rights Tribunal is willing to find that a Strata Corporation has breached section 8 of the *Human Rights Code* if it enforces a flooring bylaw without making reasonable accommodation for an owner with a physical disability.

The case that has recently been decided by the BC Human Rights Tribunal is *Konieczna v. Strata Plan NW 2489*, 2003 BCHRT 38. In that case, Halina Konieczna filed a complaint against her Strata Corporation alleging that she was discriminated against pursuant to section 8 of the *Human Rights Code*. At the time of the hearing she was 71 years old and a retiree. She had purchased her strata lot in January 1987 and at that time the strata lot had wall to wall carpeting, except in the kitchen and two bathrooms, which were tiled. In mid 1996 she wrote to the Strata Corporation about a mold smell she detected in her bedroom. In July, 2000 when the wall board and insulation were removed from her bedroom, the existence of mold was found. She had an ongoing disagreement with the Strata Corporation about who was responsible for the removal of the mold, repair of the walls and associated costs.

In a letter dated July 26, 2000, Konieczna sought permission to install hardwood flooring with a quality underlay in her strata lot. At that time she was not aware that she was allergic to the latex used in carpeting. The bylaws

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in effect when she purchased her strata lot and made the request were as follows:

An owner shall receive the written permission of the Strata Council before undertaking alterations to the exterior or structure of the Strata Lot, but permission shall not be unreasonably withheld.

In a letter dated August 10, 2000 she was granted permission to install hardwood floors in her strata lot provided that she would sign and return an Indemnification Agreement and Covenant.

At a special general meeting held on October 23, 2000, the following flooring bylaw was passed:

Wall to wall carpeting with appropriate underlay is the only allowable floor covering within a strata lot at Strata Plan NW 2489 (save for the entrance foyer)... (the "Flooring Bylaw")

Konieczna was diagnosed with a severe latex allergy in 1994 and has been diagnosed with an immunologic sensitization to dust mite and mold. It was not disputed by the Strata Corporation that latex is present in all commercially available carpeting. She has allergic and asthmatic reactions, including tightness of chest, shortness of breath, bloody and runny nose, post nasal drip, coughing, itchy eyes and headaches. She experiences one or more of these symptoms after spending prolonged periods of time in her strata lot. She did not explicitly specify to the Strata Corporation that she was experiencing these symptoms at that time, but provided general literature on these types of allergy symptoms when addressing the mold issue in her wall.

Under cover of a letter dated September 14, 2001, Konieczna enclosed the Indemnification Agreement and Covenant, signed September 26, 2000. She advised that she had not been able to install the hardwood floors when approval was given because the repairs to the external walls of the bedroom were not undertaken by the Strata Corporation until July 2001. She further advised that all currently available carpets for wall to wall coverage contain latex, and because she has a severe allergy to latex, hardwood or ceramic floors remain her only option. She also enclosed information from her physician advising that she has a severe latex allergy and should not have any latex containing carpet in her apartment.

At a special general meeting held on October 23, 2001 a resolution to grant Konieczna an exemption to the Flooring Bylaw was defeated.

By letter dated November 16, 2001, she applied for an exemption from the Flooring Bylaw and for permission to install hardwood flooring in her strata lot based on the Strata Corporation's duty to accommodate her. She warned that she would be making a human rights complaint if no accommodation was made. She obtained a further written medical opinion from her allergy and immunology specialist confirming her immunologic sensitisation to dust mite, mold and latex and patch sensitivity to formaldehyde and recommending that she live in an environmentally clean living space relating to these antigens. Her request was refused and she initiated a human rights complaint on March 2, 2002. She also obtained further written confirmation from a respiratory specialist recommending removal of the carpet.

The Strata Council held a special general meeting on December 9, 2002 to consider rescinding the Flooring Bylaw. The resolution to rescind the Flooring Bylaw failed.

It is important to consider that the decision of the Tribunal was made on the basis of a statement of agreed upon facts and the medical evidence was not disputed by the Strata Corporation.

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The Tribunal took jurisdiction over the complaint, pursuant to section 8 of the *Human Rights Code*, which provides as follows:

Discrimination in accommodation, service and facility

- 8 (1) A person must not, without a bona fide and reasonable justification,
- (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
 - (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons.
- (2) A person does not contravene this section by discriminating
- (a) on the basis of sex, if the discrimination relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of life or health insurance, or
 - (b) on the basis of physical or mental disability, if the discrimination relates to the determination of premiums or benefits under contracts of life or health insurance.

The Tribunal further found that, pursuant to the mandatory provisions of the *Strata Property Act*, the Strata Corporation is responsible for managing and maintaining the common property and common assets of the Strata Corporation for the benefit of owners and has the authority to pass bylaws that provide for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the Strata Corporation. The Tribunal found that the Flooring Bylaw related to the noise control and management and the maintenance and protection of the quiet use and enjoyment of individual strata lots and therefore is a subset of the service which the Strata Corporation provides to the owners of the strata lots. The Tribunal also found that it was a service related to the public, in that the owners are the subset of the public that the Strata Corporation serves and that human rights protection applies to bylaws that deal with individual strata lots.

The Tribunal found that Konieczna did have a disability and that, based on the undisputed medical evidence, she had established a prima facie case of discrimination. Once a Complainant establishes a prima facie case of discrimination the onus shifts to the Respondent to prove on a balance of probabilities that it has a bonafide and reasonable justification for the discrimination. In this case the Strata Corporation did not raise the defence of a bonafide and reasonable justification for the discrimination, so the Tribunal considered the appropriate remedy.

The parties consented to an order that Konieczna be entitled to install hardwood flooring in her strata lot, at her own expense, with an appropriate quality underlay that provides adequate sound insulation while addressing the Complainant's health concerns, upon her signing and delivering the Indemnity Agreement and Covenant. The Tribunal did not order a change to the bylaws. Konieczna sought damages for injury to her dignity, feelings and self-respect in the sum of \$5000.00. The Tribunal found that the Strata Corporation had exhibited a high degree of inflexibility in failing to address the Complainant's concerns. It also found that the Strata Corporation had acted aggressively by adding its legal expenses to Konieczna's account and demanding that she pay them. She was awarded \$3,500 as compensation for injury to her dignity, feelings and self-respect.

5. Possible Bylaws

Given that properly worded flooring bylaws are enforceable in Court, but vulnerable to a human rights

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challenge, it is our view that bylaws that prohibit certain types of flooring should allow the council to make an exception in order to comply with the *Human Rights Code* and provide reasonable accommodation to occupants.

We have prepared two bylaws for discussion purposes, to be considered as an addition to section 5 of the Schedule of Standard Bylaws. The following bylaw could be considered for use when there has been a problem with noise transfer in the building and the consensus of the owners is that only wall to wall carpeting is appropriate for use in the living areas of the strata lot.

5(4) No other flooring but wall to wall carpeting is allowed in a strata lot, with the exception of in the bathroom and kitchen and for the first five feet of the front foyer. Notwithstanding the previous sentence, the council will make reasonable accommodation for a resident who has proven a physical disability that in the reasonable discretion of council requires an alternative type of flooring to be used pursuant to section 8 of the *Human Rights Code*, but the council will require the owner of the strata lot to remove the flooring and replace it with wall to wall carpeting and underlay immediately when the resident for which the exception is being made moves out. If an owner sells his strata lot with flooring that has been allowed pursuant to accommodation being made pursuant to the *Human Rights Code* and the resident for which the exception is made no longer occupies the strata lot, the new owner of the strata lot will be responsible to immediately remove the flooring and replace it with wall to wall carpeting and underlay and will be responsible for all associated costs.

The next bylaw could be considered for use when the Strata Corporation wants to maintain some control over the type of flooring used in individual strata lots, but does not want to prohibit any particular type of flooring. This bylaw could be added to section 5 of the Schedule of Standard Bylaws:

- 5 (4) No other flooring but wall to wall carpeting with underlay is allowed in a strata lot, with the exception of in the bathroom and kitchen and for the first five feet of the front foyer, unless the owner has received the prior written approval of council to install other flooring.
- (5) When considering an application for flooring the council may:
 - (a) require the owner to provide evidence from an expert on flooring, including evidence from an acoustical engineer, that the quiet enjoyment of other residents is unlikely to be impacted by the use of the strata lot because of the change in the flooring; and
 - (b) require the owner to take steps to reduce noise transmission, including but not limited to installing a specific type of underlay and/or covering the flooring with rugs or carpets in high traffic areas.
- (6) Council will make reasonable accommodation for a resident who has proven a physical disability that in the reasonable discretion of council requires an alternative type of flooring to be used pursuant to section 8 of the *Human Rights Code*, but subsection (5) of this bylaw still applies.

6. Enforcement Procedure

If council does receive a noise complaint because of a change in flooring, or receives a complaint that an owner installed flooring in contravention of a bylaw, then the matter should be dealt with by following the bylaw enforcement procedure set out in section 135 of the *Strata Property Act*, which provides as follows:

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- 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.

It is important that council make a decision after giving both sides an opportunity to present their case. If council fails to follow the procedure outlined above, it is possible that an owner complaining about the noise will take the position that council has failed to perform its duties under section 26 of the *Strata Property Act*, which provides as follows:

26 Subject to this Act, the regulations and the bylaws, the council must exercise the powers and perform the duties of the strata corporation, including the enforcement of bylaws and rules.

Depending on council's decision and findings it may be necessary for the council to take further enforcement action, including asking the owners to approve legal action by a $\frac{3}{4}$ vote resolution.

7. Other Considerations

The actual installation of the alternative type of flooring is another story. Other bylaws can be adopted to stop owners from installing the flooring during inappropriate hours and leaving construction debris out in the common property hallway, but those considerations are beyond the scope of this article.

** This information article is provided courtesy of Elaine McCormack, Lawyer with McCormack & Company Law Corporation Ms. McCormack may be contacted by phone at (604 688-0930). The information is prepared for educational purposes only. Please seek legal advice if you require information about how the Strata Property Act applies to a particular situation.*

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