

CondoChronicle

NEWSLETTER OF THE CCI NEWFOUNDLAND AND LABRADOR CHAPTER

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**CANADIAN
CONDOMINIUM
INSTITUTE
NEWFOUNDLAND AND
LABRADOR CHAPTER**

P.O. Box 23060, Churchill Square
St. John's, NL A1B 4J9

CHAPTER ADMINISTRATOR
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mbutt@martek.ca

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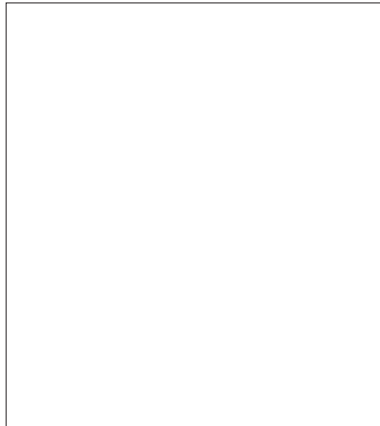
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MESSAGE FROM THE PRESIDENT

GEOFF PENNEY | PRESIDENT CCI-NL



Welcome one and all to the debut issue of Condo Chronicle - CCI Newfoundland and Labrador's very own newsletter!

Through the efforts of our Board of Directors and with assistance from CCI-National we are now able to offer our members additional information and education on condo issues and news and events involving CCI-NL.

Many of you will recall that in November 2008 we launched our Chapter's website (www.cci.ca/Newfoundland) with much excitement and enthusiasm. This was the first step in our communications initiative to bring more information to our members. Our second step was to develop and publish a newsletter. We have now met both goals and, in so doing, have joined the ranks of other CCI chapters across the country in offering these resources to members.

We had planned this newsletter for several years, however lack of funds prevented us from following through. It will come as no surprise that our membership numbers are small when compared to those in larger more mature chapters. However we always kept this initiative on "our radar". With a recent generous grant from CCI-National we were finally able to make this a reality.

In future issues we will offer condo related articles and report on issues of interest for those who own condos and for those who provide services to the industry. Our features may change from issue to issue as the newsletter evolves to meet our Chapter's needs and the comments we hear from our members.

We hope you enjoy this issue of Condo Chronicle.

Geoff Penney
President CCI-NL

DO'S AND DON'TS FOR RESERVE FUND EXPENDITURES

BY RON DANKS, ACCI, FCCI



Most provincial condominium legislation specifies that a condominium must have one or more reserve funds. They also usually restrict the use of money from the reserves indicating that a reserve fund shall be used solely for the purpose of major repair and replacement of the common elements and assets of the corporation.”

Seems pretty straight forward; a condominium must have a reserve fund and can only use the money in the reserves for paying for “major” repairs or

IF IT IS SO STRAIGHT FORWARD WHY ARE WE SEEING BOARDS OF DIRECTORS USING RESERVE MONEY FOR NON-RESERVE EXPENDITURES?

replacement of common elements and assets, (an “asset” might be anything from a superintendent’s unit to a lawnmower or television). If it is so straight forward why are we seeing Boards of Directors using reserve money for non-reserve expenditures?

One answer may be that they simply don’t know they can’t spend reserve moneys on some project which may be forgivable....once. In other instances the writer is aware of boards who have deliberately used reserve funds for non-reserve fund expenditures sometimes out of what they believe is economic necessity, (e.g. to shore up a budget deficit in the operating account) or because they don’t want to become unpopular by having to levy a special assessment.

Whatever the case, the answer is, with few exceptions, NO, you can’t use reserve fund moneys for anything other than for major repairs or replacements of common elements.

ARE THERE ANY EXCEPTIONS?

There are few exceptions to making expenditures from the reserves that are not specifically for major repairs and the province’s condominium legislation must be examined carefully to ensure that the reserve moneys are being used properly.

One of the more common examples is where a law is changed or implementing that mandates that a com-

ponent of the common elements must be dealt with in a certain way. An example may be where a change in environmental legislation requires the condominium to replace an inefficient mechanical system of some type with a more efficient and expensive system.

However, the cost of such alterations must still be considered “major”. As an example if legislation mandates that all condominiums must use low voltage light bulbs for common element hallways and a 200 unit condominium spends a few thousand dollars complying, that cost may not be considered “major” given its two million dollar budget. On the other hand the \$250,000.00 spent installing mandatory solar panels on the roof would be considered major.

MAINTENANCE vs. IMPROVEMENT

Condominium boards must be cautious when contemplating major renovations to ensure they do not inadvertently breach their Reserve Fund trust obligations. While the board is usually free to spend reserve funds on major repair or replacement programs without the need for owner approval, they cannot use reserves to pay for improvements or up-grades that are not otherwise required.

Improvements made to the common areas in many cases do not relate to a major repair or replacement. A condominium cannot use funds from the reserves, for example, to add a playground complex where none existed before. That would have to be paid for with funds drawn from the operating account, obtained by a special assessment or perhaps borrowed from a bank. Simply put, if you are adding something **Anew@** to the common elements it usually can't be paid for from the reserves.

Boards sometimes inadvertently breach the reserve trust obligations during major renovation programs where new or up-graded materials or objects are acquired as part of the project. As an example, carpeting in common area hallways may need to be replaced due to wear and tear. If the board replaces the old carpeting with new carpeting, the cost of the new carpeting could be paid for from the reserves. However, if the board decided to replace the carpeting with hardwood floors, that would be considered an improvement and the cost, (or at least the extra cost) of installing the hardwood could not be paid from reserves. Care must be taken to break out **Aimprovements@** from such projects and follow the applicable procedures set out in local condominium legislation.

CAN RESERVE FUND MONEY BE USED TO REPAIR UNITS?

The Act states that money in a reserve fund can only be used for the repair or replacement of “common elements”. What this means is that money in the reserves cannot be used to make major repairs to the owner's

units. That would appear obvious to most boards however there are many condominiums where parts of what most would consider common element, are actually part of the unit.

THE WRITER HAS COME ACROSS NUMEROUS EXAMPLES WHERE BOARDS OF DIRECTORS FAILED TO REALIZE THAT CERTAIN ITEMS THAT THEY THOUGHT WERE COMMON ELEMENT WERE IN FACT PART OF THE UNIT.

The writer has come across numerous examples where boards of directors failed to realize that certain items that they thought were common element were in fact part of the unit. As a result they had been putting money into the reserves to eventually deal with their replacement and in some cases had been paying for replacement or repairs of unit components. A common example is where the declaration describes the boundaries of the units as being the “*exterior unfinished surface of the exterior doors and windows in a closed position*”. That means the doors and windows are part of the unit. In that case the condominium cannot pay for the replacement of the windows or doors when they get to the point where they no longer function. In some cases the declaration may indicate the condominium is to maintain the windows and doors but that does not include replacing them when they wear out.

Some condominiums are designed in such a way that the boundaries are not what you would consider typical, (such as ending with the internal drywall). In some of these condominiums the boundaries may extend beyond the unit walls and include such things as the exterior cladding, roof structures, eaves trough and downspouts, decks and patios and even the front and rear lawns and the fencing that surrounds them. These are not confined to new construction and the writer has come across several such condominiums that were over 30 years old.

In each of these cases the boards had not realized that they did not need to put money into the reserves for the eventual replacement of, for example, the roofs, because they were part of the unit. These condominiums could not use all this money they had collected unless they amended their declaration and description plans to change the boundaries.

Other condominiums have attempted to absorb the cost of repairs to the units by passing by-laws or rules indicating that unit items will now become part of the common expenses. Those by-laws and rules would be unenforceable since they are inconsistent with what is described in the declaration.

Board members must be fully satisfied that the money they are spending from the reserves is for major repair or replacement of the common elements, not for components of the units.

“BORROWING” FROM THE RESERVES

Some boards consider the reserve fund to be the condominiums’ bank and will take funds from the reserves to shore up a budget deficit in the operating account with, hopefully, the intent to pay it back. This is not an appropriate expenditure from the reserves especially when it is done on a regular basis. That suggests poor budgeting and/or fear of increasing common expenses.

If a condominium finds itself in an emergency situation where it has no other recourse and it does transfer money from the reserves to the operating account the board should:

- Disclose what they are doing to the owners and explain why;
- Advise the corporation’s auditor;
- Make every effort to replenish the reserves before the end of the current fiscal year end perhaps by levying a series of special assessments or at least increase common expenses for the next fiscal year to pay back the amount taken from the reserves; and
- Make sure any status or estoppel certificates issued during this period accurately reflect the amount of the reserves and the possibility of special assessment and/or increases in common expenses.

A better alternative, where time permits, is to levy a special assessment or borrow the money from a bank provided you have a by-law that permits the corporation to borrow the required funds.

INVESTING RESERVE FUNDS

Let’s start by saying that lending the president’s brother-in-law money from the reserves in exchange for a second mortgage on his house, is not an appropriate investment of reserve funds, (yes this really did happen!). Most provincial legislation stipulates that money in a reserve account must be invested in very safe types of investment vehicles such as a bond, debenture, guaranteed investment certificate, deposit receipt, deposit note, certificate of deposit, term deposit or similar instruments;

IT SHOULD BE NOTED THAT IT IS NOT MANDATORY TO INVEST RESERVE FUNDS.

It should be noted that it is not mandatory to invest reserve funds. Simply leaving the funds in the reserves in an interest bearing account is sufficient. In

fact at today’s investment rates some condominiums with large deposit may earn as much or more interest by leaving their funds in an interest bearing account than they might earn on a short term GIC or T-Bill.

Where reserve funds are to be invested the condominium board should develop an investment plan based upon the anticipated cash needs of the corporation as set out in the most recent Reserve Fund Study.

What this means is that the terms of the investments must co-inside, more or less, with the dates on which the condominium anticipates it will have to make expenditures from the reserves for major repairs. As an example, if the reserve fund study predicts that the corporation will need \$500,000.00 to replace the roofs in three years and, in the interim, the board would like to invest that money then they need to make sure that the investments are structured such that they will mature prior to that date, (i.e. no longer than a three year term) with no loss of interest or other penalty for early termination.

OTHER THINGS YOU CAN’T SPEND RESERVE FUNDS ON

The following are some random examples of instances the writer has come across where reserve funds have been used or invested improperly:

- To pay for insurable common element repairs that should have been paid for by the insurance company or, where the damage was minimal and the board did not want to make a claim, out of operating funds;
- To pay for “minor” repairs, for example using the reserve fund to pay for pot holes to be filled in as opposed to resurfacing the whole road;
- To pay for new (expensive) art work for the lobby;
- To buy a bigger residential unit for the superintendent;
- To buy parking units from the condominium’s developer;
- To pay for new water conservation devices to be retrofitted into each unit;
- To pay the cost of a settlement in a lawsuit;
- To loan money to unit owners;
- To pay a director or other owner a wage for work done on behalf of the corporation; and
- To pay a Christmas bonus to an employee;

When in doubt a board should consult with their manager, auditor or their lawyer to determine whether the reserve fund is being used properly. A quick phone call or e-mail can avoid a costly mistake.

Ron Danks, ACCI, FCCI is a partner with the Hamilton and Burlington business law firm, SimpsonWigle LLP and he currently represents in excess of 650 condominiums throughout Southern Ontario. ■

TEN QUESTIONS ON RESERVE FUND STUDIES

BY KIM COULTER | COULTER BUILDING CONSULTANTS LTD.
CONSULTING ENGINEERS & BUILDING SCIENTISTS

The following article was written in 2001 and pertains to the Ontario condominium legislation that had recently been adopted. Though written to address condominiums in Ontario and Ontario's statute, the article may be of interest to condominium interests in Newfoundland and Labrador in anticipation of the Province's new Act in which reserve funds and reserve fund studies will likely become mandatory. Readers should note that dates, time frames and specific legislative provisions discussed herein apply to Ontario and may not be the same under Newfoundland and Labrador's new legislation."



As of May 5, 2001, the Condominium Act 1998 requires all existing and new condominium corporations to have a "Reserve Fund Study" undertaken. This article outlines some of the key aspects of Reserve Funds and the Studies.

1. What is a Reserve Fund?

The Condominium Act requires that the corporation maintain a separate fund to be used solely for the purpose of paying for the major repair and replacement of the common elements and assets of the corporation. This can include exterior wall claddings, roofing, windows, doors, heating and cooling systems, site elements including roads, sewers, playground equipment etc.

2. What is a Reserve Fund Study?

A Reserve Fund Study is necessary in order for the Board of Directors to know if the amount of money currently in the reserve fund and the amount of contributions collected for the reserve fund are adequate to provide for the expected costs of major repair and replacement of the common elements and assets. As noted above, Reserve Fund Studies are mandatory for all existing and newly registered condominium corporations.

3. When and How Often Does the Study Need to be Done?

For existing corporations, they have three years from May 5, 2001 to have a study done. For corporations registered after May 5th, they have one year from the date

the condominium was registered. The studies have to be updated every three years.

4. Does the Corporation Need a Full (Comprehensive) Study, Or An Update?

If the Corporation has never had a Study, a Comprehensive Study including a site inspection as outlined above will be necessary. An update study basically takes the original information and updates the key parameters such as common elements, age, costs, current reserve amounts and contributions. The first update can be without a site inspection. The next update is with an inspection with the need for site inspections alternating between each update. The same type of tables prepared as part of the original study are again submitted, with the updated information.

5. Who Is Allowed to Prepare the Reserve Fund Study?

The Regulations to the Condominium Act 1998 note who is permitted:

- Members of the Appraisal Institute of Canada
- Persons who hold a certificate of practice within the meaning of the Architects Act
- Certified Engineering Technologists
- Architectural Technologists
- Holders of a CRP designation
- Persons who hold a certificate of authorization within the meaning of the Professional Engineers Act
- Quantity Surveyors

- Graduates of Ryerson Polytechnic University with a Bachelor of Technology (Architectural Science) Building Science or Architecture option.

Notwithstanding the above, there are regulations on who cannot prepare the Study which include members of the Board, the condominium's property manager, certain relatives of Board members, an owner or a resident in the condominium. In addition, the person/company being considered cannot have any direct or indirect interest in a contract or proposed contract with any Board member outside of his/her capacity as a Board member.

Aside from professional credentials, you want someone who has demonstrated experience with condominiums. Notwithstanding the Study being a budget document, it is also a technical report that involves the review of architectural and engineering drawings and the visual inspection of common elements. A trained eye can identify building problems for which repair costs can be included in the Study. In addition, much of the future Reserve Fund expenditures will be due to building envelope (roofing, windows, exterior cladding) and structural restoration (parking garages, balconies). These costs are often very site dependent for which "costing manuals" are of little use. Companies that have designed and administered these types of rehabilitation projects will be better suited to provide budgets for similar future work that the Corporation may be facing.

The regulations to the Condominium Act stipulate the minimum liability insurance requirements; \$1,000,000.

6. What Information Does the Corporation Need to Provide?

Once you have hired a consultant, he/she will require information about the condominium corporation. This will include the following:

- As-built drawings and specifications.
- The Declaration and Description.
- Reciprocal cost sharing agreements.
- Previous reserve fund studies.
- The most recent audited financial statements.
- What the current annual contribution to the Reserve Fund is.
- The interest rate on the Corporation's Reserve Fund investments.
- Repairs or replacements to the common elements that have already been completed and when. Similarly, scheduled future work needs to be accounted for.
- A summary of problems being encountered by the Corporation that should be reviewed. As an example, water penetration concerns.

7. What Is The Process?

The process is as follows:

- The consultant is provided the above information. One of the most important are the drawings. They will be reviewed prior to visiting the site in order for the consultant to become familiar with the overall design and construction schemes.
- Site inspection. In order to have an understanding on the current condition of the common elements, visual inspections are undertaken. Problem areas noted above can be reviewed. After the first study, the next study update can be completed without a site inspection. The next update must include a site inspection.
- The report is then prepared (see next question). The drawings are used to "take-off" quantities such as roofing, exterior wall cladding, asphalt, hallway finishes etc that will assist in preparing the replacement/repair cost budgets. It is recommended that a draft report should be submitted in order for the Board and Property Manager to review it prior to it being finalized. The consultant should be available to attend a meeting to review the report.
- Upon receiving direction from the Board of Directors, the Reserve Fund Study is finalized and submitted.

8. What Is The Report Format?

Each consultant will have a different format, but in general, the Reserve Fund Study will contain a Physical and Financial Analysis:

- Background Information about the Corporation in general; where it is, its age, a general description of the property as a whole.
- Inspection Report. Based upon the results of the site inspection, the report will provide an itemized overview description of the major common elements. This will include general condition, the need and timing for remedial work or replacement and any other information that the Board should be aware of.
- Information Tables. There is typically a table that summarizes the common elements in terms of current age, life expectancy, remaining service life and current and future cost budgets.
- Expenditure Tables. The data from the Information Tables is summarized to show in a tabular format when the itemized common element repair/ replacements are estimated to take place. For each year, these expenditures are summed. The annual projections must be a minimum of 30 years commencing in the year the Study (and updates) is prepared.
- Cash Flow Tables. Based upon the estimated expenditures, different contribution plans can be provided. Often, one plan includes the contribution level currently being used as a form of comparison to other scenarios.

9. What is the Funding Plan

As part of the Financial Analysis, the study must

include a recommended funding plan projected over 30 years from the date of the study. As part of the draft submission, several different Funding Plans can be prepared showing different cash flow scenarios. The plan must show:

- The estimated cost of major repairs and replacements based upon current costs.
- The same costs adjusted to account for an assumed inflation rate. The inflation rate must be stated in the study.
- The opening balance of the reserve fund.
- The recommended amount of contributions to the reserve fund determined on a cash flow basis that are required to offset adequately the expected cost in the year of the expected major repair or replacement of the common elements and assets.
- An estimate of the interest earned on the reserve fund contributions based upon an assumed interest rate. The study shall state the assumed interest rate. The Condominium Act requires that interest generated by the Reserve Fund is reinvested into the Fund.
- The percentage increase in annual contributions to the reserve fund for each year of the 30 year study period.
- The estimated closing balance of the reserve fund for each year.

For existing corporations (registered prior to May 5th, 2001) if their first study prepared after May 5th does not show positive cash flow over the next 30 year period, they have 10 years from the date of the first study to achieve positive cash flow (for any year, the year's contributions plus what is already in the fund must exceed the estimated expenditures for that year) which must be then maintained for all subsequent years. Corporations registered after May 5, 2001 must show positive cash flow for the first fiscal year after the study is completed and for all years thereafter. **[Update: For newly registered condominiums, the reserve contribution set by the Declarant of 10% of the corporation's operating budget (exclusive of the reserve transfer), is typically insufficient. This has often necessitated a large increase in the transfer starting the second year. Consequently most consultants show a 10 year catchup provision similar to what was afforded to the pre-Act condominium stock]**

10. What Happens After the Reserve Fund Study Is Submitted?

After receiving the final study, the Board has 120 days to prepare a plan that outlines the future funding of the Reserve Fund. This is usually prepared as part of the Reserve Fund Study.

Within 15 days of proposing the plan, the board shall send a notice to all owners, containing a summary of the reserve fund study, a summary of the proposed plan and a statement indicating the areas if any in which the proposed plan differs from the study. The

auditor shall also receive a copy of the reserve fund study and a copy of the proposed plan and a copy of the notice sent to the owners. The Board shall implement the plan within the next 30 days. As the studies are typically done in the year prior to a new updated contribution plan being required, the plan does not become into play until the start of the corporations' next fiscal year.

Once the study and contribution plan have been adopted, the contributions to the Reserve Fund must be maintained. While additional funds from perhaps an operating transfer can be made in addition to the plan's contribution, the reserve contributions cannot be less. In addition, once funds have been transferred into the reserve fund, they cannot be taken out except for the express purpose of the reserve fund; the major repair and replacement of the common elements and assets.

Summary

The Condominium Act has increased the role of the condominium's Board of Directors with respect to its fiduciary duty to the owners in ensuring the common elements and assets are properly maintained. The Act gives the Board one of the necessary tools in this regard; a Reserve Fund Study. Boards should be referring to it on a regular basis and treat it as a planning document to assist in ensuring the financial health of the condominium's Reserve Fund.

Kim Coulter, B.Tech.(Arch.Sc.) is President of Coulter Building Consultants Ltd., Consulting Engineers & Building Scientists based in Burlington Ontario. Mr. Coulter is a building science consultant and from 1993 to 2008, was a member of the National Building Code of Canada Standing Committee on Environmental Separation. This committee was responsible for writing the 1995 and 2005 National Building Code of Canada Part 5 on building envelope design. Mr. Coulter is President of the Golden Horseshoe Chapter of CCI.

Coulter Building Consultants Ltd. provides engineering services to condominium corporations in the fields of building envelope and structural engineering, reserve fund studies and performance audits. The firm is a member of the Golden Horseshoe Chapter of CCI, as well as an Associate Member of the Association of Condominium Managers of Ontario.

Coulter Building Consultants Ltd.

Consulting Engineers & Building Scientists
920 Brant Street, Suite 22
Burlington, Ontario L7R 4J1

(905) 632-5206/1-877-313-9862

www.cbcengineers.com ■

CONDOMINIUM LEGISLATION

BY KEVIN O'BRIEN
MINISTER OF GOVERNMENT SERVICES

The current *Condominium Act* was drafted in 1975 and was intended to regulate the condominium industry within the province to ensure consumer protection. The legislation is considered first generation and does not reflect current market conditions. In the past number of years, there has been growth in the condominium industry and it continues to grow.


These are just some of the reasons why the Department of Government Services felt that this legislation required reviewing. In addition, the Newfoundland and Labrador Chapter of the Canadian Condominium Institute presented us with a brief requesting changes to the condominium legislation.

After seeking authority to draft new legislation and holding public consultations to solicit opinions from potential owners, current owners, condominium corporations, developers, municipalities as well as the insurance industry, the Department decided the focus of the review would be threefold. The new legislation would be providing protection for first-time condominium buyers and current owners, improving the day-to-day operation of condominium corporations, and allowing for new types of condominium developments.

In August 2008, we released our consultation document to key stakeholders and the general public and held public consultations that began in Labrador in September and ended in St. John's at the end of October. One hundred and fifty-eight people attended the sessions across the province and a total of 27 written submissions were received representing a wide range of interests from credit unions, condominium owners, condominium corporations, condominium management companies, municipalities, condominium developers, real estate agents, and lawyers.

My officials within the Department have reviewed the submissions, conducted a review of similar legislation in other Canadian jurisdictions and have begun to draft the new legislation. It is my goal to introduce this new legislation in the House of Assembly in the Fall Session of 2009.

Sincerely,



Kevin O'Brien
Minister of Government Services

**Canadian Condominium Institute
Newfoundland and Labrador Chapter**

P.O. Box 23060, Churchill Square, St. John's, Newfoundland, A1B 4J9

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New Renewal July 1, 2009 to June 30, 2010.

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CONDO CHRONICLE

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