

Our File: 164815

November 20, 2018

By Email: stan@happyhollow.us

Mr. Stan Frantz
9 Astaak Road
Clam Bay, NS B0J 1Y0

Dear Mr. Frantz,

I write to provide an initial opinion regarding your dispute with the maintenance of common areas within your residential Co-Op. I have based this opinion on the review of correspondence between you and Aileen Furey, as well as the lease agreement for use of the common areas.

Facts

You are a resident of Abbecombec Ocean Village. As a part of your land purchase you entered into a lease of the development's shared "common areas". Under the lease agreement, Atlantic East Property Limited, and its successor company HarbourEdge Capital Corporation, (the "Developer"), Boosit Properties Limited (the "Co-Op") have each covenanted to maintain the common areas in a "reasonable state of repair" and maintain "reasonable access". You have concurrently covenanted to pay a "monthly levy" to be used to maintain the common areas. However, you have stated that the common areas have fallen into disrepair, and some have been demolished. You seek a preliminary opinion regarding any legal rights you may possess.

Issues

- (1) What are your rights to enforce maintenance of the common elements? Do you have a legal right to input, and does the Developer and Co-Op have a corresponding duty to respond?
- (2) Do the Developer and Co-Op have the option to decide not to maintain and demolish certain common areas and structures if they determine it is not financially or otherwise feasible?

Opinion

This is an issue of contractual interpretation. The legal rights and obligations of each party for the common areas can only be derived from the lease agreement. In review of that agreement, the Developer and Co-Op do not have a duty to consult with you, or other leasees, about the maintenance of common areas. However, they do have an obligation to keep common areas in a reasonable state of repair.

Reasonable state of repair is a subjective standard. It would be met if the Developer and Co-Op maintain the common areas up to their basic function. The agreement does not list off every structure contained within the common areas; however, this ambiguity may result in their inclusion under the lease agreement. The most likely remedy would be damages in the amount of levies paid by you and other residents.

(1) All rights and obligations regarding the common elements are contained in the lease agreement

You seek, primarily, some type of legal right to have input on how the common areas are maintained.

Unfortunately, there is little beyond the contract that imposes affirmative rights on how the Developer or Co-Op may seek to fulfil their obligation. It is trite law to state that the terms of a contract must be interpreted based on the ordinary and grammatical meaning. If there is some ambiguity in the terms, the conflict should be resolved against the party who drafted the contract. However, that is a factual determination.

When reviewing the terms of the agreement there is little to suggest that the Developer and Co-Op must include the leasees in their decisions regarding who and how they choose to maintain the common elements. Their only obligation is to, "to maintain the common areas in a reasonable state of repair and maintain reasonable access."

I have reviewed case law and statute and was unable to discover an overarching or inferred obligation of the kind sought by you.

Therefore, it is my opinion that that the Developer and the Co-Op board do not have a positive obligation to engage with you or the leasees in the maintenance of the common areas.

(2) The Developer and Co-op must maintain the common areas in a "reasonable state of repair"

Again, the obligations of the Developers and Co-Op must be found in the terms of the contract. According to you, the above noted parties have unilaterally decided to not maintain certain common areas, and demolish others, due to cost.

The question seemingly turns on whether the obligation to maintain common areas in a "reasonable state of repair" allows for a unilateral decision by the Developer and the Co-Op to neglect or demolish buildings due to financial constraints.

I have reviewed case law and have found little that would define the term "reasonable state of repair".

In my opinion, based on the ordinary meaning of the term, the lease agreement provides a great deal of autonomy to the Co-Op and Developer. "Reasonable maintenance and repair" is a subjective standard that would be met as long as the areas were reasonably maintained, in keeping with their basic function.

It is also my opinion that allowing the common areas to fall into disrepair is a clear violation of this obligation. In addition, the demolition of common areas, and structures, which existed at the time of contract, may also be a violation.

There is ambiguity as to what structures are included in the term “common areas”. The lease agreement contemplated the maintenance of specified common areas; however, from my understanding, not all the structures are expressly mentioned in schedule A1, yet they are contained within the areas devised under the schedule. This is an ambiguity.

The general rule regarding contractual ambiguity is that the ambiguity falls against the party who devised the agreement; especially if they are a sophisticated party. In your case, this may impose an obligation on the above noted parties to maintain all structures contained within the common areas in a good state of repair, as long as they existed at the time of contract. Alternatively, the above noted parties may argue that since the structures were not explicitly referenced in the lease, they are not included. Ultimately, this would be a fact dependant determination by the Court and there is little case law to provide clear guidance on success in your discrete matter.

However, it is still my opinion that if the Co-Op and Developer are not maintaining the common areas, they are in direct breach of the lease agreement.

Remedies

In terms of legal remedy there are three options: (1) Damages, (2) Specific Performance, and (3) Injunctive Relief.

Ordinarily, in a breach of a lease agreement, damages are the legal remedy that a court will turn to first. Only if damages would be inadequate, will the court impose specific performance or injunctive relief.

In this case, the source of a potential damage award is the return of your monthly levy. Perhaps, this may satisfy you and other residents, and act punitively to prevent further breach by the Developer and Co-Op.

However, it may be argued that damages are inadequate due to the ongoing lack of upkeep to the common areas, and the potential for further demolition. In such a case, perhaps specific performance of the Developer and Co-Op’s duties for upkeep, as well as an injunction against demolition of common area structures may be sought.

There is some case law that provides guidance. In the ***Parker Cove Owners' Assn v Parker Cove Properties Ltd Partnership***, 2010 BCCA 100, the Court of Appeal dealt with the maintaining of common areas within a similar residential organisation as yours. In that case, they determined that the appropriate remedy for improper maintenance was damages in the return of levies.

The novelty of your legal issue, and the scant case law, lead me to believe that the most likely remedy you may receive, if brought to trial, would be damages; any remedy seeking to force or forbear the Developer and Co-Op from a course of action would be a more tentative result.

Next Steps

I would recommend that you continue to strive to hold the Developer and Co-Op to the strict terms of the lease agreement. If it would assist you, we could draft a demand letter insisting that the above noted parties meet their contractual obligations under the lease, or face legal action.

If you would like to pursue further litigation we would be happy to assist; however, there remains many details that must be explored, as we have little information at this time regarding the full breadth of your matter aside from the anecdotal information you have provided, and the original lease agreement.

Some preliminary questions include:

- (1) What structures were in existence at the time of contract?
- (2) When were they destroyed, over what period of time?
- (3) Which common areas have not been maintained?
- (4) How long have they not been maintained and what evidence exists to that fact?
- (5) How much levy has been paid and by whom?
- (6) How much should be returned by the offending parties as damages?

The novelty and complexity of this matter would correspond with high litigation costs; without knowing more, we are unable to project a preliminary budget. However, you may want to consider the potential costs of litigation against the benefit that may be recovered before seeking to move forward.

If you have any further questions, thoughts or concerns do not hesitate to contact us.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Sunil Sharma', with a stylized flourish at the end.

Sunil Sharma
Lawyer