

Sub-metering in condos: The legal implications

Sep. 9, 2006. 01:00 AM

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Rising costs of utilities and services are a universal concern for condominium boards of directors across the province. As common expenses increase, particularly if they increase beyond the general prevailing rate of inflation, they can adversely affect property values.

The spiralling cost of utilities, for example, is often out of the board's control. Utility prices in general, and electricity costs in particular, are expected to continue to rise as the province comes to grips with rising input costs and the replacement of antiquated power generation facilities.

Wresting control of spiralling utility costs is particularly challenging for boards in condominiums that are bulk metered. The cost of a bulk-metered utility is shared by owners based on the mandated percentage contribution to common expenses, along with the costs of all other services. Therefore, there is little or no incentive, particularly in large buildings, for residents to decrease the use of a bulk-metered utility. The inability of the board to control the use of these unmetered utilities has wide ramifications for the board members; they will bear the brunt of the wrath of the owners for failing to keep common expenses in check.

One solution to encourage conservation is to allocate the costs of the use of utilities to the owners who consume them. This will require the sub-metering of the bulk-metered utility to each of the owners, together with a mechanism to enforce collection of individual bills.

The challenge arises from the Condominium Act (1998) and the declaration of the condominium corporation itself. The act provides that the common expenses are to be shared among unit owners in the proportions set out in the declaration, and the declaration allocates those percentages to all of the owners. These percentages are fixed and can be modified only by an amendment to the declaration, which requires the approval of at least 80 per cent of the unit owners.

The proportionate common expenses and the proportionate ownership of the common interest (which need not be identical) are typically allocated by the developer at the time of the registration of the condominium based on the size of the units, although there is no particular requirement to do so. Under the new act, the developer is required to provide a statement in the disclosure documents if the proportion of a common interest or the proportion of common expenses differs in an amount of 10 per cent or more from that required of the owner of any other unit or proposed unit of the same type, size and design.

Reallocating bulk-metered utilities on any basis other than the fixed percentages set out in the declaration is very problematic for a board. In one case, a condominium corporation was able to obtain some relief where, in a mixed-use building, a particular commercial owner was using almost twice the amount of bulk-metered water that all of the other units taken together were using. The court in that case determined that the owner would be required to pay the costs determined by separately metering the water to the commercial unit owner's premises only, despite the fact that the declaration contemplated separate metering and separate billing only where separate metering was provided to each of the units in the condominium.

At the trial level, the judge said as follows: "The philosophy of a condominium development is that the

common expense proportions cannot be examined under a microscope. The persons occupying a unit on the first floor cannot avoid any costs of the elevator because they don't use it. Similarly, a family with a large number of members may use a lot more of the utilities than a single person. Different retail units have different requirements of various services in the condominium. It is not until there is a flagrant, excessive use, such as the present one, that there should be an adjustment."

The court came to the conclusion that the separate metering was permissible on the basis that the expense for excessive water usage did not form part of the common expenses. (See York Region Condominium Corporation No. 771 v. Year Full Investment (Canada) Inc.) The court confirmed that the intention of a declaration is to apportion common expenses as closely as possible to allocate the benefit among owners from those matters included as common expenses, but these allocations, as set out above, were not to be revisited willy-nilly, and in particular, not on an individual service or utility basis.

The ability of boards to allocate the cost of utilities among unit owners based on consumption, rather than fixed percentages under the declaration, may soon be authorized by new provincial legislation. The Energy Conservation Responsibility Act (Bill 21 — 2006) has received royal assent and is the outgrowth of a discussion paper released on Dec. 21, 2004, entitled "Electricity Transmission and Distribution in Ontario — A Look Ahead." It works hand-in-hand with the Ontario government's smart metering program, which is designed to tackle the growing demand for electricity in the province.

The government has set itself a goal to install 800,000 so-called smart meters by Dec. 31, 2007, and to arrange for all Ontario consumers to have smart meters by Dec. 31, 2010. The Energy Conservation Responsibility Act is designed to promote opportunities for energy conservation, and in particular, to support the smart metering program. A specific section provides that distributors and "licensed persons" may be required to install smart meters in condominiums and consumers shall be billed based on the consumption or use of electricity, despite a registered declaration.

How this will be accomplished will in large measure depend on the regulations enacted.

The benefits of sub-metering are significant. Based on the presentations made to the standing committee on justice policy in February 2006, consider the following statistics:

Only 15 per cent of the approximately 2.6 million apartments and social housing suites, and condominium units, receive a monthly electricity bill directly. For the rest, the cost of electricity is hidden in the common element fees or fixed rent; 10 per cent of residents use 25 per cent of the electricity in bulk-metered buildings; 70 per cent of the residents use 50 per cent of the electricity.

The average saving as a result of an enforceable method of sub-metering is 15 per cent to 20 per cent in electricity in gas-heated buildings, and a 20 per cent to 30 per cent in electrically heated buildings.

The regulations will need to deal with several important issues, including the ability of condominiums to continue to obtain electricity on the basis of a bulk rate for an entire condominium building, the ability to continue to enforce the collection of sub-metered utilities by means of the condominium lien procedure, and the authority of a board to proceed to separately meter utilities.

Boards will need to transition carefully the move to separate metering so that there is not a "double bill" period for owners. Communication to owners and residents will be essential to ensure an effective changeover.

Boards that seize the opportunity to secure the efficiencies of separate metering will reap the rewards of lower costs of separately metered utilities for the owners in the building, and will ultimately add value to each owner's property by reducing common expenses and operating a more efficient building.

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