

ACMO - ASK THE PROS- FALL 2002 PUBLICATION

**Contributed by: Andrea M. Thielk, BA, LLB, JD
 Clarks Barristers & Solicitors**

Q. Without full information and appropriate discussion, our board has approved a formula of assessments as was indicated following a reserve fund study. In 2002, our fund was in excess of \$125,000 and the next assessments foreseen in the study are in 2009 and 2010 for amounts of \$125,000 and \$250,000 respectively. We only have 19 units, making these amounts quite significant.

Is it true that, since the future funding plan has been approved, smaller assessments at regular intervals until 2009 to avoid depletion of the reserve fund cannot be made unless another fund study is undertaken?

A. Your board should have approved the funding plan based on the reserve fund study in accordance with section 94 (8) (9) (10) of the *Condominium Act*. These new provisions outline the procedure for implementing the reserve fund study and funding plan. There is no legal requirement to have owner approval of the board's funding plan, although I do recommend, from a communication point of view, having owner involvement before the board implements a funding plan.

The board is required to send the owners a notice containing a summary of the study and the proposed plan together with a statement indicating any areas in which the proposed plan differs from the study. In addition, the board has to send the condominium's auditor a copy of the study, the proposed plan and the notice sent to owners. Once this is done, the board must implement the proposed plan after the expiration of 30 days. It is true that this plan can only be amended by an updated or new reserve fund study.

Please note, however, that under the new Condominium Act, reserve fund studies must be updated within every three (3) years of the previous study, which means that it is conceivable that the funding plan can be amended by the board before 2009. Boards should be careful to seek the appropriate professional advice before arbitrarily amending the funding plan. It is important to note that there may be more than one funding model that will suit your condominium. The board should be sure to discuss alternative funding models with its certified reserve fund planner and other professionals in order to select the plan that best suits the condominium's needs and objectives.

Q. I am concerned about the estimates made in our reserve fund study. What can one do if one feels the estimates are too high?

A. As an owner, you are limited in what you can do if you feel the estimates made in your reserve fund study are too high. A reserve fund study is a complex document and the board is left with the difficult task of its review and implementation into a funding plan. In preparing the funding plan, all directors have a duty to exercise care, diligence

and skill that a reasonably prudent person would exercise in comparable circumstances. Like any other acts or omissions of the board that owners may not agree with, owners have the power to change the management of their condominium by removing some or all of the directors on the board. Sections 33 and 46 (1) (2) (3) of the Condominium Act deal with the procedure to remove and replace one or more directors. Before taking these steps, you may wish to obtain a copy of the reserve fund study and review the reasoning behind the board's funding plan. If you still feel that the funding plan needs to be amended, you may instead wish to request a meeting of owners by following the procedure set out in section 46 (1) (2) for further discussion on the matter.

Q. To what extent does a corporation have to meet the reserve fund allocation and still comply with the Condominium Act, 1998?

The Condominium Act has set time frames for when your condominium must comply with its funding plan (see section 33 of Regulation 48/01 of the Condominium Act).

If your condominium was registered on or after May 5, 2001, your condominium's compliance date to meet its plan for future funding must be the fiscal year of the condominium following the fiscal year in which the comprehensive reserve fund study is completed. This means that your condominium's reserve fund must show sufficient funds starting the first fiscal year after the year the study was submitted.

If your condominium was registered before May 5, 2001, your condominium's compliance date to meet its plan for future funding must be 10 years from the date of the first comprehensive reserve fund study. This means that your condominium's reserve fund must show sufficient funds within 10 years of the date of the first reserve fund study.

What is allocated to the reserve fund must be the amount reasonably expected to provide sufficient funds for the major repair and replacement of the common elements and assets of the condominium, calculated on the basis of their expected repair and replacement costs and life expectancy as determined by the reserve fund study. Regardless of the ultimate funding plan approved by the board, it must be sufficient to ensure that repair and replacement of the common elements and assets of the condominium are properly funded within these time frames. The goal is to better foresee and budget for future repair and replacement items, so that special assessments and excessive borrowing is avoided and the market value of the condominium is protected.