

The Road to Energy Conservation May Make a Detour through Condominium Corporations

The Province of Ontario is taking major steps towards energy conservation and in particular conservation of utilities such as hydro and gas. The aim of the government is to ensure that the citizens become more energy conscious and take the necessary steps to conserve energy as best as possible. One of the most useful tools in this fight is requiring the user of the utility to pay for it directly, through the use of individual meters or “smart” meters. This initiative may have a significant effect on condominium corporations where the cost of hydro and other utilities form part of the common element expenses as mandated by the declaration. The *Energy Conservation Leadership Act* which has passed third reading and is awaiting proclamation by the government may contain regulations that will allow the government to compel condominium corporations to install “smart” meters in every condominium. This would allow the utility supplier to bill the individual users directly and thus by-pass the provisions of the declaration that state the cost of utilities form part of the common elements.

In many condominium corporations, where the cost of hydro and other utilities have been included in the common expenses for the entire corporation, the incentive for individuals to conserve energy (i.e. turn the lights out when they leave, use less water, less loads of laundries, lowering the heat and/or air conditioning) is far less than those who have to pay for what they use. One of the major selling features of a condominium used to be the convenience of not having to worry about water bills, gas bills or any other utility bill. It was always included in the common expense. However, nowadays with utility costs exceedingly high and conservation a major issue, the inclusion of utility costs in common element fees can be more of a burden than a benefit. Most new condominiums are being designed so that the common expenses do not include utilities for each unit and the unit owners are responsible to pay for what they use. The rationale being that if the owner pays for what they use, they will be more conservation conscious in order to save money.

The purpose of the proposed new legislation is to enable the Ontario government to remove barriers and promote opportunities for energy conservation and to use energy efficiently. One of the barriers to energy conservation in the condominium context may be a declaration which states that all utility costs form part of the common expenses. Since it is desirable and conservation conscious to have the unit owners pay for what they use, the new Act may be used to get around the provisions of the declaration and compel the unit owners to pay for their personal utility use. The Act does not specifically state this but it does state that in order to assist in the removal of barriers and promote the opportunities for energy conservation, the government may, by regulation, designate goods, services and technologies to assist in this function. This may be done despite any restriction imposed at law that would otherwise prevent or restrict their use, including a restriction established by a municipal bylaw, a condominium bylaw and encumbrance on real property or an agreement. In particular, the Act specifically states that a restriction imposed at law that would otherwise prevent or restrict the use of designated goods and services or technologies may be inoperative. In other words, a declaration which specifically states that common expenses includes utilities may be considered a barrier to conservation and thus a designated service or technology such as a “smart” meter may be installed in each unit and the unit owner would from then on be separately metered.

The interesting conundrum that has arisen in the past number of years involve those condominiums that wanted to reduce the excessive utility costs that formed part of the common expenses by separately metering each unit. This would involve amending the declaration for the condominium corporation which is an onerous task and requires the consent of 80% or 90% of the owners for this type of amendment. The corporation could apply to court to amend the declaration but they would have to show that the declaration contains an error or inconsistency which is simply not the case where the corporation simply wants to change the utility cost from a common element to a unit owner responsibility. In most condominiums this may not be an issue; however the issue becomes important where the condominium is mixed use and the commercial condominiums’ utility costs, which are usually significantly higher than residential use, are included in the common elements. The commercial unit owners were usually not

likely to give their consent to an amendment of the declaration which would inevitably see their own costs increase substantially as a result of having to now pay their own utility costs as opposed to having their use part of the pool of common expenses and simply paying their percentage. This led to disputes between the residential owners and the commercial owners. These disputes may now become a thing of the past, if the new Act allows for condominium corporations to install separate meters and individually bill unit owners despite the fact their declaration states that the common expenses include utilities. Condominium corporations that are presently involved in disputes over this issue or who are attempting to have units separately metered may seek solace in the fact that the entire dispute may become moot once the new legislation comes into force. The Corporation will not need the consent of the unit owners to install the meters or be required to amend their declarations to remove the obligation to include utility costs as part of the common expenses.

The individual billing of unit owners for their utility use is exactly the type of initiative that the new Act is aimed at achieving. The by-passing of the declaration is the “removal of the barrier” that the Act was intended for in order to conserve energy. For most condominiums, it will see their common expenses reduced dramatically and thus may increase the value of the units and make them more attractive on a re-sale basis.

Hopefully, the government will implement programs to allow corporations to off-set the cost of installing “smart meters”. This has yet to be determined, but it would be a major benefit to a condominium corporation to be able to get a portion of the cost of installing these individual meters covered by the government and it should be taken advantage of by corporations when they plan their energy conservation programs for the future.