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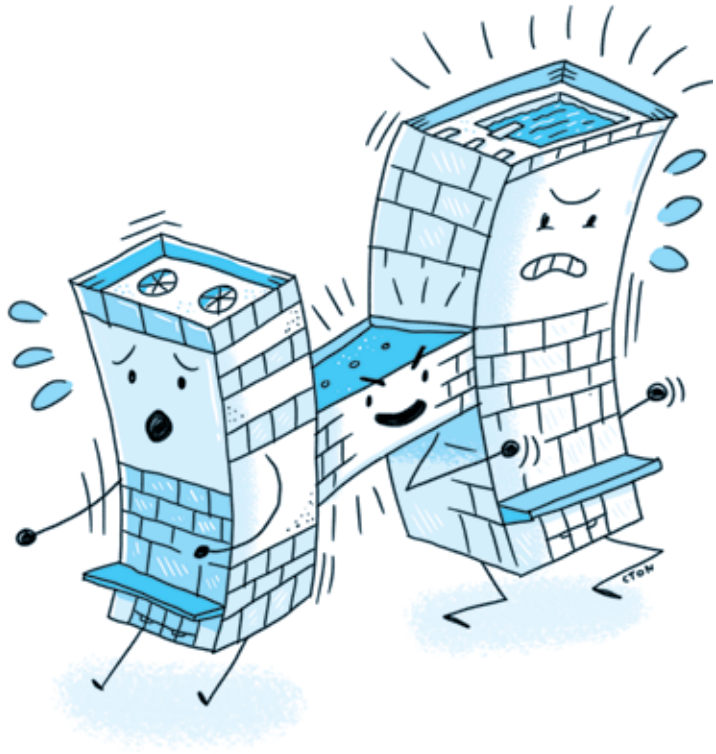
PART 1 OF A 3 PART SERIES

Shared Facilities Agreements



There's No Reason Why We Can't All Just Get Along. However, When Dealing With Shared Facilities and Cost Sharing Agreements, Often One Party Feels Unfairly Treated

They come with a variety of names - shared agreement, shared facility agreement, cost sharing agreement, easement agreement, mutual use agreement, etc; whatever the agreement is called, the purpose is the same, to define and set out the defined obligations, boundaries and governance, including associated costs, for areas used by multiple parties.

There's no reason why we can't all just get along. However, when dealing with shared facilities and cost sharing agreements, often one party feels unfairly treated. This is likely because they are not drafted by those who are required to govern them. To add more fun or confusion, depending on how you approach it, every agreement is different, just like every condominium in Ontario is different in some way. It is important to understand what is covered (or not covered) in your own agreement.

For board members, it's important to understand where the governance of the shared facilities lies. There is usually reference to a committee, which will be outlined further in a by-law and there are numerous structures of who represents the committee and what their voting authority is. In new condominiums, there is often a transfer date referred to which allows the declarant to maintain control until this date passes. Good governance dictates that one member from each party be defined as the shared committee representative for consistency; changing this representative for each meeting would slow down decisions and be a distraction for the other committee members.

In newer condominiums, agreements are often not completed until after registration has taken place, and while the developer is still controlling the declarant board. The disclosure statement may only consider a reference to the agreement, stating that the actual agreement will come later. These agreements, which become by-laws, are drafted by developers with their lawyers and could be viewed as one sided, with unfair cost sharing allocations. When the actual components are not in place and the building is not occupied, it is difficult to envision the use and determine the cost of every component. The Act (Condominium Act, 1998) protects the turnover board by allowing for termination of the agreement within 12 months of turnover. The process is not as simple as it sounds and consent by all parties is still usually required.

In older condos, some agreements may be perceived to be drafted as one sided to the developer or owner of a commercial component, especially where costs are minimal to one party and disproportionately high for the others. Some agreements may contain cost sharing for equipment and maintenance and, at

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times, fail to account for the administration and controls and they lack dispute remedies, which leaves costly litigation as the only option. Traditionally, costs were typically determined by number of units or square footage proportions by party, not by benefit or actual use.

There has been a movement to more complex and sophisticated agreements as condominiums are built with diverse use intents - such as hotels, shared amenities, retail, office, with freehold components not subject to the same rules and regulations and fee based systems i.e. reserve fund contributions. When the agreement is drafted, the facilities are not always completed and not being used and difficult to anticipate all areas to consider. We are starting to see more defined and thoughtful cost sharing agreements becoming more itemized down to each component and proportionate shares of use for each item, instead of lumping together as a whole. This creates more complicated and additional administration; however, it also creates a balance and fair distribution of costs, where all parties agree that the terms are reasonable. One of the easiest ways to see the defined areas for each party are on site plans with boundaries clearly marked.

Boundaries - understanding what's yours, what's theirs and where the in-between and shared areas are; this is more complicated than it sounds. A typical example involves two parties having equipment on the roof; percentages of ownership are clear depending on which piece of equipment serves which area. Consider this, how is access gained to the equipment, who uses the elevators and corridors and the utilities for the space? Metering is another huge issue if not enough check meters are installed or if they are not in the proper place. We found a party who was overpaying hydro because the check meter was in the wrong place and double counting the consumption - it was easy to find the problem, as the billing did not make sense as compared to the sister building. Finding the solution, however, was trickier as it involved getting the engineer involved to assist and pinpoint the specific area to provide a solution.

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Here are a few typical areas to recognize if the committee has agreed to renegotiate a shared agreement (some to avoid, some to be mindful of):

- delving into minutia; for example, elevator use - is there a dedicated cab?, access controls etc; it could send the wrong message to resident owners with respect to their own maintenance fees; i.e. I don't use the pool, so I shouldn't pay for it or I live on the ground floor and don't even use the elevator; be mindful of what makes sense and can be easily explained
- forgetting the purpose of being a good board member - representing the best interest of the community and not allowing emotions or personal experiences with other parties at the table to influence your decisions
- recognizing everyone at the table has a different interest; business (commercial) vs home (residential); decide what

is most important for your community
- making decisions - are voting rights clear? Is voting unanimous or majority based? Can the committee make binding decisions or does it need to go back to the individual boards?

Most Arguments are About Unfair Cost Allocations

Unfortunately, there is no set standard or template. Some agreements are written well and some are vague. For condominiums with complicated shared areas, it would be difficult for a purchaser to make an informed decision and appreciate how these areas are governed.

It's not all bad news, here's an example of where a shared agreement works well. The common areas are shared by a hotel condo, a freehold restaurant, and 2 residential condos. Over time, there has been a consistent representative from each party and they work together for a common goal. It works well due to a number of thoughtful considerations, such as good governance of both residential boards, a long standing relationship built on trust with the developer and a mandate to do what is right and fair.

Then, there are other times where a shared facility situation can tear a community apart. Consider a group of residential condos with a shared recreation centre - all have their own boards. Group One worked together and ended up amalgamating to ensure future good governance and consistency for maintaining property values; of secondary importance was the ability for some administrative cost savings (audit and management fees). The boards saw an opportunity to work together for the greater good, despite some of them having to give up their long term board positions. Group Two had divisive boards where each wanted controlling interest, which was not permitted by the governing documents; frequent board changes prevented either consistency or a clear vision; decisions were based on their condo 'winning'. Constant disagreements meant incurring legal costs to settle petty disputes and a disruptive community where gossip snowballed at annual general meetings.

Top 5 tips for successful shared agreement committees:

1. consider the vision and intent for the entire complex; do not be one sided when making decisions; have a balance of decision makers
2. make impartial, not emotional decisions; personal biases or relationships should never be a factor; if you didn't live there, what would you advise?
3. involve external support for the best use of resources - your engineer, lawyer or a mediator can be invaluable before things get out of hand and end up costing more to resolve
4. appreciate the balance of working with peoples' homes and businesses
5. solicit feedback from parties working within the governance of the agreement
6. read and understand the agreement

Understanding shared agreements is becoming a specialized area of expertise for condominium managers where the complexities of the agreements and how to develop a working relationship with all parties become an integral part of success.

Knowing when to involve the corporation's solicitor for consultation or redrafting by-laws or involving a mediator to facilitate addressing a dispute between parties will be covered in the next 2 parts of this series. Communities and their binding agreements are here for a long time, people are not. Managing relationships is key to having a successful shared facilities community.

My final thought on shared agreements is that they should be seen as a partnership and equitable for all parties; if each gives a little, it should be considered reasonable. Most importantly, be excellent to each other. CV