IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Barrett v. The Owners, Strata Plan LMS 3265,* 2016 BCSC 1477

Date: 20160812
Docket: S158187
Registry: Vancouver

Between:

Laurence (Chip) Barrett, Cynthia Barrett, Young Wan Lee, John McNulty, Dolores McNulty, Sylvia Stark, Dan London, Sandra London, William Massey and Debra Massey

Petitioners

And

The Owners, Strata Plan LMS 3265

Respondents

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for Petitioners:	Paul G. Mendes Alexander J. Chang
Counsel for Respondents:	Shawn M. Smith
Place and Dates of Hearing:	Vancouver, B.C. March 1, 2016
Place and Date of Judgment:	Vancouver, B.C. August 12, 2016

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Introduction

[1] This case arises from a dispute among the owners of strata lots in a residential strata development over the allocation of unit entitlements, which governs each strata lot's share of common expenses and liabilities. Each strata lot's unit entitlement is initially established at the time the strata plan is deposited in the Land Title Office and is indicated in a schedule of unit entitlement accompanying the strata plan.

[2] The strata development in question, which is known as Deer Run, comprises 80 strata lots distributed between 23 buildings. It was developed by Genex Development (Deer Run) Corp. ("Genex") in the latter part of the 1990s and was established by Strata Plan LMS 3265. Strata Plan LMS 3265 is a phased strata plan, which is a strata plan that is deposited over time in separate phases. Genex deposited Phase I (strata lots 1 to 52) on June 3, 1998 and Phase II (strata lots 53 to 80) on November 10, 2000. A schedule of unit entitlement was deposited with each phase (collectively the "Schedule"). The Schedule reflects the unit entitlements for all units at Deer Run.

[3] Of the 80 strata lots in Deer Run, 59 were constructed with unfinished basements, 16 with crawl spaces and five with neither a basement nor a crawl space. Two of the strata lots with basements were also constructed with unfinished lofts located above their garages.

[4] Deer Run's Schedule was based on the size of the habitable area of the strata lots. Strata lots with a larger habitable area have a larger unit entitlement and therefore are responsible for a proportionately larger share of the common expenses and liabilities. The habitable area of each strata lot at Deer Run was calculated by excluding unfinished basements, crawl spaces, cantilevered windows, lofts, and garages. Over time, the basements and lofts in most of the strata lots were finished but the Schedule was not amended to reflect any corresponding increase in the habitable area.

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[5] The petitioners are the owners of six of the strata lots. Their strata lots do not have basements or lofts. Because the common expenses and liabilities are borne by the owners in proportion to the unit entitlements of their strata lots, the petitioners say that the owners of strata lots without basements have effectively subsidized those whose strata lots have basements by bearing responsibility for a disproportionately high share of the common expenses and liabilities.

[6] The issue of the unit entitlements has been a matter of controversy at Deer Run for some time but it came to a head in 2015 when it became apparent that a special levy was going to be required to replace the roofs (the "Roof Levy"). Some of the owners without basements advised the strata council that the Schedule ought to be changed. On March 31, 2015, the Strata Corporation passed a resolution approving the Roof Levy and allocating it amongst the owners in accordance with the original Schedule; in other words, without making any change.

[7] The petitioners apply for an order that the Schedule be amended and an order that the resolution approving the Roof Levy be varied to reflect the amended Schedule. The respondent, The Owners, Strata Plan LMS 3265, is the strata corporation (the "Strata Corporation"). The Strata Corporation opposes the petition.

Legislative Framework

[8] The petitioners' rights and obligations are governed by the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*], and the regulations made under it.

[9] The *SPA* came into force on July 1, 2000 and replaced the *Condominium Act*, R.S.B.C. 1996, c. 64. However, the *Strata Property Regulation*, B.C. Reg. 43/2000, contains some transitional provisions, one of which makes certain provisions of the former *Condominium Act* applicable and certain provisions of the *SPA* inapplicable to all phases of a phased strata plan where the first phase was filed under the *Condominium Act*. Section 17.17(2) of the *Regulation*, which came into force on July 1, 2000, states:

> (2) Despite any section of the Act, if the first phase of a phased strata plan has been deposited in the land title office before the coming into force of this section,
>
> > (a) the requirements for the schedule of unit entitlement, schedule of voting rights, schedule of interest on destruction and address for service set out in sections 1(2) to (6) and 4(f) to (i) of the *Condominium Act* and the forms required for those sections apply to all phases of the phased strata plan, and
> >
> > (b) sections 245(a) to (c), 246(1) to (6), 247, 248 and 250(2)(a) to (c) of the Act do not apply.

[10] As already noted, the two phases of the Deer Run strata plan were deposited on June 3, 1998 and November 10, 2000. Phase I was deposited before s. 17.17 of the *Regulation* came into force and accordingly s. 17.17(2) applies to Deer Run. In the result, the original requirements for the Schedule for both phases of Deer Run's strata plan were those expressed in the portions of the *Condominium Act* referred to in s. 17.17(2)(a) of the *Regulation*. Those permitted the developer of a residential strata development to submit a schedule of unit entitlement based on a formula that allocated unit entitlements according to the relative square footage of the strata lots or an alternative method not based on that formula, but in either case the Superintendent of Real Estate had to approve the Schedule. The material provisions in the *Condominium Act* are ss. 1(2) to (4):

> (2) A schedule of unit entitlement that is acceptable to the superintendent is required for each strata plan.
>
> (3) In the case of a residential strata plan, the owner developer may submit
>
> > (a) a schedule of unit entitlement based on the following formula:
> >
> > $$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots in the strata plan}} = \frac{\text{square footage of strata lot expressed as the nearest whole number}}{\text{total square footage of all strata lots in the strata plan expressed as the nearest whole number}}$$
> >
> > and the unit entitlement so calculated must be expressed as the nearest whole number resulting from the application of the formula, or
> >
> > (b) an alternative schedule of unit entitlement not based on the formula set out in paragraph (a).

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> (4) If the owner developer submits a schedule under one paragraph of subsection (3), the superintendent may require the owner developer to submit a schedule under the other paragraph and may accept the schedule submitted, which, in his or her opinion, would result in a more equitable contribution by the owners to the common expenses of the strata corporation.

[11] In addition, in accordance with s. 17.17(2)(b) of the *Regulation,* ss. 245(a) to (c), 246(1) to (6), 247, 248 and 250(2)(a) to (c) of the *SPA* do not apply.

[12] The requirements for a schedule of unit entitlement under the *SPA* are similar to those under the *Condominium Act.* However, the *SPA* expressly contemplates that only the "habitable area" of the strata lots be counted when measuring the size of the strata lot where unit entitlements are allocated on the basis of relative size. The material provisions of the *SPA* are ss. 246(3)(a) and (4):

> (3) The unit entitlement of a strata lot, other than a strata lot in a bare land strata plan, must be calculated as follows:
>
> > (a) if the strata lot is a residential strata lot, the unit entitlement is either
> >
> > > (i) the habitable area, in square metres, of the strata lot, as determined by a British Columbia land surveyor, rounded to the nearest whole number,
> > >
> > > (ii) a whole number that is the same for all of the residential strata lots, or
> > >
> > > (iii) a number that is approved by the superintendent and that in the superintendent's opinion allocates a fair portion of the common expenses to the owner of the strata lot;
> >
> > …
>
> (4) For the purposes of subsection (3), "habitable area" has the meaning set out in the regulations.

[13] The parties agree that the unit entitlements for the strata lots in both Phase I and Phase II of Deer Run were based on habitable area even though the concept of habitable area was not explicitly referred to in the *Condominium Act*. As noted above, pursuant to s. 1(2) of the *Condominium Act*, the schedule of unit entitlement submitted by a developer had to be acceptable to the Superintendent of Real Estate. It was the Superintendent's policy that the area to be counted was the habitable area. This policy was articulated in what was known as "Policy Statement 4". As the

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Strata Corporation put it, while the *Condominium Act* did not have a definition of "habitable area", Policy Statement 4 "applied similar principles".

[14] While Policy Statement 4 was not in evidence before me, the material portions of it were quoted by Burnyeat J. in *Fenwick v. Parks*, 2004 BCSC 1132 at para. 33:

> 1. "Unit Entitlement" is defined in the *Condominium Act* as the indication of "the share of an owner in the common property, common facilities and other assets of the strata corporation, and is the figure by reference to which the owner's contribution to the common expenses of a strata corporation is calculated". The *Condominium Act* further sets out a formula for the calculation of unit entitlement based on the area of each strata lot in ratio to the total area of all strata lots. The Superintendent may accept or require an alternative schedule.
>
> 2. It is a matter of policy that the Superintendent will require that the above formula be based on "habitable" area and should not include areas such as patios, balconies, parking stalls or storage areas, aside from closet space in the strata lot. Alternative formulas will be considered if such alternatives result in more equitable contribution by the owners to the common expenses of the strata corporation.

[15] It is also not disputed that the establishment of a schedule of unit entitlement is intended to be based upon principles of equity and fairness and that where unit entitlement is based on habitable area, fairness typically demands that when an owner increases the habitable area, the unit entitlement for that strata lot should also increase. This is reflected in s. 70(4) of the *SPA*, which applies where the unit entitlements are calculated on the basis of habitable area under the *SPA* or square footage under the *Condominium Act* and prohibits owners from increasing the habitable area of a strata lot without obtaining an amendment to the schedule of unit entitlement through a unanimous vote. It provides:

> 70(4) Subject to the regulations, if an owner wishes to increase or decrease the habitable part of the area of a residential strata lot, by making a nonhabitable part of the strata lot habitable or by making a habitable part of the strata lot nonhabitable, and the unit entitlement of the strata lot is calculated on the basis of habitable area in accordance with section 246(3)(a)(i) or on the basis of square footage in accordance with section 1 of the *Condominium Act*, R.S.B.C. 1996, c. 64, the owner must
>
> > (a) seek an amendment to the Schedule of Unit Entitlement under section 261, and

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> (b) obtain the unanimous vote referred to in section 261 before making the change.

[16] Section 261 prescribes the process for making an amendment contemplated by s. 70(4):

> 261(1) To amend a Schedule of Unit Entitlement to reflect a change in the habitable area of a residential strata lot in a strata plan in which the unit entitlement of the strata lot is calculated on the basis of habitable area in accordance with section 246(3)(a)(i) or on the basis of square footage in accordance with section 1 of the *Condominium Act*, R.S.B.C. 1996, c. 64, the schedule must be amended as follows:
>
> (a) a resolution approving the amendment must be passed by a unanimous vote at an annual or special general meeting;
>
> (b) an application to amend the schedule must be made to the registrar accompanied by
>
> (i) a new Schedule of Unit Entitlement that meets the requirements of section 246, together with evidence of the superintendent's approval, and
>
> (ii) a Certificate of Strata Corporation in the prescribed form stating that the resolution referred to in paragraph (a) has been passed and that the Schedule of Unit Entitlement conforms to the resolution.
>
> (2) The registrar must, if satisfied that the application and accompanying documents to amend the Schedule of Unit Entitlement comply with the requirements of this Act and the regulations, file the Schedule of Unit Entitlement.

[17] Subsections 246(7) and (8) of the *SPA* provide a potential remedy to an owner of a residential strata lot in circumstances where the unit entitlement is calculated on the basis of habitable area in accordance with the *SPA* or on the basis of square footage in accordance with the *Condominium Act* but the actual habitable area or square footage is not accurately reflected in the schedule of unit entitlement:

> (7) Subject to the regulations, an owner or the strata corporation may apply to the Supreme Court for an order under subsection (8) if
>
> (a) the unit entitlement of a residential strata lot is calculated on the basis of habitable area in accordance with subsection (3)(a)(i) or on the basis of square footage in accordance with section 1 of the *Condominium Act*, R.S.B.C. 1996, c. 64, and

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> (b) the actual habitable area or square footage is not accurately reflected in the unit entitlement of the strata lot as shown on the Schedule of Unit Entitlement.
>
> (8) On application under subsection (7) and after consideration of the matters set out in the regulations, the Supreme Court may
>
> (a) order that a Schedule of Unit Entitlement be amended, in accordance with the regulations, to accurately reflect the habitable area or square footage of the strata lot, and
>
> (b) make any other orders it considers necessary to give effect to an order under this subsection.

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[18] The reference to the "regulations" is a reference to the *Regulation* cited above. Among other things, the *Regulation* places limits on the availability of the remedy in ss. 246(7) and (8):

> 14.13 An application must not, after November 24, 2009, be brought under section 246(7) of the Act in respect of the strata lot
>
> (a) if the inaccuracy referred to in section 246(7)(b) of the Act was contained in the Schedule of Unit Entitlement at the time of the deposit of the strata plan in a land title office, or
>
> (b) in any other case, unless one or both of the following conditions apply:
>
> (i) the actual habitable area or square footage of the strata lot is at least 10% greater than, or at least 10% less than, the habitable area or square footage used to determine the unit entitlement of the strata lot;
>
> (ii) the actual habitable area or square footage of the strata lot is at least 20 square metres greater than, or at least 20 square metres less than, the habitable area or square footage used to determine the unit entitlement of the strata lot.

[19] The parties agree that the limitation in s. 14.13(b) of the *Regulation* does not apply on the facts of this case. The limitation in s. 14.13(a) was added to the *Regulation* in November 2009. Previously, s. 14.13 of the *Regulation* permitted an application under s. 246(7) to correct inaccuracies existing at the time the schedule of unit entitlement was deposited. With the 2009 amendment, the s. 246 remedy is only available when the inaccuracy in question was not contained in the schedule of unit entitlement as originally deposited.

[20] Sections 164 and 165 of the *SPA* provide additional remedies to an owner of a residential strata lot that apply in particular circumstances. Pursuant to s. 164, the court may make orders to prevent or remedy significant unfairness:

> 164(1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
>
> (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
>
> (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
>
> (2) for the purposes of subsection(1), the court may
>
> (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
>
> (b) vary a transaction or resolution, and
>
> (c) regulate the conduct of the strata corporation's future affairs.

[21] Pursuant to s. 165, the court may make orders requiring a strata corporation to perform its duties:

> 165 On application of an owner, tenant, mortgagee of the strata lot or interested person, the Supreme Court may do one or more of the following:
>
> (a) order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;
>
> (b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;
>
> (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

Background

[22] As noted above, the Schedule for Deer Run was established under the *Condominium Act* and, in accordance with Policy Statement 4, was based on the size of the habitable area of the strata lots. The disclosure statement filed by Genex under the *Real Estate Act*, R.S.B.C. 1996, c. 397, (which was replaced by the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, in 2005) advised that Deer Run's unit entitlement was "calculated by reference to habitable area of each unit, but excludes any non-living areas such as garages and unfinished basements and

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lofts". In addition, the following notation was included on the first page of each phase of the strata plan:

> UNFINISHED BASEMENTS, CRAWL SPACES, CANTILEVERED WINDOWS, LOFT AREAS AND GARAGES ARE PART OF THE STRATA UNIT, BUT NOT INCLUDED IN THE UNIT ENTITLEMENT.

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[23] Over time, the basements and lofts in many of the strata lots at Deer Run were finished but the Schedule was never amended to reflect any corresponding increase in the habitable area of those strata lots. The evidence concerning specifically how many basements and lofts have been finished, and to what extent, is not precise.

[24] One of the petitioners, Mr. Barrett, has deposed that "virtually every owner with an 'unfinished basement' on the strata plan has finished their basements". He appears to rely primarily on historical MLS listings, many of which refer to the basement of the unit as finished. However, only about 30 of the strata lots are the subject of the MLS listings he relies upon, some of the listings do not mention the state of the basement, and three of the listings (those for strata lots 52, 54 and 57) refer to the basement as unfinished. The evidence also discloses that unit 41 and unit 53 still have unfinished basements.

[25] Although s. 70(4) of the *SPA*, which applies where the unit entitlements are calculated on the basis of habitable area under the *SPA* or square footage under the *Condominium Act*, prohibits owners from increasing the habitable area of a strata lot without first obtaining an amendment to the Schedule, none of the owners who finished their basements obtained any corresponding amendment to the Schedule. Further, the Strata Corporation's bylaws require owners to obtain the written approval of the Strata Corporation before making certain alterations, but the Strata Corporation did not require all the owners with basements to obtain approval prior to finishing their basements. The Strata Corporation apparently has few, if any, records about which owners have finished their basements and/or lofts. Nevertheless, the Strata Corporation concedes that "some and probably the vast majority" of the basements have been finished.

[26] In the circumstances, I find that some and as many as the vast majority of the basements have been finished, but at least two of the basements remain unfinished. The evidence does not permit me to make findings concerning whether the lofts have been finished.

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[27] As already noted, the question of whether the Schedule ought to be amended to reflect the finishing of the basements came to a head in 2015 during discussions concerning the Roof Levy. The strata council circulated an information document (the "Backgrounder") in advance of a meeting scheduled to be held on March 5, 2015 to discuss the roofing project and the issue of unit entitlements. The information document reads in part:

> …
>
> Recently owners have raised an issue with the Strata Corporation with regard to the unit entitlement figures registered for each of the 80 strata lots of Deer Run and how that relates to the allocation of the roofing levy to each strata lot.
>
> Deer Run consists of 80 strata lots in total. Of the 80 strata lots, approximately 60 strata lots are three level wood frame townhouses. Approximately 12 - 15 of the townhouses are 2 level over a crawlspace. The five remaining strata lots are in the 'Manor Building' which is a three level wood frame condominium style building housing five strata lots in total over a common parking structure.
>
> 'Unit entitlement' is used under the terms of the Strata Property Act and represents the gross habitable floor area of each strata Lot represented as a fraction over the total gross habitable floor area of all 80 strata lots of Deer Run. Unit entitlement serves two purposes. First, it represents each owners fractional ownership of the common property. Second, it represents an owners responsibility to the common expenses of the Strata Corporation and is the formula by which strata fees and special levies are calculated for each of the 80 strata lots. Copy of the schedule of unit entitlement is attached for ease of reference.
>
> The issue raised by owners surrounds the lower level basement area of strata lots within Deer Run that were constructed as unfinished basements. Some of these areas have, over the years, been improved with the addition of drywall, floor coverings and various degrees of finish to make these areas useable space for Owners and their families. These areas are not included in the unit entitlement allocation for those strata lots.
>
> It is the position of some owners that the basement areas should be included in the unit entitlement and the unit entitlement figures recalculated to reflect the inclusion of these areas in the gross habitable floor area. In turn, this would redistribute the allocation of common expenses and special levies.

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In review of the registered Strata Plan of Deer Run, it is noted that the project was built in two phases. The first phase was registered at the land title office in 1998. The second phase registered in 2000. The Strata Plan was essentially registered under the provisions of the Condominium Act, which was the legislation at the time. It is noted that the developer and surveyor placed a statement on the face page of the strata plans indicating that areas such as garages, unfinished basements and crawlspaces are part of the strata lot but not reflected in the unit entitlement. In researching this matter, it is noted that developers and surveyors during this time did not consider unfinished areas i.e. crawlspaces, unfinished basements and garages to be "habitable area" and this is the reason these areas were not typically included in unit entitlement of Strata Plans of that time period.

Commencing virtually at time of original construction or shortly thereafter, owners of the various strata lots with these unfinished areas requested and received permission of the Strata Corporation under the Bylaws to alter these areas by way of improvements and finishing to various degrees. Typical of Strata Corporations in these circumstances, owners have been given permission for their requested alterations, subject to usual conditions i.e. cost, permits, necessary insurance etc. and as set out in the Strata Corporation Bylaws.

With the inception of the Strata Property Act, which took effect 2001/2002, under section 70, "Changes to Strata Lot" subsection 4 provides: "subject to the regulations, if an owner wishes to increase or decrease the habitable part of the area of a residential strata Lot, by making a non-habitable part of the strata lot habitable or by making a habitable part of the strata lot non-habitable, and the unit entitlement of the strata lot is calculated on the basis of habitable area in accordance with section 246 or on the basis of square footage in accordance with section 1, of the Condominium Act, the owner must:

(a) seek an amendment of the schedule of unit entitlement under section 261 and

(b) obtain the unanimous vote referred to in section 261 before making the change."

A unanimous vote is defined under the Strata Property Act as a vote in favour of the resolution by all the votes of all eligible voters.

For Strata Corporations such as Deer Run, in order to satisfy the provisions of the Strata Property Act set out above in relation to improvements to the unfinished basement areas would require the calling of a General Meeting of the Strata Corporation and consideration of a unanimous resolution. A unanimous vote is very rare and moreover, very difficult to achieve at any given time. For any owner to follow the requirements would prove to be very difficult, time-consuming and costly, with a very low likelihood of approval of a unanimous vote.

The Strata Council sought an initial response and submitted the information to legal counsel. In response, the Strata Corporation was advised that to change the schedule of unit entitlement requires a unanimous vote of the Owners. Legal counsel also advised, "Alternatively, an Owner or a group of

> Owners can apply to the Supreme Court (section 246(7) of the Strata Property Act and section 14.13 of the regulations) for an order to correct the schedule of unit entitlement if:
>
> > 1. Unit entitlement is currently calculated on the basis of habitable area; and
> >
> > 2. The increase in habitable area arising from finishing the basement is at least 10% (of the habitable part or more than 20 square metres)."
>
> Also for consideration would be a resolution under section 108(2) and 100 of the Strata Property Act which allows the Strata Corporation to utilize a different formula for the calculation of a Special Levy. This alternative also requires a unanimous vote.
>
> This is a complex matter. Strata Corporation legal counsel will be in attendance to assist in the discussion.
>
> ...

[28] The Strata Corporation did not attempt to obtain a unanimous resolution to amend the Schedule at the March 5, 2015 meeting or at any other time. John Lehman, the manager for the Strata Corporation, deposed that the strata council did not put forward a resolution to amend the Schedule or to implement an alternative schedule for the Roof Levy because a straw poll of the owners taken at the March 5, 2015 meeting indicated that most owners would be opposed to any change.

[29] The Strata Corporation sought approval of the Roof Levy at a meeting on March 31, 2015. The owners were told that if the Roof Levy was not approved the contractor would not stand by its price and would walk away from the project. There is no suggestion that the petitioners did not support the roof project. To the contrary, Mr. Barrett deposed that he did support the project and did not want to delay it. The only concern was the allocation of the cost. As a result of that concern, the petitioners advised the Strata Corporation, through counsel, that they would be applying to court for relief if the Roof Levy resolution was approved.

[30] The Roof Levy resolution was approved at the March 31, 2015 Special General Meeting. It required payments totaling $1,964,348 in two installments of $982,174. The first installment was due on May 31, 2015 and the second on May 31, 2016.

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[31] The per strata lot share of the Roof Levy, calculated pursuant to the Schedule, ranges between approximately $18,000 and approximately $35,000. The monthly strata fees per strata lot, calculated pursuant to the Schedule, range between approximately $350 per month and approximately $690 per month.

[32] Attached to the petition is a schedule setting out the petitioners' proposed changes to the Schedule and corresponding Roof Levy on a per strata lot basis. This proposal appears to be based on the total square footage of each strata lot as reflected in the strata plan, including all basements whether finished or not. For the two strata lots with lofts, the square footage of the lofts has been included in the proposal as part of the basement area unit entitlement.

[33] The magnitude of the changes reflected in the petitioners' proposal, on a per unit basis, is difficult to express in a general way because of the variety in the size of the strata lots. However, in rough terms, the monthly strata fees for the owners of the strata lots that do not have basements would be reduced by as much as approximately 25% or approximately $100 per month while the monthly strata fees for the owners of the strata lots that have basements would be increased by as much as approximately 40% or approximately $150. In rough terms, the Roof Levy for the owners of the strata lots that do not have basements would be reduced by approximately $5,000 while the Roof Levy for the owners of the strata lots that have basements would be increased by approximately $8,000.

The Positions of the Parties

[34] The petitioners seek an order that the Schedule be amended to match the version attached to the petition "or as otherwise determined by the court", and an order that the resolution approving the Roof Levy be varied to reflect the amended Schedule.

[35] The petitioners rely on three separate legal bases for the relief they seek in relation to the Schedule. First, they say the court ought to order an amendment to the Schedule pursuant to s. 246(8) of the *SPA* because it does not accurately reflect the actual habitable area of the strata lots. They say that unfinished basements do

not fall within "habitable area" and the Schedule was therefore accurate until the unfinished basements were finished with the result that s. 14.13(a) of the *Regulation* does not apply to preclude relief under s. 246(8). In the alternative, they say the court ought to order an amendment to the Schedule pursuant to s. 165 of the *SPA* because the Strata Corporation failed to ensure compliance with s. 70(4) of the *SPA*, which required the owners who finished their basements to first obtain an amendment to the Schedule, and with the bylaws, which required the owners who finished their basements to first obtain written approval of the Strata Corporation. In the further alternative, they say the court ought to order an amendment to the Schedule pursuant to s. 164 of the *SPA* because such an order is necessary to remedy a significantly unfair action or decision of the Strata Corporation.

[36] The petitioners also rely on ss. 164 and 165 of the *SPA* in support of the relief they seek in relation to the Roof Levy resolution. The petitioners submit that the decision not to amend the Schedule prior to passing the Roof Levy resolution was significantly unfair and they seek to vary the resolution pursuant to s. 164(2)(b). With respect to s. 165, they argue that the Strata Corporation has not complied with the *SPA* or its own bylaws in relation to the finishing of basements and they seek an order amending the Roof Levy resolution pursuant to s. 165(c).

[37] The Strata Corporation concedes that the basements are habitable area and that the actual habitable area of the strata lots is not accurately reflected in the Schedule. However, the Strata Corporation submits that none of ss. 246, 165 or 164 of the *SPA* apply.

[38] The Strata Corporation says the unfinished basements ought to have been considered habitable area and included in the original Schedule and, accordingly, the inaccuracy that would otherwise trigger the application of ss. 246(7) and (8) falls within s. 14.13(a) of the *Regulation* because it existed at the time the strata plan was deposited. The Strata Corporation says that, in any event, the s. 246 remedy is discretionary and the court ought not to exercise its discretion in favour of the

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petitioners because the Schedule reflects the state of affairs into which everyone bought and which has been used for many years.

[39] The Strata Corporation says there has been no decision or action by the Strata Corporation to trigger the application of s. 164. It also submits that, in any event, it complied with the *SPA* when the Roof Levy resolution was passed and, accordingly, the passing of the resolution cannot be characterized as significantly unfair. In addition, it submits that s. 165 is not available to the petitioners because it does not have retroactive application and could only apply to future renovations.

Issues

[40] The following issues arise:

1. Should the Schedule be amended pursuant to ss. 246(7) and (8) of the *SPA*?
2. Alternatively, should the Schedule be amended pursuant to either s. 164 or s. 165 of the *SPA*?
3. Should the Roof Levy resolution be varied pursuant to s. 164 of the *SPA*?
4. Alternatively, should the Roof Levy resolution be amended pursuant to s. 165 of the *SPA*?

Analysis

Should the Schedule be amended pursuant to ss. 246(7) and (8) of the *SPA*?

[41] For ease of reference, ss. 246(7) and (8) of the *SPA* are reproduced:

> 246(7) Subject to the regulations, an owner or the strata corporation may apply to the Supreme Court for an order under subsection (8) if
>
> > (a) the unit entitlement of a residential strata lot is calculated on the basis of habitable area in accordance with subsection (3) (a) (i) or on the basis of square footage in accordance with section 1 of the *Condominium Act*, R.S.B.C. 1996, c. 64, and
> >
> > (b) the actual habitable area or square footage is not accurately reflected in the unit entitlement of the strata lot as shown on the Schedule of Unit Entitlement.

> (8) On application under subsection (7) and after consideration of the matters set out in the regulations, the Supreme Court may
>
> > (a) order that a Schedule of Unit Entitlement be amended, in accordance with the regulations, to accurately reflect the habitable area or square footage of the strata lot, and
> >
> > (b) make any other orders it considers necessary to give effect to an order under this subsection.

[42] As already discussed, the relevant provision in the *Regulation* is s. 14.13(a):

> 14.13 An application must not, after November 24, 2009, be brought under section 246(7) of the Act in respect of the strata lot
>
> > (a) if the inaccuracy referred to in section 246(7)(b) of the Act was contained in the Schedule of Unit Entitlement at the time of the deposit of the strata plan in a land title office, …

[43] The question of the availability of the remedy contemplated by ss. 246(7) and (8) of the *SPA* gives rise to the following sub issues:

(a) Were the unit entitlements for Deer Run originally calculated on the basis of habitable area in accordance with the *SPA* or on the basis of square footage in accordance with s. 1 of the *Condominium Act*?

(b) If so, is the actual habitable area or square footage accurately reflected in the Schedule?

(c) If not, was the inaccuracy contained in the Schedule at the time of the deposit in the Land Title Office?

(d) If not, should the court order that the Schedule be amended and if so how?

(e) If an order is granted amending the Schedule, is it necessary to make any other orders to give effect to that order?

I will deal with each sub issue in turn.

Were the unit entitlements for Deer Run originally calculated on the basis of habitable area in accordance with the SPA or on the basis of square footage in accordance with s. 1 of the Condominium Act?

[44] Section 246(7)(a) of the *SPA* provides that the court may only grant a remedy under s. 246(8) if the unit entitlements were "calculated on the basis of habitable area in accordance with subsection (3)(a)(i) [of the *SPA*] or on the basis of square

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footage in accordance with section 1 of the *Condominium Act*". It is helpful to reproduce the material portions of s. 1 of the *Condominium Act*:

> (2) A schedule of unit entitlement that is acceptable to the superintendent is required for each strata plan.
>
> (3) In the case of a residential strata plan, the owner developer may submit
>
> > (a) a schedule of unit entitlement based on the following formula:
> >
> > unit entitlement of strata lot / total unit entitlement of all strata lots in the strata plan = square footage of strata lot expressed as the nearest whole number / total square footage of all strata lots in the strata plan expressed as the nearest whole number
> >
> > and the unit entitlement so calculated must be expressed as the nearest whole number resulting from the application of the formula, or
> >
> > (b) an alternative schedule of unit entitlement not based on the formula set out in paragraph (a).

[45] As already discussed, the parties agree that the unit entitlements in Deer Run were based on the size of the habitable area of the strata lots. The question is whether they were calculated in accordance with s. 246(3)(a)(i) of the *SPA* or on the basis of square footage in accordance with s. 1(3)(a) of the *Condominium Act*.

[46] The petitioners submit that the unit entitlements for Phase II were determined under s. 246(3)(a)(i) of the *SPA*, which expressly refers to "habitable area". They say the unit entitlement's for Phase I were determined on the basis of square footage under s. 1(3)(a) of the *Condominium Act* and, although "habitable area" was not expressly mentioned in the *Condominium Act*, the square footage was calculated by reference to habitable area in accordance with the Superintendent's Policy Statement 4.

[47] The Strata Corporation did not specifically address the question of whether the threshold requirement expressed in s. 246(7)(a) had been met, but the same threshold requirement is found in s. 70(4) of the *SPA* and, in the course of its

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submissions on the application of s. 70(4), the Strata Corporation took the position that the unit entitlements at Deer Run were not based on square footage as contemplated by s. 1(3)(a) of the *Condominium Act.* Rather, it submits the unit entitlements were established under s. 1(3)(b) as an alternative not based on the square footage formula in s. 1(3)(a). Put simply, the Strata Corporation's position is that in order to fall within s. 1(3)(a) of the *Condominium Act*, the schedule of unit entitlement had to be based on the square footage of the entire strata lot and not on the square footage of what was considered by the Superintendent to be the habitable area.

[48] The petitioners' submission overlooks s. 17.17 of the *Regulation* which, as already discussed, stipulates that the requirements for the Schedule for both phases of Deer Run's strata plan are those expressed in s. 1 of the *Condominium Act* and, as expressly stated in s. 17.17(2) of the *Regulation*, ss. 246(1)-(6) of the *SPA* do not apply. However, the issue remains as to whether the Schedule for Deer Run was calculated on the basis of square footage in accordance with s. 1(3)(a) of the *Condominium Act* or, as submitted by the Strata Corporation, as an alternative under s. 1(3)(b).

[49] There is no evidence that expressly establishes whether Genex submitted Deer Run's Schedule under s. 1(3)(a) or (b). However, it is plain from the Schedule that it is based on the square footage of the habitable areas, which was calculated to exclude, among other things, the unfinished basements. This is not disputed. The question is whether, in order to fall within the words "calculated … on the basis of square footage in accordance with section 1 of the *Condominium Act*" in s. 246(7)(a) of the *SPA*, the Schedule had to be based on the square footage of the entire strata lot and not on the square footage of what was considered by the Superintendent to be the habitable area.

[50] As already discussed, there is no dispute that a schedule of unit entitlement established under s. 1 of the *Condominium Act* had to be acceptable to the Superintendent and there is no dispute that the Superintendent's policy, as

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articulated in Policy Statement 4, required that the square footage formula be based on habitable area. For ease of reference, the material portions of the policy statement are reproduced:

> 1. "Unit Entitlement" is defined in the *Condominium Act* as the indication of "the share of an owner in the common property, common facilities and other assets of the strata corporation, and is the figure by reference to which the owner's contribution to the common expenses of a strata corporation is calculated". The *Condominium Act* further sets out a formula for the calculation of unit entitlement based on the area of each strata lot in ratio to the total area of all strata lots. The Superintendent may accept or require an alternative schedule.
>
> 2. It is a matter of policy that the Superintendent will require that the above formula be based on "habitable" area and should not include areas such as patios, balconies, parking stalls or storage areas, aside from closet space in the strata lot. Alternative formulas will be considered if such alternatives result in more equitable contribution by the owners to the common expenses of the strata corporation.
>
> [Emphasis added.]

[51] In other words, in practice, the square footage counted for purposes of applying the formula in s. 1(3)(a) was the square footage of the habitable area. This practice appears to be consistent with the legislature's interpretation of s. 1(3)(a) as reflected in ss. 70(4) and s. 261(1) of the *SPA*. Again, those provisions provide:

> 70(4) Subject to the regulations, if an owner wishes to increase or decrease the habitable part of the area of a residential strata lot, by making a nonhabitable part of the strata lot habitable or by making a habitable part of the strata lot nonhabitable, and the unit entitlement of the strata lot is calculated on the basis of habitable area in accordance with section 246(3)(a)(i) or on the basis of square footage in accordance with section 1 of the *Condominium Act*, R.S.B.C. 1996, c. 64, the owner must…
>
> [Emphasis added.]

> 261(1) To amend a Schedule of Unit Entitlement to reflect a change in the habitable area of a residential strata lot in a strata plan in which the unit entitlement of the strata lot is calculated on the basis of habitable area in accordance with section 246(3)(a)(i) or on the basis of square footage in accordance with section 1 of the *Condominium Act*, R.S.B.C. 1996, c. 64, the schedule must be amended as follows: …
>
> [Emphasis added.]

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[52] Both of these sections apply to a change in the habitable area of a residential strata lot where the schedule of unit entitlement was calculated "on the basis of square footage in accordance with section 1 of the *Condominium Act*". If the words "calculated … on the basis of square footage in accordance with section 1 of the *Condominium Act*" were limited to unit entitlements calculated on the basis of total square footage as opposed to habitable square footage, they would be redundant because no change in the habitable area of a strata lot with a unit entitlement based on total square footage could ever trigger a change in the schedule of unit entitlement.

[53] The very same language, namely "on the basis of square footage in accordance with section 1 of the *Condominium Act*" is used in s. 246(7)(a). The use of the same language in ss. 70(4) and 261 indicates that the legislature intended those words to extend to unit entitlements calculated on the basis of habitable square footage.

[54] Further, the Strata Corporation's position that Deer Run's Schedule was established as an alternative under s. 1(3)(b) of the *Condominium Act* and not on the basis of square footage in accordance with s. 1(3)(a) is inconsistent with its position that the unfinished basements, as habitable areas, ought to have been included in the Schedule and that the failure to include those areas renders the Schedule inaccurate from the outset thereby triggering the application of s. 14.13(a) of the *Regulation*. The Deer Run strata plan made clear that the unfinished basements were not included in the Schedule. If that Schedule was submitted as an alternative under s. 1(3)(b) of the *Condominium Act*, the failure to include the unfinished basements could not be characterized as an inaccuracy. It could only be characterized as an inaccuracy if the Schedule was based on habitable square footage under s. 1(3)(a).

[55] For the foregoing reasons, I find that the Deer Run unit entitlements were originally calculated on the basis of square footage in accordance with s. 1 of the *Condominium Act*. The requirements of s. 246(7)(a) of the *SPA* are met.

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Is the actual habitable area or square footage accurately reflected in the Schedule?

[56] Section 246(7)(b) of the *SPA* permits a remedy to be granted under s. 246(8) if the "actual habitable area or square footage is not accurately reflected in the unit entitlement of the strata lot as shown on the Schedule of Unit Entitlement".

[57] The definition of "habitable area" is found in s. 14.2 of the *Regulation:*

> For the purposes of section 246 of the Act, "habitable area" means the area of a residential strata lot which can be lived in, but does not include patios, balconies, garages, parking stalls or storage areas other than closet space.

[58] There is no dispute that finished basements fall within this definition. Once a basement has been finished, it is clearly "habitable": *Smith et al. v. The Owners, Strata Plan LMS 1821 et al.*, 2007 BCSC 402 at para. 6. There is no dispute that many, if not the majority, of the basements at Deer Run have been finished. There is also no dispute that the actual habitable area is not accurately reflected in Deer Run's Schedule to the extent that the finished basements are not included.

[59] The petitioners have also claimed that there are two finished lofts that are not included in the Schedule. It is not disputed that the two lofts were unfinished at the time the Schedule was deposited and not included in calculating the unit entitlements reflected in the Schedule. A finished loft is as habitable as a finished basement and if the lofts are finished, they represent habitable area that is not accurately reflected in the Schedule. While there is insufficient evidence to find that these lofts have, in fact, been finished, the principles and analysis applicable to the basements also apply to the two lofts.

[60] The remaining question is whether unfinished basements and unfinished lofts also fall within the definition of "habitable area". As already discussed, at least two, and perhaps more than two, of the basements remain unfinished. It may be that one or more lofts are also unfinished.

[61] In *Fenwick*, Burnyeat J. held that both the finished and the unfinished portions of the lower levels of certain strata lots fell within the meaning of "habitable area" in

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s. 14.2 of the *Regulation* and he granted an order under s. 246(8) of the *SPA* amending the schedule of unit entitlement to accurately reflect the habitable area. *Fenwick* arose out of facts that were the same in all material respects as the facts here, but it was decided before s. 14.13(a) was added to the *Regulation*. Accordingly, in *Fenwick* there was no question about whether the inaccuracy found to exist in the schedule of unit entitlement was contained in it at the time it was deposited. Nevertheless, *Fenwick* is indistinguishable on the present question; namely, whether the failure to include both finished and unfinished areas in a schedule of unit entitlement means that the "actual habitable area or square footage is not accurately reflected in the unit entitlement of the strata lot as shown on the Schedule of Unit Entitlement" as required by s. 246(7)(b) of the *SPA.*

[62] *Fenwick* concerned a strata development that had both one-storey units and two-storey units. All but a very small portion of the lower levels in the two-storey units were left unfinished by the developer and those unfinished areas were not included in the calculation of habitable area at the time the schedule of unit entitlement was deposited in the Land Title Office. Subsequently, the lower levels were finished to varying degrees. There were both unfinished and finished portions and the uses to which the lower levels were being put ranged from bedrooms to storage areas.

[63] Burnyeat J. engaged in a full consideration of the meaning of the word "habitable" in s. 14.2 of the *Regulation* and concluded that the words "can be lived in" in s. 14.2 extend to an area that "can, could or is capable of being lived in" (at para. 45), "free of serious defects that might harm health and safety" (at para. 47). In the result, he held that the entire lower floor areas, even those portions that had not been finished, were "habitable areas". I agree with Justice Burnyeat's analysis and conclusion concerning the construction of the s. 14.2 of the *Regulation*. In any event, there is no valid basis to depart from his conclusion on that issue under the principles articulated in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.).

[64] For the foregoing reasons, the actual habitable areas of the strata lots at Deer Run are not accurately reflected in the Schedule in two respects:

(1) the finished basements and lofts (if there are any) are not included; and

(2) the unfinished basements and lofts (if there are any) are not included.

Was the inaccuracy contained in the Schedule at the time of the deposit in the Land Title Office?

[65] Section 14.13(a) of the *Regulation* precludes relief being granted under s. 246(8) "if the inaccuracy referred to in section 246(7)(b) of the [*SPA*] was contained in the Schedule of Unit Entitlement at the time of the deposit of the strata plan in a land title office". This provision was enacted in its current form by B.C. Reg. 273/2009, which came into force on November 25, 2009, after *Fenwick* was decided, and it has not been the subject of judicial interpretation.

[66] The petitioners' position is that, notwithstanding *Fenwick*, unfinished basements are not habitable area but finished basements are habitable area and therefore the Schedule was accurate when filed, the Schedule became inaccurate as the basements were finished, and accordingly the threshold prerequisites to the exercise of the court's discretion under s. 246(8) are satisfied.

[67] The Strata Corporation's position, relying on *Fenwick*, is that both unfinished and finished basements are habitable area, the Schedule was therefore inaccurate when deposited, and accordingly s. 14.13(a) of the *Regulation* precludes an application under s. 246(7).

[68] In my view, neither submission reflects the correct application of s. 14.13(a) because both are based only on whether it was inaccurate to exclude unfinished basements at the time the Schedule was deposited. The question is not simply whether it was inaccurate to omit unfinished basements. The question is whether "the inaccuracy referred to in section 246(7)(b) of the [*SPA*]", which is an inaccuracy arising from the current, actual habitable area of the strata lots, was "contained in

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the Schedule of Unit Entitlement at the time of the deposit of the strata plan". As explained above, there are currently two inaccuracies in the Schedule: the finished basements and lofts (if any) are not included, and the unfinished basements and lofts (if any) are not included.

[69] The phrase "referred to in section 246(7)(b) of the Act", modifies "the inaccuracy", which clearly indicates that the relevant inaccuracy for purposes of s. 14.13(a) is the specific inaccuracy or inaccuracies found to exist under s. 246(7)(b). This, together with the phrase "at the time of the deposit of the strata plan in the land title office", clearly indicates that in order for s. 14.13(a) to preclude an application under s. 246(7), the same inaccuracy that currently exists must also have existed at the time of the deposit of the Schedule.

[70] In addition to the specific wording of s. 14.13(a), this construction is consistent with the purpose of the legislative scheme as a whole.

[71] The Strata Corporation suggested that s. 14.13(a) was a legislative response to the outcomes in *Fenwick* and *Smith*. I have already discussed the circumstances in *Fenwick*. The inaccuracy in *Fenwick* that arose from the areas of the lower levels that remained unfinished was contained in the schedule of unit entitlement from the outset and so s. 14.13(a), had it existed, would have precluded an amendment to correct that inaccuracy. In *Smith*, the schedule of unit entitlement purported to allocate unit entitlements based on the square footage of each unit but it included the basement areas of only some of the units that had basements. Edwards J. granted an order amending the schedule of unit entitlement under s. 246(8) even though the inaccuracy was contained in the schedule of unit entitlement at the time it was deposited. Again, this was before the enactment of s. 14.13(a).

[72] In *Fenwick*, Burnyeat J. specifically addressed the question of whether reliance by the owners on the original schedule of unit entitlement should bar relief:

> I am also satisfied that reliance on what was set out in the Schedule of Unit entitlement cannot be a complete bar to an amendment of that Schedule. If it

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> was, then the Legislature would not have created the power available to the Court under s. 246(7)(a) of the *Act* (at para. 51).

[73] From the foregoing, it is reasonable to infer that the purpose of s. 14.13(a) was to prevent amendments that would alter the original schedule of unit entitlement upon which it could be said the owners reasonably relied. However, this would not insulate owners from amendments driven by subsequent physical changes to the strata lots. This view is consistent with ss. 70(4) and 261 of the *SPA*, which mandate amendments to unit entitlements in response to physical changes.

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[74] As already discussed, it was not disputed that the establishment of a schedule of unit entitlement is intended to be based upon principles of equity and fairness. This was noted by Justice Burnyeat in *Fenwick* at para. 48:

> After reviewing Policy Statement No. 4, the *Act*, the *Regulations*, and the role taken by the Superintendent of Real Estate, I am satisfied that the underlying principles in establishing a Unit Entitlement Schedule is to require that any formula used to calculate unit entitlement is "consistent" and "equitable". It is only in this way that an equitable contribution to the common expenses of a strata development could be assured.

[75] It was also not disputed that where unit entitlement is based on habitable area, fairness typically demands that when an owner increases the habitable area, the unit entitlement for that strata lot should also increase. As already noted, this is reflected in s. 70(4) of the *SPA*, which prohibits owners from increasing the habitable area of a strata lot without obtaining an amendment to the schedule of unit entitlement through a unanimous vote.

[76] Given the underlying principles of consistency and equity, it would be absurd if a current inaccuracy that was reflected in the original Schedule, in this case the exclusion of unfinished basements, was found to immunize the parties from changes to the Schedule that would otherwise arise from subsequent significant improvements to the strata lots, in this case the finishing of the basements.

[77] I note that the Strata Corporation submits that s. 70(4) does not apply to the owners at Deer Run who finished their basements because it only applies "if an

owner wishes to increase or decrease the habitable part of the area of a residential strata lot, by making a nonhabitable part of the strata lot habitable or by making a habitable part of the strata lot nonhabitable…" (emphasis added). The Strata Corporation submits that the unfinished basements were always habitable (according to *Fenwick*) and therefore finishing them is not a change from nonhabitable to habitable, and the subsection is inapplicable.

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[78] In my view, this submission is inconsistent with the purpose of s. 70(4). Regardless of whether unfinished basements are "habitable" as that word has been judicially construed, the unfinished basements in this case were considered nonhabitable at the time the unit entitlements were allocated and not included in the Schedule as a result. Given the context of s. 70(4), the relevant question is how the space was designated in the original Schedule and whether the change to the strata lot in question would change that designation. Finishing the unfinished basements would clearly result in habitable area that is not currently indicated in the Schedule. In other words, when s. 70(4) is read in its entire context, harmoniously with the purpose of ensuring that unit entitlements are allocated in a consistent and fair manner, it is apparent that the phrase "by making a nonhabitable part of the strata lot habitable", must be construed to mean "by making habitable a part of the strata lot previously designated nonhabitable".

[79] I have found that the actual habitable area is not accurately reflected in the Schedule in two respects. The finished basements and lofts (if any) are not included and the unfinished basements and lofts (if any) are not included. In determining whether s. 14.13(a) precludes relief, the question is whether either of these inaccuracies were reflected in the Schedule at the time the strata plan was deposited.

[80] The basements and lofts were unfinished at the time the strata plans were deposited. As a result, the inaccuracy that arises from the failure to include finished basements and lofts did not exist at the time the strata plan was deposited. In contrast, the inaccuracy that arises from the failure to include unfinished basements

and lofts did exist at the time the strata plan was deposited. The inaccuracy that arises from the failure to include finished basements and lofts was not "contained in the Schedule of Unit Entitlement at the time of deposit of the strata plan" and, according, s. 14.13(a) of the *Regulation* does not preclude an application under s. 246(7) for relief in relation to that inaccuracy. The inaccuracy that arises from the failure to include unfinished basements and lofts was "contained in the Schedule of Unit Entitlement at the time of deposit of the strata plan" and, according, s. 14.13(a) of the *Regulation* does preclude an application under s. 246(7) for relief in relation to that inaccuracy.

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Should the court order that the Schedule be amended and if so how?

[81] It is apparent from the use of the word "may" in s. 246(8) of the *SPA* that the court retains the discretion not to order an amendment to the Schedule.

[82] The Strata Corporation says the court ought not to exercise its discretion in this case because the Schedule reflects the state of affairs into which everyone bought and which has been used for many years. However, the state of affairs has changed. The majority of the unfinished basements have been finished. Some unfinished lofts may have been finished. I am satisfied that the unit entitlements should be reallocated to reflect those changes. While this will mean an increase in the strata fees for some owners, there is no evidence that indicates this will result in an unbearable financial burden for any of them. Further, unfinished basements and lofts will continue to be excluded from the calculation of habitable area and, accordingly, the state of affairs into which the original owners purchased will be preserved.

[83] Pursuant to s. 246(8)(a) of the *SPA*, I order that the Schedule be amended to accurately include the areas of the finished basements and the finished lofts in the calculation of habitable area.

Is it necessary to make any other orders to give effect to that order?

[84] Section 246(8)(b) provides the court with jurisdiction to make any other orders considered necessary to give effect to an order under s. 246(8)(a). I expect the parties will likely agree on the specific changes that must be made to the Schedule to give effect to the order I have granted under s. 246(8)(a). If that is not the case and, in particular, if disputes arise as to the classification of any particular area of any strata lot as finished or unfinished, they have leave to make further submissions and seek other orders pursuant to s. 246(8)(b).

Should the Schedule be amended pursuant to either s. 164 or s. 165 of the *SPA*?

[85] I have granted an order, pursuant to s. 246(8)(a), that the Schedule be amended to include the areas of the finished basements and the finished lofts. I have not granted an order, pursuant to s. 246(8)(a), to amend the Schedule to include any areas of the basements or lofts that remain unfinished. The question remains as to whether the petitioners have established a basis for that further amendment under either s. 164 or s. 165 of the *SPA*, which I understand they rely upon in the alternative to s. 246.

[86] In *Smith,* Edwards J. held, at para. 34, that s. 164 did not give the court jurisdiction to amend a schedule of unit entitlement:

> Section 164(1)(a) does not confer jurisdiction on the court to amend the Schedule. That jurisdiction is granted and circumscribed by s. 246 … .

The same conclusion was reached in *Liverant v. The Owners, Strata Plan VIS-5996*, 2010 BCSC 286 at para. 23.

[87] In my view, the same is true of s. 165. The only means of amending a schedule of unit entitlement is through the unanimous vote of the owners or an order of the court pursuant to s. 246.

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Should the Roof Levy resolution be varied pursuant to s. 164 of the *SPA*?

[88] For ease of reference, s. 164 is reproduced:

> 164(1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
>
> (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
>
> (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
>
> (2) For the purposes of subsection (1), the court may
>
> (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
>
> (b) vary a transaction or resolution, and
>
> (c) regulate the conduct of the strata corporation's future affairs.

[89] The Strata Corporation submits that s. 164 has no application because there has been no relevant action or decision. The Schedule itself is not an action or decision, and the Strata Corporation emphasizes the conclusions in *Smith* and *Liverant* that s. 164 cannot be used to amend a schedule of unit entitlement.

[90] I do not agree that there has been no action or decision. The Strata Corporation decided to pass the resolution approving the Roof Levy, which allocated the costs of the roofing project in accordance with the Schedule as it existed at the time. While s. 164 does not confer jurisdiction to amend the Schedule itself, it clearly does provide jurisdiction to amend a resolution. Section 164 expressly states that the court may "vary a transaction or resolution" if necessary to remedy a significantly unfair action or decision. The question is whether the decision of the Strata Corporation to pass the resolution approving the Roof Levy in the circumstances present in this case was significantly unfair.

[91] The Roof Levy resolution was approved at a Special General Meeting held on March 31, 2015, following an information meeting held a few weeks earlier. The Backgrounder was circulated by the council prior to the information meeting. It is

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apparent from the Backgrounder that the following facts were known prior to the passing of the Roof Levy resolution:

- the unit entitlement of each strata lot would dictate each owner's share of the Roof Levy;
- the unit entitlements were based on the habitable area of each strata lot;
- unfinished basements were not considered habitable at the time the unit entitlements were initially allocated;
- many of the owners had since finished their basements;
- s. 70(4) of the *SPA* requires owners wishing to increase the habitable part of their strata lots to seek an amendment to the Schedule and obtain a unanimous vote before making any change;
- s. 70(4) had not been followed at Deer Run, with the result that the actual habitable area was not accurately reflected in the Schedule;
- some owners had taken the position that the Schedule should be changed to reflect the finished basements;
- the Schedule could be changed by unanimous vote;
- in the absence of a unanimous vote, an application could be brought under s. 246(7) to correct the Schedule; and
- the *SPA* (ss. 100 and 108(2)) permitted the Strata Corporation to allocate the Roof Levy in a manner other than in accordance with the Schedule, by unanimous vote.

[92] It is accepted that there was some urgency associated with passing the resolution due to the desire to lock the contractor into its quoted price. However, it was known that several mechanisms were available to address the situation

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including a unanimous vote to change the Schedule, an application to court to change the Schedule, and a resolution to allocate the Roof Levy in some manner other than in accordance with the Schedule. Nevertheless, the resolution was passed to allocate the Roof Levy in accordance with the inaccurate Schedule.

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[93] The Strata Corporation relies on *Peace v. The Owners, Strata Plan VIS2165*, 2009 BCSC 1791, for the proposition that the allocation of a special levy in accordance with unit entitlement is not unfair because such an allocation is expressly contemplated, and is in fact the default position, under s. 108 of the *SPA.* Along the same vein, the Strata Corporation cites *Re Owners of Strata Plan NW2212*, 2010 BCSC 519 and *Liverant* for the proposition that compliance with the requirements of the legislation cannot be significantly unfair. In my view, these cases are distinguishable because there was no suggestion that the action or decision in question was taken with knowledge that other requirements of the legislation had not been complied with and that this would directly affect some of the owners.

[94] For example, in *Peace* it was asserted that a decision to finance repairs to the building envelopes by allocating the costs on the basis of unit entitlement rather than on the average relative cost of repairing the units was significantly unfair, but there was no claim, as there is here, that the decision was taken in circumstances where it was known that the actual habitable area was not accurately reflected in the schedule of unit entitlements. In other words, there was no suggestion in *Peace* that the schedule of unit entitlements, in accordance with which the costs were to be allocated, was itself inaccurate.

[95] The leading case on the application of s. 164 is *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. Garson J.A. identified the specific issues in that case as the appropriate degree of deference owed to a decision of a strata corporation and the meaning of the phrase "significantly unfair" in s. 164.

[96] On the first issue, Garson J.A. held, at para. 24, that a significantly unfair decision reached through a fair and democratic process is not insulated from judicial

intervention under s. 164, and that the outcome of a fairly held vote may ground a finding that a particular decision is nevertheless unfair.

[97] On the second issue, Garson J.A. observed, at para. 26, that "the language of s. 164 bears some resemblance to s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57, which concerns oppression remedies" and that "[t]he jurisprudence considering the oppression remedy has informed the interpretation of s. 164". She endorsed the decision in *Reid v. The Owners, Strata Plan LMS 2503*, 2001 BCSC 1578, aff'd 2003 BCCA 126, as correctly describing the meaning of significantly unfair in this context. In that case, Ryan J.A. stated:

> [26] ... Under s. 42 of the *Condominium Act*, an owner could apply to the court to remedy behaviour of the strata corporation that was "oppressive" or acts or resolutions that were "unfairly prejudicial" to the owner. A review of how these terms had been defined by the courts can be found in the case of *Blue-Red Holdings Ltd. v. Strata Plan VR 857* (1994), 42 R.P.R. (2d) 49 (B.C.S.C.). In that case, the court found that oppressive conduct had been defined as conduct that is burdensome, harsh, wrongful, lacking in probity or fail dealing, or has been done in bad faith and that unfairly prejudicial conduct had been defined as conduct that is unjust or inequitable. In the case at bar counsel for both parties submitted that the meaning of "significantly unfair" would encompass, at the very least, oppressive and unfairly prejudicial conduct and the judge agreed with them. …
>
> [27] ... I agree with Masuhara J. [in *Gentis v. The Owners, Strata Plan VR 368*, 2003 BCSC 120 at paras. 28-29] that the common usage of the word "significant" indicates that a court should not interfere with the actions of a strata council unless the actions result in something more than mere prejudice or trifling unfairness. This analysis accords with one of the goals of the Legislature in rewriting the *Condominium Act,* which was to put the legislation in "plain language" and make it easier to use (British Columbia, *Official Report of Debates of the Legislative Assembly,* Vol. 12 (1998) at 10379). I also note that the term "unfair" is defined in the *Canadian Oxford Dictionary* as "not just, reasonable or objective." It may be that this definition of "unfair" connotes conduct that is not as severe as the conduct envisaged by the definitions of oppressive or unfairly prejudicial. However, counsel argued this appeal on the basis that "significantly unfair" has essentially the same meaning as "oppressive and unfairly prejudicial". For the purposes of this appeal the distinction between the definitions makes no difference. On either definition, the resolution passed by the strata council cannot be said to be significantly unfair to Mr. Reid.
>
> [Emphasis added.]

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[98] Thus, "significantly unfair" in s. 164 of the *SPA* contemplates something more than mere prejudice or trifling unfairness. It includes conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust, or inequitable, and it might extend to less severe conduct as well.

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[99] In *Dollan*, at para. 30, Garson J.A. adopted a two-stage analysis focusing on the petitioner's reasonable expectations in determining whether particular conduct meets the threshold of significant unfairness. First, it must be determined whether the evidence supports the asserted reasonable expectations of the petitioner. Second, it must be determined whether those reasonable expectations have been violated in a way that is significantly unfair, applying the above-noted definition of that phrase.

[100] The petitioners submit that it was reasonable for them to expect that when there was a change to the basis upon which the Schedule was created, there would be a corresponding change to the Schedule. In particular, they say they expected that strata fees would be calculated on the basis of a schedule of unit entitlement based upon habitable area. One of the petitioners, Mr. London, deposed that he expected that "if an owner significantly changed their habitable area, this would also result in a readjustment of strata lot fees".

[101] The Strata Corporation submits that this stated expectation is not reasonable and that the petitioners merely assumed that the Schedule was based on habitable area. This submission is surprising given that the disclosure statement filed by Genex expressly stated that the unit entitlements were calculated by reference to habitable area and characterized unfinished basements as "non-living" areas. The obvious implication is that finished basements would be considered living areas or, in other words, habitable. Further, earlier in its submission, the Strata Corporation conceded that the original Schedule was in fact based on habitable area. In the circumstances, it is difficult to characterize the petitioners' expectations as anything but reasonable.

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[102] Further, as stated earlier in these reasons, it is not disputed that the establishment of a schedule of unit entitlement is intended to be based upon principles of equity and fairness and that where unit entitlement is based on habitable area, fairness typically demands that when an owner increases the habitable area, the unit entitlement for that strata lot should also increase. This is expressly reflected in s. 70(4) of the *SPA*, which prohibits an owner from increasing the habitable area of a strata lot without obtaining an amendment to the schedule of unit entitlement through a unanimous vote.

[103] In the circumstances, I have no hesitation concluding that the petitioners reasonably expected that the Schedule would be based on habitable area and that increases to the habitable area would be accompanied by corresponding changes to the Schedule. The next question is whether that reasonable expectation was violated in a way that is significantly unfair. As discussed above, this requires something more than mere prejudice or trifling unfairness.

[104] As noted above, at the time the Roof Levy resolution was passed it was known that the Schedule was based on habitable area and that, at the time it was deposited, unfinished basements were not considered habitable; that many owners had since finished their basements without complying with s. 70(4); and that some owners had taken the position that the Schedule ought to be changed to reflect the increases in the habitable area. It was also known that several mechanisms were available to address the situation including a unanimous vote to change the Schedule, an application to court to change the Schedule, and a resolution to allocate the Roof Levy in some manner other than in accordance with the Schedule. Thus, it was known that the majority of the owners (those with finished basements) would pay proportionally less if they forged on without a change to the Schedule than if they amended the Schedule prior to passing the Roof Levy resolution. The effect of the decision was to cause the owners without finished basements to bear a significantly larger proportion of the costs of the roof project than they would have borne had the Schedule first been amended.

[105] The purpose of s. 70(4) of the *SPA* is to ensure that schedules of unit entitlement remain accurate notwithstanding physical changes that increase or decrease habitable area. In effect, the result of the decision was to avoid the default position of the *SPA*, which is to allocate costs in accordance with a schedule of unit entitlement that, given s. 70(4), is intended to accurately reflect habitable area. I have no difficulty concluding that this was burdensome, harsh, and inequitable. As discussed above, the evidence indicates that in approximate terms, the Roof Levy for the owners of the strata lots that do not have basements would be reduced by approximately $5,000 if the costs were allocated in accordance with a schedule of unit entitlement that reflected all the basements and lofts. As already explained, there are only two lofts and it is conceded that many if not the vast majority of the basements have been finished. Accordingly, $5,000 is a reasonable estimate of the impact of the decision on the owners of the strata lots without basements. This is not trifling.

[106] For these reasons, I find that the reasonable expectations of the petitioners have been violated in a way that is significantly unfair. In other words, I find that the decision of the Strata Corporation to pass the resolution approving the Roof Levy in the circumstances present in this case was significantly unfair. Pursuant to s. 164(2)(b) of the *SPA*, I order that the Roof Levy resolution be varied to reflect the Schedule as amended to accurately reflect the habitable area of the strata lots by including the areas of the finished basements and the finished lofts.

Should the Roof Levy resolution be amended pursuant to s. 165 of the *SPA*?

[107] Given my order that the Roof Levy resolution be varied pursuant to s. 164, it is not necessary to consider whether it could also be varied pursuant to s. 165.

Conclusion

[108] I make the following orders:

1. Pursuant to s. 246(8)(a) of the *Strata Property Act*, the Schedule of Unit Entitlement for The Owners, Strata Plan LMS 3265, shall be

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amended to include the areas of the finished basements and finished lofts in the calculation of habitable area.

2. If the parties are unable to agree on the specific changes that must be made to give effect to paragraph 1 above, they have leave to make further submissions concerning the specific changes that must be made including submissions concerning any other orders, pursuant to s. 246(8)(b), that they consider are necessary to ascertain the areas of the finished basements and finished lofts.

3. Pursuant to s. 164 of the *Strata Property Act*, the Roof Levy resolution, passed March 31, 2015, shall be varied to reflect the amendments to the Schedule of Unit Entitlement for The Owners, Strata Plan LMS 3265, required by paragraph 1 above.

4. If the parties wish to make submissions on costs they may do so by contacting the registry to obtain a date to make further submissions on costs, provided they contact the registry for this purpose within 60 days of release of this judgment. Otherwise the petitioners shall have their costs at Scale B.

"WARREN J."

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