Court of Queen's Bench of Alberta

Citation: Boardwalk REIT Properties Holdings Ltd v Condominium Corp No 0822896, 2019 ABQB 40

Date: 20190118
Docket: 1703 00202
Registry: Edmonton

Between:

Boardwalk REIT Properties Holdings Ltd.

Appellant

- and -

Condominium Corp. No. 0822896

Respondent

Reasons for Decision
of the
Honourable Mr. Justice G.S. Dunlop

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1. Overview

[1] The Axxess at Terwillegar condominium development in Edmonton consists of three apartment buildings containing 275 apartments, plus some parking stalls and common property. Boardwalk REIT Properties Holdings Ltd. owns two of the apartment buildings containing 164 apartments, plus some land around those two buildings. Boardwalk claims it does not have to pay condominium fees. The Condominium Corporation says it does.

[2] On January 4, 2017 Boardwalk filed an Originating Application seeking declarations and other remedies relating to its relationship with the Condominium Corporation, including Boardwalk's liability for condo fees. The Condominium Corporation responded with a Cross-Application for various declarations and other relief. Those applications were determined in Masters' chambers on several dates in 2017. The Master granted two Orders. In the first Order she dismissed Boardwalk's application to be declared to be a developer and allowed the Condominium Corporation's applications for a declaration that Boardwalk is not a developer and an order directing Boardwalk to comply with the Axxess Bylaws as an owner. In the second Order she dismissed Boardwalk's originating application and awarded costs to the Condominium Corporation on a solicitor and own client basis. Boardwalk appealed both Orders; the Condominium Corporation appealed neither Order.

[3] The standard of review on this appeal is not in issue; the parties agree that the standard of review is correctness. Furthermore, the parties have filed three additional affidavits, and have conducted three questionings, the transcripts of which are before me. None of that additional evidence was before the Master. Consequently, the hearing before me is de novo.

[4] The context and issues are:

1. history of the Axxess at Terwillegar development;
2. interpretation of the *Condominium Property Act* and Regulation and the Axxess Bylaws;
3. whether the condo fees levied against Boardwalk and other conduct of the Condominium Corporation are improper conduct; and
4. specific remedies sought by Boardwalk and the Condominium Corporation.

[5] I find that Boardwalk is not a developer as that term is used in the Bylaws. I also find that the Axxess Bylaws were written with the expectation that the entire Axxess at Terwillegar development would be subject to several redivisions ultimately resulting in an individual condominium unit for each self-contained residential dwelling. In that context, the Bylaws exempt the developer owner of the bare land units from liability for condo fees in some circumstances. The condo fee exemption described in the Bylaws is for a finite period. The context has changed, with Boardwalk having no intention of redividing the two buildings it owns into individual condominium units. In this context, the exemption period ended with the redivision of the first building in 2009. Therefore, the Bylaws require Boardwalk to pay condo fees.

[6] In addition, the *Condominium Property Act* gives a condominium corporation the power to set condo fees in proportion to unit factors. Condominium bylaws cannot remove that power. To the extent the Axxess Bylaws purport to do so, they are ultra vires. The Axxess at Terwillegar board set its budgets and levied condo fees in proportion to unit factors, including the unit factors of Boardwalk's units. Those actions were not improper. Boardwalk is liable to pay condo fees as levied by the Condominium Corporation.

[7] I have reached the same conclusion as the Master regarding whether Boardwalk is a developer and its obligation to pay condo fees. However, there are two declarations, relating to the election of members of the condominium board and validity of the condo fee article of the bylaws, which were not granted by the Master, which I find should be granted. The appeal is allowed with respect to those declarations. In all other respects, the appeal is dismissed.

[8] I these reasons I use the term "condo fees" to refer to what the *Condominium Property Act* defines as "contributions" and what the Axxess Bylaws refer to as "assessments". I use the term "common expenses" to refer to what the Act refers to as "administrative expenses" and what the Axxess Bylaws define as "Common Expenses".

2. History of Axxess at Terwillegar

2.1 Prior to Boardwalk's Involvement

[9] The original developer of Axxess at Terwillegar was Medican (Edmonton Terwillegar) Developments Ltd. On April 1, 2008, Medican registered Condominium Plan 082 2896 which created three bare land condominium units: units 1, 2 and 3.[1] The plan describes the three units and their unit factors as follows:

UNIT NUMBER	TOTAL AREA SQ. METRES (APPROX.)	UNIT FACTOR
1	5785.6	3972
2	3854.1	3421
3	6146.4	2607
	TOTAL	10,000

[1] Brunelle February 7, 2017 affidavit, para 2 and 3 and exhibit "A"

BASIS FOR DETERMINING UNIT FACTORS:
The unit factors are determined by proportioning the areas of the units to be built against the total of all units to be built in the project

[10] A site plan included in Medican's marketing materials describes the building to be built on unit 1 as:[2]

> PHASE 1
>
> BUILDING A
>
> 111 UNITS
>
> 77 STALLS
>
> U/G PARKING"
>
> (underlining added)

[11] Medican completed construction of a building on unit 1 and on March 10, 2009, Medican registered a redivision plan, dividing unit 1 into residential units 4 – 114, common property unit 115 and parking units 116 – 195.[3]

[12] Medican commenced construction of buildings on units 2 and 3, but became insolvent before the buildings were complete.[4] On May 26, 2010 Medican obtained a Companies' Creditors Arrangement Act protection order. One of Medican's creditors, Monarch Capital Corporation, through a numbered company, obtained title to units 2 and 3. On July 6, 2012, Monarch wrote to the owners of other units (being the individual residential units in building 1) requesting that they approve a change to the wording of the Axxess Bylaws. It its letter, Monarch describes itself as "the owners of the Phase 2 and Phase 3 of the Terwillegar development land" (underlining added). Monarch's letter requests the bylaw change as follows:[5]

> The By-laws of your Condo Corporation specify Medican as the 'Developer' for Phase 2 & 3. This wording was developed 4 years ago when Medican expected to complete the entire project. As this is no longer possible, we are asking for your agreement to amend the by-laws to change the wording to: '1343670 Alberta Ltd. and any person who may acquire a fee simple interest in one or both of those units prior to registration of a Redivision Plan". This will enable development of Phase 2 and 3 which in turn will complete the entire project for the enjoyment of all. **At present, the by-law is blocking the completion of the development and no building can occur until the by-law is amended.**
>
> (bolding in original; underlining added)

[13] On January 3, 2014 a special resolution was passed by the Axxess unit holders making the change to the Bylaws requested by Monarch, and the change to the Bylaws was registered at

[2] Site plan, exhibit "B" to Brunelle February 7, 2017 affidavit
[3] Brunelle February 7, 2017 affidavit, para 7 and exhibit "C"
[4] Brunelle February 7, 2017 affidavit, para 11 and 12
[5] Monarch July 6, 2012 letter, exhibit "F" to Brunelle February 7, 2017 affidavit

Land Titles on May 27, 2014.[6] Monarch then proceeded with construction of the buildings on units 2 and 3.[7] Title to units 2 and 3 was transferred to Axis by City Vibe GP Inc. on July 9, 2014.[8]

[14] On December 2, 2015 the Registrar of the *New Home Buyer Protection Act* registered a caveat against title to unit 3, which prohibits unit 3 from being included in a condominium plan.[9] At that date unit 3 was already included in a condominium plan, and had been since April 1, 2008. The parties provided no authorities and little argument on the application of the *New Home Buyer Protection Act* to the issues before me. I have no evidence beyond the caveat. The Condominium Corporation argues in its March 16, 2017 reply submission, at paragraph 31, that the caveat is improper because it purports to deny a right to sell condominium units. In its written submissions filed March 14, 2017, at paragraph 38, Boardwalk argues that if it were ordered to redivide units 2 and 3, the order, or Boardwalk, would be in conflict with the caveat. But in its additional written argument filed November 30, 2017, at paragraph 27, Boardwalk argues that it could redivide units 2 and 3, thereby becoming a developer under the Act. In the November 30, 2017 written argument Boardwalk does not explain how it could do so without being in conflict with the caveat. It appears to me from a review of the regulations under that *New Home Buyer Protection Act*, that Boardwalk can apply to the Registrar for a discharge of the caveat.[10] It also appears to me from a review of the *New Home Buyer Protection Act* as a whole, that Boardwalk may be able to obtain the Registrar's approval to redivide unit 3, provided that the Registrar's caveat is then registered against the individual units created in the redivision. Given the limited evidence and argument before me, I conclude that this caveat and the *New Home Buyer Protection Act* are irrelevant to this appeal.

[15] Construction on units 2 and 3 was completed at the end of July or beginning of August, 2016.[11]

[16] The Condominium Corporation did not collect condo fees from Monarch or any other owner of units 2 and 3, up to August 2016.[12]

2.2 August 2016 Onward

[17] In August 2016, Axis sold units 2 and 3 to Boardwalk, with transfers registered at Land Titles on August 24, 2016.[13]

[18] Boardwalk's business is buying and renting properties.[14] Boardwalk had no involvement in the construction of the buildings on units 2 and 3.[15] After obtaining title to units 2 and 3,

[6] Brunelle February 7, 2017 affidavit, para 14
[7] Brunelle February 7, 2017 affidavit, para 16
[8] Brunelle February 7, 2017 affidavit, para 17
[9] Exhibit "R" to Brunelle February 7, 2017 affidavit
[10] New Home Buyer Protection (Ministerial) Regulation, Alta. Reg. 220/213, s 6.1
[11] Brunelle February 24, 2017 questioning, p. 11, ll. 17 – 27
[12] Brunelle February 24, 2017 questioning, p. 9, l. 9 – p. 10, l. 8
[13] Brunelle February 7, 2017 affidavit, para 18 and exhibit "H"
[14] Harper February 24, 2017 questioning, p. 9, ll. 6 – 9
[15] Harper January 8, 2018 undertaking 21 response

Boardwalk began leasing residential apartments in buildings 2 and 3 and established offices for its employees in those buildings.[16]

[19] The Condominium Corporation calculated Boardwalk's condo fees based on the Condominium Corporation's budget at that time, applied in proportion to unit factors for all units. The total condo fees for units 2 and 3 were calculated by the Condominium Corporation to be $52,564.16 per month.[17] On September 14, 2016 the Condominium Corporation's lawyer sent Boardwalk's lawyer statements of the amounts owing for condo fees and invited a proposal regarding adjustments that might be made to the budget based on Boardwalk's treatment of units 2 and 3.[18] Also in September 2016, lawyers for Boardwalk and the Condominium Corporation discussed possible amendments to the Axxess Bylaws, but no agreement was reached.[19] The Bylaws remain today as they were after amendment in 2014.

[20] In August 2016, Boardwalk erected signs on the common property advertising the residential apartments in Units 2 and 3 for rent.[20] In October 2016, the Condominium Corporation demanded that Boardwalk remove those signs, but Boardwalk refused.[21] The Condominium Corporation removed those signs in November 2016.[22]

[21] Boardwalk requested estoppel documents, for which the Condominium Corporation issued an invoice. Boardwalk has not paid the invoice and has not received the documents.[23]

[22] On November 25, 2016, Boardwalk paid the Condominium Corporation $169,561.81 in condo fees under protest, which was the amount the Condominium Corporation claimed was owing then.[24] Boardwalk paid an additional $483,810.03 under protest on August 16, 2017, representing the condo fees assessed by the Condominium Corporation for the period December 2016 to July 2017.[25]

[23] Boardwalk has no plans to redivide units 2 and 3.[26]

[24] From August 2016 onward, Boardwalk repaired, cleaned, maintained and insured units 2 and 3 and paid their utility expenses.[27] With the possible exception of planting some trees in July 2017, the Condominium Corporation has not done any of that work because it does not have access to units 2 and 3.[28] Boardwalk paid the natural gas expenses for not only buildings 2 and 3

[16] Brunelle February 7, 2017 affidavit, para 25; Brunelle February 24, 2017 questioning, p. 6, l. 7 – p. 8, l. 13
[17] Brunelle February 7, 2017 affidavit, para 31
[18] September 14, 2016 email between lawyers, exhibit "C" to Brunelle December 1, 2017 affidavit
[19] Brunelle February 7, 2017 affidavit, para 19 and exhibit "J"
[20] Harper January 4, 2017 affidavit, para 5; Brunelle February 7, 2017 affidavit, para 28 and exhibit "o"
[21] Brunelle February 7, 2017 affidavit, para 29
[22] Harper January 4, 2017 affidavit, para 6
[23] Brunelle February 7, 2017 affidavit, para 21 and 22 and exhibit "K"; Harper February 24, 2017 undertaking 21 response; Brunelle February 24, 2017 undertaking 1 response
[24] Harper January 4, 2017 affidavit, para 8; Brunelle February 7, 2017 affidavit, para 35 and exhibit "P"
[25] Harper October 20, 2017 affidavit, para 19
[26] December 3, 2016 email from Boardwalk's lawyer, exhibit "B" to Harper January 4, 2017 affidavit; Harper February 24, 2017 undertaking 2 response
[27] Harper February 17, 2017 affidavit, para 3; Harper October 20, 2017 affidavit, para 7
[28] Brunelle February 24, 2017 questioning, p. 10, ll. 16 – 23; Harper October 20, 2017 affidavit, para 9; Brunelle December 1, 2017 affidavit, para 10 and 11

but also building 1.[29] This was due to the entire gas account being transferred to Boardwalk. The Condominium Corporation asked Boardwalk to have the gas meter split, which Boardwalk did some time after December 1, 2017.[30] Boardwalk has regularly cut a strip of grass on the common property, and does snow removal from some of the common property, without complaint by the Condominium Corporation.[31]

3. Interpretation of the *Condominium Property Act,* the Condominium Property Regulation and the Axxess Bylaws

[25] In argument before the Master and before me, the parties focused on the issue of whether Boardwalk is a developer as that term is defined in article 1 (m) of the Axxess Bylaws and section 1(j) of the *Condominium Property Act*. A declaration that Boardwalk is a developer under the Bylaws, is the first of eighteen remedies sought in Boardwalk's Originating Application; the opposite declaration is the first of eleven remedies sought by the Condominium Corporation in its Cross-Application. Boardwalk submitted at the beginning of oral argument before the Master that whether Boardwalk falls within that definition is "the key to determining the issues before the Court". The Master determined that Boardwalk is not a developer and dismissed Boardwalk's application in its entirety.

[26] The main issue between the parties is not whether Boardwalk is a developer; it is whether Boardwalk is liable to pay condo fees. Resolution of that issue requires an interpretation of the Axxess Bylaws, the *Condominium Property Act* and the Condominium Property Regulation. Both the Act and the Bylaws contain provisions that where the two are inconsistent, the Act prevails.[32] With that in mind, I start my analysis with the Act and the Regulation.

3.1 *Condominium Property Act* and Condominium Property Regulation

3.1.1 Phased Development

[27] The Act permits development of a condominium project in phases in accordance with the Regulation, and the Regulation sets specific requirements for phased developments.[33] There is no evidence before me regarding whether a phased development disclosure statement was registered as part of the bare land condominium plan registered in 2008 or the redivision plan registered in 2009. If such a disclosure statement was not registered then the project was not eligible to be developed in phases.[34] If a disclosure statement was registered then all phases were required to be registered either within the period specified in the disclosure statement, or, if no period were specified, within six years of registration of the condominium plan.[35] The Regulation provides various obligations, rights and remedies for developers, owners and condominium corporations where phased developments are not completed on time or at all.[36] Neither party invoked those

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[29] Harper October 20, 2017 affidavit, para 21
[30] Brunelle December 1, 2017 affidavit, para 16 – 23; Harper January 8, 2018 undertaking 23 response
[31] Harper January 8, 2018 undertaking 3 – 5 responses
[32] *Condominium Property Act*, s 32(7), Axxess Bylaws, article 2(c)
[33] *Condominium Property Act*, s 19; Condominium Property Regulation, Part 3
[34] Regulation, sections 34 and 35
[35] Regulation, section 36(1)
[36] Regulation, section 36 (2) – (8)

provisions in this application. However, the phased development provisions of the Act and the Regulation are important context for interpreting the Bylaws.

3.1.2 Developer

[28] The Act defines developer as:[37]

> a person who, alone or in conjunction with other persons, sells or offers for sale to the public units or proposed units that have not previously been sold to the public by means of an arm's length transaction

[29] The parties agree that Boardwalk does not meet the definition of developer in the Act.

3.1.3 Condo Fees

[30] The Act empowers a condominium corporation to set condo fees, as follows:

> **39(1)** In addition to its other powers under this Act, the powers of a corporation include the following:
>
> (a) to establish a fund for administrative expenses sufficient, in the opinion of the corporation, for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any other obligation of the corporation;
>
> (b) to determine from time to time the amounts to be raised for the purposes mentioned in clause (a);
>
> (c) to raise amounts so determined by levying contributions on the owners
>
> (i) in proportion to the unit factors of the owners' respective units, or
>
> (ii) if provided for in the bylaws, on a basis other than in proportion to the unit factors of the owners respective units;

[31] The Act thus gives a condominium corporation the power to set condo fees in proportion to unit factors in all cases, and on a different basis in cases where a different basis is provided for in the bylaws.

[32] Upon registration of a condominium plan, the bylaws of the condominium corporation are those set out in Appendix I to the Act.[38] The owners may amend or repeal and replace the bylaws by special resolution.[39] The bylaws must:[40]

[37] *Condominium Property Act*, s 1(j)
[38] *Condominium Property Act*, s 33
[39] *Condominium Property Act*, s 32(3)
[40] *Condominium Property Act*, s 32(1)

> …provide for the control, management and administration of the units, the real and personal property of the corporation, the common property and managed property.

[33] It is implicit in section 39(c) (ii) of the Act that the bylaws may provide for a basis for setting condo fees other than in proportion to unit factors. However, nothing in the Act empowers the owners, through bylaws passed by special resolution, to remove the condominium corporation's power to set condo fees in proportion to unit factors.

[34] Section 10.3 of the Act requires a developer to pay condo fees for units in a building on the same basis as other owners as soon as any unit in that building has been transferred to a purchaser, notwithstanding anything in the bylaws. Section 10.3 came into force on January 1, 2018, before the events at issue in this case, so it does not apply to this appeal.

3.2 Axxess Bylaws

3.2.1 Phased Development

[35] The Bylaws do not use the phrase "phased development" but they begin with definitions which include the following words applicable to a phased development:[41]

- bare land unit
- unit
- original plan
- redivision plans
- turnover date
- final turnover date.

[36] The Bylaws are drafted to accommodate a phased development, which is described in article 65:

> **ARTICLE 65 REDIVISION PLANS**
>
> The Developer intends to construct a Building on each of the Bare Land Units created by the Original Plan and to redivide each of such Bare Land Units by registration of a Redivision Plan relating to each of such Bare Land Units. Each such Redivision Plan when so registered is intended to create a separate Unit for each of the separate premises contained in the Building located on the redivided Bare Land Unit as well as such additional Common Property Unit under each Redivision Plan, such Unit to be the land remaining in the redivided Bare Land Unit after redivision all of the Building on the redivided Bare Land Unit which is not comprised in the Units, and such walls, hallway, etc. as shown on the Redivision Plan as would normally form Common Property. The Common Property Units when created shall be transferred by the Developer to the Corporation for nominal consideration and the Corporation shall hold the Common Property Units and administer them in every way as if the Common Property Units were Common Property under the Act.

[41] Axxess Bylaws, article 1

[37] Thus, the Bylaws articulate a context in which the original developer had completed one building, which had been redivided into individual residential units, with a common property unit transferred to the Condominium Corporation, and that developer intended that it or its successor would proceed to complete two more buildings, redivide each into individual residential units, and transfer a common property unit for each building to the Condominium Corporation.

3.2.2 Developer

3.2.2.1 Definition

[38] The Bylaws define developer as:

> i. With respect to those lands previously described as Condominium Plan 082 2896, Unit 1 that were subject to Redivision Plan 092 2542: Medican (Edmonton Terwillegar) Developments Ltd. or any other person or entity which may acquire a fee simple interest in the Unit prior to the registration of a Redivision Plan thereon;
>
> ii. With respect to those lands described as Condominium Plan 082 2896, Unit 2 and Condominium Plan 082 2896, Unit 3: Monarch Land Ltd. or any person who may acquire a fee simple interest in one or both of those Units prior to the registration of a Redivision Plan thereon;

[39] This is a different definition of developer than is in the Act.

[40] In addition to developer, the Bylaws define the following terms which are also defined in the Act:

- bare land unit
- board
- building
- bylaws
- common property
- condominium plan
- corporation
- ordinary resolution
- owner
- parcel
- residential unit
- special resolution
- unit
- unit factor.

[41] In all but one case, the definitions in the Bylaws, while not identical, are consistent with the definitions in the Act. The exception is the definition of developer. The learned Master held that the definition of developer in the Bylaws was intended to identify various entities that might fall within the definition of developer in the Act. I disagree. The definition in the Bylaws is clear, stating what developer “means”, not what it “includes” or “may include”. The Bylaws replace

the Act's definition of developer with a different definition. The same is true for the fourteen other terms which have definitions in both the Act and the Bylaws, but the difference is significant only in the case of developer.

[42] Adopting different definitions for certain terms than the Act uses, does not make the Bylaws inconsistent with the Act, which would engage the paramountcy provisions of the Act and the Bylaws. Inconsistency arises only if the Bylaws have a different substantive result than the Act. Therefore, the analysis must go beyond the definition of developer, to the rights and obligations which the Bylaws purport to create. Where those are inconsistent with the Act, then the Act prevails.

[43] Article 1 of the Bylaws, after the last definition, contains the following provision:

> Words and expressions which have a special meaning assigned to them in the [Condominium Property] Act have the same meaning in these by-laws and other expressions used in these by-laws and not defined in the Act or in these by-laws have the same meaning as may be assigned to them in the *Land Titles Act* of Alberta or the *Law of Property Act* of Alberta, as amended from time to time or in any statute or statutes passed in substitution therefor.

[44] Taken literally, this provision would nullify the fifteen definitions in the Bylaws which define terms also defined in the Act. I agree with Boardwalk that the better interpretation of the provision quoted above is that the Bylaws adopt definitions from the Act only for words not specifically defined in the Bylaws.

[45] However, the issue of whether Boardwalk is a developer, as that term is used in the Bylaws, does not end with an interpretation of the definition of article 1. The use of the term developer elsewhere in the Bylaws is also relevant.

3.2.2.2 Use

[46] Article 44 gives the developer the right to exclusive use of the condominium board office located on the common property as a sales display centre. That article also gives the developer the right to enter any unit "to complete any incomplete items, repair deficiencies, inspect the Unit and make any modifications or repairs to the utilities". These rights make no sense for Boardwalk, because it is not trying to sell units, and has no interest in completing or repairing anything in the units other than the units which it owns.

[47] Article 47(j) exempts the developer from having to pay for documents required to be provided under the Act or the Bylaws. This makes sense for a person who has built the project and is marketing individual units, as that person would have numerous repeated requirements for those documents to provide to prospective purchasers. It does not make sense for Boardwalk, because Boardwalk is not trying to sell numerous individual residential units.

[48] Article 47(k) requires the Condominium Corporation to reimburse Boardwalk for any common expenses incurred by Boardwalk. This does make sense for Boardwalk as it is incurring expenses for snow removal, other maintenance and natural gas which could be authorized by the Condominium Corporation as common expenses.

[49] Article 47(m) exempts a developer from condo fees in certain circumstances. Article 66 also contains a condo fee exemption, with different wording. These articles are discussed in section 3.2.3 of these reasons below.

[50] Article 58(d) gives the developer the right to enter the privacy areas of other owners for the purpose of carrying out the duties or functions of the Condominium Corporation. Privacy areas are balconies, patios, storage lockers and parking stalls. This provision makes sense for a builder which may have personnel and equipment on site while it is completing buildings 2 and 3 that can efficiently be used to help with the maintenance and operations of building 1. It does not make sense for Boardwalk, which is not building anything on site.

[51] Article 64 gives the developer access to, and article 70(b) gives the developer exclusive use of, the common property for the purposes of construction. This has no application to Boardwalk because it is not constructing anything.

[52] Article 65, which is set out in paragraph [36] above, uses developer in a context that has no application to Boardwalk, because Boardwalk has no intention to construct anything, redivide anything, register any redivision plans, or transfer any common property units to the Condominium Corporation.

[53] Article 67 applies "with respect to the registration of a Redivision Plan" and requires the developer to complete the building and amenities in good and workmanlike manner in accordance with the plans, to transfer the common property unit to the Condominium Corporation, and to keep the common property unit clear of liens and encumbrances. None of that applies to Boardwalk, given its intention to rent the residential units without redividing the bare land units; Boardwalk does not intend to create any common property units which it could transfer or keep clear of liens.

[54] Article 68 releases the developer upon transfer of the common property unit. Boardwalk has no intention of transferring a common property unit, so article 66 does not apply to Boardwalk.

[55] Article 69 gives the developer discretion with respect to the development of the bare land units and requires the Condominium Corporation to cooperate with that development. This has no application to Boardwalk as the buildings were completed on its bare land units before it took possession and Boardwalk is not planning any further development.

[56] The first part of article 70(e) reads:

> The Developer has advised the Corporation that in connection with the sale of the Residential Units it intends to cause the Corporation to grant for nominal consideration 99 year exclusive use agreements in respect of the Parking Stalls comprising a portion of the Common Property. The Residential Units having the benefit of those agreements shall be sold for prices reflecting the value of those agreements and the resulting increases, if any, in the prices shall accrue solely to the Developer and not to the Owners or the Corporation. The Developer may cause the Corporation to initially grant any or all such agreements to and in favour of the Developer.

[57] Article 70 does not apply to Boardwalk because it does not intend to sell any residential units.

[58] While the definition of developer in article 1 is broad and includes any owner of a bare land unit, the use of developer in the Bylaws is narrower, applying to persons who build and sell, not merely hold and rent. Consequently, Boardwalk is not a developer as that term is used in the Bylaws.

3.2.3 Condo Fees

[59] Article 5(k) authorizes the Condominium Corporation to levy condo fees "in proportion to the Unit Factors for the respective Units or as otherwise herein provided". Article 47(a) requires that common expenses be paid by the owners "in proportion to the Unit Factors for their respective Units", but subject to article 66. Article 66 excludes construction and redivision costs from common expenses, and states all costs of construction and redivision are to be borne by the developer. Article 66 goes on to provide the following exemption from condo fees for the developer:

> No assessment of Common Expenses shall be levied against the Bare Land Units or the Developer as Owner of a Bare Land Unit or a Redivision Unit or as grantee of exclusive use agreements pursuant to Article 70 until completion of construction of a building thereon which is used or ready to be used for the purpose intended.
>
> (underlining added)

[60] Article 47(m) reads as follows:

> m. Assessments made by the Corporation against the Owners with respect to Common Expenses shall be made against the Owners in proportion to their Unit Factors provided that after registration of a Redivision Plan and before the Final Turnover Date:
>
> > i. assessments for Common Expenses relating solely to the Units, and the Common Property or the other parts of the Common Property over which the Developer does not have the rights of exclusive use pursuant to By-law 70, shall be levied proportionately against the Owners of the Units; and
> >
> > ii. no assessment of Common Expenses shall be levied against the Developer as Owner of the Bare Land Units until after registration of the Redivision Plan and the Units within the Building thereon are used or ready to be used for the purposes intended.
>
> (underlining added)

[61] Article 48 provides for special assessments, which must be levied "in proportion to Unit Factors". Article 48 does not provide any exemption from special assessments to any owner, developer or not.

[62] The condo fee exemptions in articles 66 and 47(m) do not apply to Boardwalk because Boardwalk is not a developer as that term is used in the Bylaws. In addition, those two articles create different tests for the exemption and Boardwalk meets neither test. The relevant words are underlined in the portions of articles 66 and 47(m) quoted above.

[63] Under article 66 the exemption begins immediately and ends with the completion of construction of a building which is used or ready to be used for the purpose intended. Under article 47(m)(ii) the exemption begins with the registration of "a Redivision Plan" and ends with the Final Turnover Date, but is further limited by ending with the registration of "the Redivision Plan" and the use or readiness for use of the units in the building. If "a Redivision Plan" means the same thing as "the Redivision Plan" in article 47(m) (ii), then "the Redivision Plan" would have no effect; the clause would have the same meaning without those words. Therefore, I conclude that "a Revision Plan" and "the Redivision Plan" mean different things. In the context of a phased development, as described elsewhere in the Bylaws, I interpret "a Redivision Plan" to mean the first redivision plan registered for any of the three buildings, and "the Redivision Plan" to mean the redivision plan for the building which is being considered for the exemption. On that interpretation, (leaving aside for the moment the Final Turnover Date restriction), after the first building has been redivided, if the second or third building and the units within it are in use or ready for use, but a redivision plan has not yet been registered for that building, then under article 47(m) (ii) that building would be exempt from condo fees and under articles 47(a) and 66 it would not be. At an earlier point in the project, after the first building was completed and ready for use, but before a redivision plan had been registered for that building or any other, that first building would not be exempt from condo fees under either provision.

[64] However, the condo fee exemption in article 47(m) is further limited: it ends on the Final Turnover Date. The Final Turnover Date is defined as the registration date of a redivision plan for the last of the three buildings constructed.[42] That has not happened, and may never happen, given that Boardwalk has no intention of redividing its two bare land units.

[65] Given the intention of the original developer to redivide all of the bare land units as recorded in article 65, given the use of the term "Final Turnover Date" in article 47(m), and in the context of the Regulation which requires registration of all units in a phased development by a certain date, I find that the Bylaws create a finite period during which buildings would be exempt from condo fees. In the current context, with the owner of units 2 and 3 having no intention to redivide them, the Final Termination Date should be interpreted to mean the registration date of the redivision of unit 1, which was March 10, 2009, as it appears that will be the date of both the first and the last redivision plan. Thus the exemption period created by article 47(m) (ii) ended before Boardwalk became an owner, and Boardwalk has no right to an exemption.

[66] The exemption under article 66 is not available to Boardwalk, either, because buildings 2 and 3 are complete and in use.

[42] Bylaws, article 1(o) and (jj)

3.3 Conflict Between the Act and the Bylaws

[67] The Bylaws purport to prohibit the Condominium Corporation from levying condo fees in proportion to unit factors, in circumstances where one of the exemptions described above applies. To that extent, the Bylaws are in conflict with the Act, which gives the Condominium Corporation that power. The Bylaws cannot take away a power given by the Act. At most the Bylaws can permit, but not require, the Condominium Corporation to set condo fees on some basis other than in proportion to unit factors.

[68] In this case, the Condominium Corporation chose to levy condo fees in proportion to unit factors, which it had the right to do. Consequently, even if my interpretation of the Bylaws is wrong and Boardwalk is a developer against whom the Bylaws prohibit the Condominium Corporation from levying condo fees, that prohibition is in conflict with the Act and the Act prevails. The condo fees levied against Boardwalk are valid and Boardwalk is obligated to pay them.

[69] Boardwalk argues in its March 14, 2017 brief, that the Condominium Corporation should be estopped from seeking to have part of the Bylaws declared ultra vires, because Boardwalk reasonably relied upon those Bylaws to its detriment. There is no evidence of reliance by Boardwalk on the Bylaws to its detriment. In particular, there is no evidence Boardwalk relied on the bylaws in deciding to purchase units 2 and 3. In fact, Boardwalk refused to answer an undertaking regarding whether it reviewed the Bylaws prior to purchasing units 2 and 3 on the grounds that that information is not relevant and material on this application.[43] Boardwalk also provided no authority for the proposition that estoppel can operate to validate otherwise invalid condominium bylaws. For those reasons, I reject the estoppel argument.

4. Improper Conduct, Section 67 of the Act

[70] Section 67 of the *Condominium Property Act* creates a court ordered remedy for improper conduct which is defined as either:

- non-compliance with the Act, the Regulations or the bylaws of a condominium corporation, (section 67(a)(i)) or

- conduct that is oppressive, unfairly prejudicial or that unfairly disregards the interests of an interested party (section 67(a)(ii) – (v)).

4.1 Boardwalk as a Developer, and Compared to Monarch and Axis

[71] In its argument filed March 8, 2017, Boardwalk argues that the Condominium Corporation failed to comply with its Bylaws when it levied condo fees against Boardwalk, removed Boardwalk's signs and failed to provide estoppel documents at no charge. Boardwalk further argues that this conduct is oppressive and unfairly prejudicial to Boardwalk. These arguments are based on Boardwalk being a developer, which it is not, so the arguments fail.

[43] Harper February 24, 2017 undertaking 10 response; Harper January 8, 2018 undertakings 18 and 20 responses do not address reviewing Bylaws before purchase

[72] Boardwalk also argues that it was improper for the Condominium Corporation to levy condo fees against Boardwalk when no condo fees had been levied against the previous owners of units 2 and 3, Monarch and Axis. I disagree. The buildings on units 2 and 3 were not completed, and thus not ready for use, until late July or early August 2016, just before title was transferred to Boardwalk. The Condominium Corporation was authorized to exempt Monarch and Axis from condo fees under articles 47(a) and 66 of the Bylaws, because they were completing construction, thus were developers, and construction was not complete. Boardwalk is in a different position.

4.2 Independent of Boardwalk Being a Developer

4.2.1 Charging Condo Fees in Proportion to Unit Factors

[73] In its arguments filed March 14, 2017 and subsequently Boardwalk argues that even if it is not a developer, the condo fees levied against it are oppressive and unfairly prejudicial because Boardwalk and its tenants obtain little benefit from the common expenses, most of which are spent on building 1, and because the Condominium Corporation's expenses did not increase when Boardwalk took title to units 2 and 3, so the additional $52,564.16 per month in condo fees from Boardwalk is surplus to the Condominium Corporation's needs. This argument fails because the wording of the Act and the Bylaws give the Condominium Corporation no discretion to levy condo fees on any basis other than in proportion to unit factors, except with respect to a developer, which Boardwalk is not. It is not improper conduct for the Condominium Corporation to do what it is compelled to do by law.

[74] Even if the Condominium Corporation had discretion to levy condo fees on a basis other than in proportion to unit factors, Boardwalk was not oppressed or treated unfairly in this case for the following reasons.

- The condominium plan registered in 2008 describes the basis for determining unit factors, which is in proportion to the areas of the units which at that time were planned but not yet built. Thus the unit factors are an equitable basis on which to share the common expenses.

- The Axxess at Terwillegar condominium project was planned as a condominium comprised of the individual residential units in three buildings, built in phases, with common property in each building and the surrounding lands. This fact is established by the Axxess Bylaws, Medican's sales documents and Monarch's letter to the owners requesting changes to the Bylaws.

- Any inequity to Boardwalk is the result of Boardwalk frustrating the long standing plan for this condominium project by refusing the redivide units 2 and 3 and transfer common property to the Condominium Corporation, and by insisting on maintaining buildings 2 and 3 and the surrounding lands itself.

- Boardwalk has the power to rectify any inequity by following the plan, redividing units 2 and 3, and transferring common property to the Condominium Corporation. Doing so would make Boardwalk a good neighbour, which it claims it wants to be.[44]

4.2.2 Failing to Amend Bylaws

[75] The Bylaws could be amended to permit levying condo fees on a different basis. The Condominium Corporation was prepared to discuss with Boardwalk amendments to the Bylaws or adjustments to the budget to reduce the condo fees levied against Boardwalk. The parties engaged in those discussions between September and December 2016, but they did not result in a resolution before Boardwalk commenced litigation on January 4, 2017.[45] The discussions resumed at some point during this litigation, but have not resulted in a settlement.

[76] Boardwalk argues that the Condominium Corporation has failed to amend its Bylaws to authorize a more equitable allocation of common expenses than in proportion to unit factors. However, amending the Bylaws requires a special resolution, with a 75 % majority.[46] Boardwalk, holding units with 60.28% of the unit factors, has a veto over any resolution. Furthermore, as a holder of more than 15% of the unit factors, Boardwalk can compel the Axxess Board to call an extraordinary general meeting and put Boardwalk's own proposed Bylaw amendments to a vote.[47] There is no evidence before me that Boardwalk has been impeded from doing that. In these circumstances, where Boardwalk has failed to follow the process set out in the Act and the Bylaws to amend the Bylaws, I am not satisfied that the Condominium Corporation has engaged in improper conduct by failing to do so.

[77] Boardwalk also argues that the Condominium Corporation failed to negotiate in good faith with respect to bylaw amendments. In support of this argument Boardwalk adduced evidence of a meeting between the parties in September 2017 and subsequent communications.[48] I find that those were privileged settlement discussions. The Condominium Corporation has not waived privilege. Boardwalk's evidence on this point is inadmissible and I exclude it. In the absence of evidence, the argument fails.

4.2.3 Inflating Budgets and Expenses

[78] Boardwalk also argues that the Condominium Corporation has inflated its budgets which increases condo fees for all unit holders, but has the largest impact on Boardwalk, as the holder of 60.28% of the unit factors. Boardwalk notes section 39(1) of the Act empowers the corporation to establish a fund "sufficient" for its business, and argues this engages an expectation of reasonableness. I do not agree that setting a budget higher than necessary, particularly in the face of substantial uncertainty, discussed below, would contravene section 39(1) of the Act. The word "sufficient" implies a floor, not a ceiling. Consequently, the budgets set by the Condominium Corporation do not amount to non-compliance with the Act.

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[44] Harper October 20, 2017 questioning, p. 45, l. 19, p. 52, l. 5
[45] Brunelle January 8, 2018 questioning, p. 11, l. 10 – p. 12, l. 18, p. 15, l. 9 – p. 18, l. 15; p. 23, l. 10 – p. 26, l. 23; p. 30, ll. 1 – 22; p. 80, l. 1 – p. 88, l. 10
[46] *Condominium Property Act*, ss 1(1)(x) and 32(3)
[47] Bylaws, article 25
[48] Harper April 24, 2018 affidavit, para 23 – 25 and exhibit "J"

[79] Boardwalk also argues that the Condominium Corporation's budgets are inflated and consequently are oppressive or unfairly prejudicial to it, or unfairly disregard its interests. I do not agree, because of the uncertain and fluid circumstances in which the Condominium Corporation set its budgets for 2016/2017 and 2017/2018. The circumstances are described by the board President in paragraph 4 of his affidavit filed December 1, 2017, and his questioning on January 8, 2018, at pages 8 – 55. Initially, the Condominium Corporation expected that Boardwalk would redivide units 2 and 3, as described in the Bylaws, which would add to the common property that the Condominium Corporation would be responsible for, thus increasing its expenses. As matters proceeded in the fall of 2018, it became apparent that Boardwalk did not intend to redivide, and instead preferred to cover itself many of the costs that would otherwise be covered by a condominium corporation. The parties negotiated but did not reach an agreement. In January 2017 Boardwalk commenced this litigation. The outcome of this litigation was (and given the possibility of an appeal, still is) uncertain, which was a major consideration for the Condominium Corporation. If, after years of litigation, Boardwalk were successful in avoiding any liability for condo fees, then the Condominium Corporation would need to have enough funds from the condo fees paid by the owners in building 1 to cover its costs, including the costs of the litigation, and it would have to have enough funds to repay Boardwalk the $653,371.84 in condo fees which Boardwalk has paid in protest, plus interest and costs.[49]

[80] The most recent balance sheet in evidence, dated August 2018, shows that the Condominium Corporation has actually under-budgeted for its worst case outcome of this litigation. As of August 31, 2017 total Condominium Corporation assets were $1,238,221.64, but that includes accounts receivable of $653,021.34.[50] Given that Boardwalk has not paid condo fees for the period August 2017 to August 2018, the accounts receivable likely consist almost entirely of Boardwalk's unpaid condo fees. If Boardwalk were successful in this litigation, those accounts receivable would evaporate, leaving total Condominium Corporation assets as of August 31, 2018 at $585,200.30, which would be insufficient to repay Boardwalk the condo fees it paid in protest, plus interest and costs. The reserve fund, which Boardwalk argues has been inappropriately inflated, would be wiped out and the Condominium Corporation would have an unfunded liability to Boardwalk of approximately $68,000 plus interest on $653,371.84 and costs, which Boardwalk is claiming on a solicitor and own client basis.

[81] Boardwalk notes that the Condominium Corporation's capital replacement reserve fund has increased quickly and beyond what the reserve fund study dated October 2016 recommends. Specifically, the reserve fund has increased as follows:[51]

May 31, 2013	$109,727
May 31, 2014	$148,875
May 31, 2015	$200,257
May 31, 2016	$267,103

[49] Harper April 24, 2018 affidavit, para 21
[50] Record, Tab 31, Murti September 17, 2018 undertaking 6 response
[51] Audited annual financial statements 2013 – 2017, exhibit "F" to Harper April 24, 2018 affidavit; unaudited monthly financial statements 2018, Murti September 17, 2018 undertaking 6 response

May 31, 2017	$352,372
May 31, 2018	$580,581
August 31, 2018	$513,846

[82] The October 2016 reserve fund study recommends an annual increase of 2% in the reserve fund contributions, resulting in the following closing balances, after payment of anticipated capital expenses:[52]

May 31, 2016	$267,103
May 31, 2017	$358,214
May 31, 2018	$352,802
May 31, 2019	$449,649
May 31, 2020	$358,786

[83] Boardwalk argues that the Condominium Corporation is in breach of section 38 of the Act and section 23 of the Regulation by increasing the reserve fund beyond what is required for major repairs and replacements, and by failing to provide a copy of the reserve fund study prior to collecting funds for the reserve fund. This argument might apply to a Condominium Corporation in stable circumstances, but it does not apply here, for three reasons.

[84] First, the reserve fund study addresses only the capital replacement and repair requirements for building 1 and the common property. That is understandable, given that it was completed in October 2016, when the responsibility for maintaining buildings 2 and 3 was the subject of negotiations between the Condominium Corporation and Boardwalk. The outcome those negotiations and this litigation were uncertain, so it was prudent for the Condominium Corporation to reserve more than the reserve fund study recommended, in case the Condominium Corporation became responsible for repairs and replacements in buildings 2 and 3.

[85] Second, Boardwalk paid $653,371.84 in condo fees under protest. Those funds had to go somewhere on the balance sheet. It appears the Condominium Corporation split those funds between the reserve fund and the equity account. Perhaps more perfect accounting would have created a third contingency account for this litigation, and recorded those funds there. However, the reality is the funds Boardwalk paid in protest have been reserved pending the outcome of this litigation. Holding them partially in the reserve fund is reasonable and not misleading. In these circumstances, doing so is not a breach of section 38 of the Act or section 23 of the Regulation.

[86] Third, on the issue of delivering a copy of the reserve fund study before collecting contributions to the reserve fund, as required by section 23(6) of the Regulation, the chronology is as follows:[53]

[52] Reserve Fund Study, Murti September 18, 2018 undertaking 1 response, p. 5 and spreadsheet C

- October 17, 2016 the reserve fund study was finalized
- October 25, 2016 Boardwalk's lawyer requested the estoppel documents, including the reserve fund study
- October 25, 2016 the Condominium Corporation's property manager emailed Boardwalk's lawyer that the documents were ready to be picked up upon payment of $152.25
- October 25, 2016 Boardwalk's lawyer emailed the property manager stating that a cheque had been requisitioned and a courier would be sent as soon as possible
- no courier ever arrived to pick up the documents.

[87] The Condominium Corporation made the reserve fund study available to Boardwalk. Given the relationship between these parties, that was all that was required.

[88] Boardwalk also takes issue with the increased amounts paid by the Condominium Corporation for management fees and maintenance. The total for both increased from $52,443 for the year ending May 31, 2016 to $132,040 for the year ending May 31, 2017. In a similar vein, Boardwalk objects to approximately $70,000 spent from the reserve fund in the year ending May 31, 2018, which Boardwalk argues benefited primarily the owners in building 1. These amounts are not large enough, in the context of a budget of $300,000 to $500,000, to warrant judicial intervention pursuant to section 67 of the Act, particularly in light of the deference due to a condominium board with respect to decisions it is required to make.[54]

[89] In these circumstances it was not improper conduct for the Condominium Corporation to budget and incur expenses as it did. Adjustments can be made in the future, as circumstances become more certain.

5. Remedies

[90] Boardwalk's Originating Application seeks several items of relief and the Condominium Corporation's Cross-Application responds and seeks its own items of relief. There is a partial overlap between them. Neither party filed any amendments to those pleadings.

[91] After the Master issued her written decision on May 9, 2017, Boardwalk took the position that the Master had decided only the issue of whether Boardwalk is a developer, and that all other issues, including other relief sought in the Originating Application, remained open. The Condominium Corporation did not agree. Consequently the parties could not agree on a form of Order. This led to their appearance before the Master on June 1, 2017. As a result of that appearance, the Master's first Order, dated June 1, 2017 was filed on June 2, 2017. The numbered paragraphs in that Order read:

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[53] Reserve Fund Study, Murti September 18, 2018 undertaking 1 response, Brunelle February 24, 2017 undertaking 1 response

[54] ***Maverick Equities v Condominium Plan No. 942 2336***, 2010 ABQB 179 at para 50

1. The Originating Application of Boardwalk REIT Properties Holdings Ltd. is hereby dismissed to the extent of it seeking a declaration that Boardwalk REIT Properties Holdings Ltd. is a "developer" under the Bylaws of Condominium Corporation No. 0822896.

2. The Cross-Application of Condominium Corp. No. 0822896 is allowed as follows:

    a. It is declared that Boardwalk REIT Properties Holdings Ltd. is not a "developer" under the *Condominium Property Act* and the Bylaws of the Condominium Corporation No. 0822896;

    b. Boardwalk REIT Properties Holdings Ltd. is directed to comply with the *Condominium Property Act* and the Bylaws of Condominium Corporation No. 0822896 as an "owner" under those enactments.

3. If the parties wish to speak to any further outstanding issues in respect of this Order, they may do so within 45 days of the date of this Order.

4. The parties may speak to costs if they are unable to agree on them within 45 days.

[92] On July 6, 2017 Boardwalk's counsel wrote to the Master and the Condominium Corporation's lawyer listing issues which, according to Boardwalk, were still in dispute.[55] The list includes some things, such as the election of directors to the Condominium Corporation board, which are in the Originating Application, and other things, such as alleged trespass onto Boardwalk's lands, which are not in the Originating Application. The letter asserts that the outstanding issues do not need to be addressed at that time.

[93] On July 13, 2017 counsel for the parties appeared again before Master Schulz and spoke to costs, on which they had made prior written submissions, and any remaining issues arising from the Master's first order. That appearance resulted in Master Schulz's second Order dated July 13, 2017 and filed August 17, 2017. The numbered paragraphs of the second Order read:

1. The Originating Application of Boardwalk REIT Properties Holdings Ltd. is hereby dismissed.

2. The Condominium Corporation is entitled to costs related to the Originating Application and Cross-Application on a solicitor-and-own-client basis.

3. The Condominium Corporation is further awarded costs of its July 13, 2017 reappearance on a solicitor-and-own-client basis.

4. If the parties are unable to agree on the amount of the Condominium Corporation's costs arising from paragraphs 2 and 3 of this Order, the Condominium Corporation may schedule a hearing with the assessment officer to determine the amount of its solicitor-and-own-client costs in this matter.

[94] Boardwalk has appealed both Orders. Boardwalk argues that the Master erred in dismissing Boardwalk's entire Originating Notice in her second Order, when her written reasons

[55] July 6, 2017 letter, exhibit "A" to Harper April 24, 2018 affidavit

addressed only the developer issue. The adequacy of the Master's reasons is not something I need address, as all issues are before me de novo.

[95] The issues in an action are defined by the pleadings. All issues pled in the Originating Notice and the Cross-Application were before the Master, and they are all before me, with the exception of relief sought by the Condominium Corporation which was not granted by the Master. As the Condominium Corporation did not appeal the Master's Orders, her decision on those points is final.

[96] The relief sought in the pleadings falls into five categories:

- declarations
- monetary judgments
- additional parties
- commercial operations and leasing
- costs.

5.1 Declarations

5.1.1 Developer[56]

[97] Boardwalk sought a declaration that it is a developer pursuant to article 1(m) of the Bylaws. The Condominium Corporation sought the opposite declaration together with a declaration that Boardwalk is not a developer pursuant to the *Condominium Property Act*. For the reason's set out above (which differ from the Master's reasons) I reach the same conclusion as the Master. I dismiss Boardwalk's appeal on this point.

5.1.2 Signage[57]

[98] Boardwalk sought a declaration that it is entitled to erect signage on the common property to advertise its units for rent. The Condominium Corporation sought a declaration that Boardwalk is not entitled to erect signage, or alternatively that any such signage be limited to offering Boardwalks' units for sale. The Bylaws prohibit an owner from erecting signage in or on the common property or any unit, except with prior board approval.[58] Boardwalk's argument that it is entitled to erect signs is based on it being a developer and therefore entitled to an exemption from the signage restriction, pursuant to article 44 of the Bylaws. Boardwalk is not a developer, as that term is used in the Bylaws, so its argument on this point fails. I dismiss Boardwalk's appeal on this point. As the Condominium Corporation did not appeal, I make no declaration in its favour, but the Master's Order that Boardwalk comply with the Bylaws as an owner includes the signage provision.

5.1.3 Election of Board Members[59]

[99] Boardwalk sought a declaration that it is not limited under the Bylaws from electing up to five representatives to the Axxess board. The Condominium Corporation sought a declaration

[56] Originating Application para 19, Cross-Application, para 1 – 3
[57] Originating Application, para 20 and 29
[58] Axxess Bylaws, article 62(a)(xvi)
[59] Originating Application, para 21

that Boardwalk may not elect or nominate more than one member to the board. As Boardwalk holds a majority of the unit factors, it is able to elect as many board members as it likes, but they must be owners and otherwise eligible.[60] Those board members will be obligated to act in the best interests of the Condominium Corporation as a whole and with an even hand as between competing interests of the owners.

[100] Boardwalk argues that, because it is a corporation, article 56 of the Bylaws entitles it to name representatives to fill all five board positions. I disagree. Boardwalk is an owner. It is entitled to stand for election to the board, and, if elected, article 56 entitles Boardwalk to appoint a representative to attend board meetings. The Bylaws do not entitle any owner to fill more than one seat on the board.

[101] The Master's Order dismissing Boardwalk's originating application included a dismissal of Boardwalk's application for a declaration regarding the election of directors. I allow Boardwalk's appeal on this point and declare that Boardwalk may exercise its majority voting rights to elect all the members of the board, but they must be owners and otherwise qualified pursuant to the Bylaws.

5.1.4 Condominium Corporation Contravened Bylaws[61]

[102] Boardwalk sought a declaration that the Condominium Corporation "in whole or in part" acted in contravention of its Bylaws. It has not. I dismiss Boardwalk's appeal on this point.

5.1.5 Condominium Corporation Contravened Act, Regulations or Bylaws, or Engaged in Improper Conduct[62]

[103] Boardwalk sought a declaration that the Condominium Corporation has not complied with the Act, the Regulation, or the Bylaws, or has engaged in improper conduct, by "without limitation":

- assessing common expenses against Boardwalk "as a Developer",
- refusing to permit Boardwalk "as a Developer" to place signage on common property advertising its units for lease, and
- charging the applicant "as a Developer" for estoppel documents.

[104] Those declarations are denied because Boardwalk is not a developer as that term is used in the Bylaws. Boardwalk's appeal on this point is dismissed.

5.1.6 Validity of the Bylaws Regarding Common Expenses[63]

[105] Boardwalk sought a declaration that the method for assessing common expenses set out in the Bylaws is valid under section 39(1) (c) (ii) of the Act. The Condominium Corporation sought a declaration that article 47(m) (ii) of the Bylaws, which exempts a developer from

[60] Axxess Bylaws, articles 7(a) and 34
[61] Originating Application, para 22
[62] Originating Application, para 23 and 24
[63] Originating Application, para 25, Cross-Application, para 4

common expenses for a period, is void. For the reasons set out above, each application is allowed in part. To the extent article 47(m)(ii) prohibits the Condominium Corporation from assessing common expenses in proportion to unit factors, it is void, but to the extent it permits assessment on a different basis, it is valid.

5.1.7 Future Assessments[64]

[106] Boardwalk sought a declaration that the Condominium Corporation may not assess common expenses against Boardwalk until a redivision plan has been filed with respect to Unit 2, Unit 3, or both. The Condominium Corporation sought a declaration that Boardwalk is obligated to pay common expenses. Because Boardwalk is an owner, but not a developer, and because the period of exemption from common expenses has ended, Boardwalk is obligated to pay its share of common expenses. The Master's Order that Boardwalk comply with the Bylaws as an owner implicitly includes the declaration sought by the Condominium Corporation. I dismiss Boardwalk's appeal on this point.

5.1.8 Interest[65]

[107] Boardwalk sought a declaration that the Condominium Corporation is not entitled to interest on "improperly assessed" common expenses. Common expenses have not been improperly assessed against Boardwalk. The Condominium Corporation is entitled to charge interest to a maximum of 18% per annum, pursuant to section 40 of the Act and section 76 of the Regulation. The interest rate is set at prime plus 4% in the Bylaws.[66] Consequently, Boardwalk's appeal on this point is dismissed.

5.1.9 Oppression[67]

[108] Boardwalk sought declarations that the conduct of the business affairs of the Condominium Corporation, and the exercise of the Axxess board's powers, have been oppressive or unfairly prejudicial to Boardwalk, or have unfairly disregarded Boardwalk's interests. The particulars relied upon by Boardwalk are the assessment of common expenses, interfering with Boardwalk's signage and charging Boardwalk for estoppel certificates. Those things are expressly authorized by the Act and the Bylaws. The Condominium Corporation has not treated Boardwalk any differently than any other owner. Boardwalk's appeal on this point is dismissed.

5.1.10 Animals

[109] The Condominium Corporation sought a declaration that Boardwalk may not allow its tenants to keep animals either in their apartments or on the common property. Article 62(iii) of the Bylaws prohibits an Owner from keeping an animal in a unit, unless the animal is brought by the Owner to the unit when the unit is first occupied. Boardwalk argues that it would be unreasonable, oppressive and unfairly prejudicial to Boardwalk to enforce this provision against Boardwalk, because pets in buildings 2 or 3 would have little or no impact on the owners in building 1. There is no evidence before me on the impact of pets being banned or allowed, so I reject that argument. The Master's Order that Boardwalk comply with the Bylaws as an owner

[64] Originating Application, para 26, Cross-Application, para 5
[65] Originating Application, para 28
[66] Axxess Bylaws, articles 1(r) and 5(l)
[67] Originating Application, para 33 and 34

implicitly includes the declaration sought by the Condominium Corporation. I dismiss Boardwalk's appeal on this point.

5.2 Monetary Judgments

5.2.1 Common Expenses Paid in Protest[68]

[110] Boardwalk sought an order that the Condominium Corporation return the $653,371.84 in condo fees which Boardwalk paid in protest. As set out above, the Condominium Corporation was entitled to levy condo fees against Boardwalk and Boardwalk was obligated to pay those assessments. Boardwalk's appeal on this point is dismissed.

5.2.2 Damages[69]

[111] "If requested or necessary", Boardwalk sought an order for damages for its losses in relation to its units or flowing from the Condominium Corporation's conduct. The Condominium Corporation sought a declaration that Boardwalk has no cause of action for damages against the Condominium Corporation or any of its directors personally arising out of the grounds set out in Boardwalk's Originating Application. Boardwalk has proven neither a cause of action nor any damage or loss.

[112] Implicit in the Master's dismissal of Boardwalk's Originating Notice is a finding that Boardwalk has failed to prove its claim for damages; the declaration sought by the Condominium Corporation to the same effect would have been redundant.

[113] I dismiss Boardwalk's appeal on this point.

5.2.3 Fees for Estoppel Documents[70]

[114] Boardwalk sought an order that the Condominium Corporation reimburse Boardwalk for fees charged for estoppel documents. This claim is based on Boardwalk being a developer, and consequently entitled to an exemption under article 47 of the Bylaws. This claim fails because Boardwalk is not a developer and the Condominium Corporation is entitled to charge for estoppel documents pursuant to section 74 of the Act. Furthermore, Boardwalk has not yet paid for any estoppel documents, so it cannot be entitled to a refund. I dismiss Boardwalk's appeal on this point.

5.2.4 Parking Stall Rent[71]

[115] The Condominium Corporation sought an order for an accounting and disgorgement of rent received by Boardwalk for parking stalls on the common property. The evidence before me on this point is not clear. However, the Master did not grant this relief and the Condominium Corporation did not appeal, so the issue is not before me.

[68] Originating Application, para 27
[69] Originating Application, para 30; Cross-Application, para 10
[70] Originating Application, para 31
[71] Cross-Application, para 7

5.3 Additional Parties[72]

[116] "If requested or necessary" Boardwalk sought an order giving it leave to add as respondents to its Originating Application one or more individual members of the Axxess board, or the Condominium Corporation's property manager. Boardwalk has not established that any member of the board, or the property manager, is a proper party. In particular, Boardwalk has not described any cause of action it could have against those persons, nor has Boardwalk established that any of them are necessary parties for the determination of the claims made in Boardwalk's application against the Condominium Corporation. I dismiss Boardwalk's appeal on this point.

5.4 Commercial Operations and Leasing[73]

[117] The Condominium Corporation sought a declaration that Boardwalk may not carry on commercial operations from its units, or alternatively, an order that Boardwalk provide written notice of its tenants' names and the rent charged by Boardwalk, together with a signed undertaking from each tenant agreeing to comply with the Bylaws. The Master made no specific order on this point, but did order Boardwalk to comply with the bylaws as an owner. As the Condominium Corporation did not appeal, I make no order on this point, but I do make the following observations.

[118] Because Boardwalk is an owner but not a developer, it is prohibited by the bylaws from carrying on commercial operations from its units.[74] However, Boardwalk is entitled to lease its units, pursuant to section 32(5) of the Act and article 51 of the Bylaws. As Boardwalk is in the business of renting residential units, renting its apartments in the Axxess at Terwillegar is a commercial operation, which is permitted by the Act and the Bylaws.

[119] The Act requires Boardwalk to provide the names of its tenants and the amount of rent being charged.[75] Boardwalk argues that that provision does not apply because it is not renting out the entirety of units 2 or 3, but rather apartments within each building. Boardwalk provides no authority for its interpretation. I interpret "rent the owner's unit" and "renting the unit" in section 53(1) and 53(5) of the Act to include renting an apartment within a unit.

[120] The Bylaws require each owner to provide an undertaking from any proposed tenant in which the tenant agrees to comply with the Act and the Bylaws.[76] However, the Act imposes a condition on each tenancy that the tenant not contravene the Bylaws.[77] Boardwalk submits that requiring a signed undertaking would add nothing to the provision in the Act. I agree.

5.5 Costs

[121] Boardwalk sought costs. The learned Master awarded costs on a solicitor and own client basis against Boardwalk. Both parties presented argument to me regarding the Master's costs decision. The Condominium Corporation argues that the Master's decision on cost is entitled to

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[72] Originating Application, para 32
[73] Cross-Application, para 6
[74] Axxess Bylaws, article 62(a)(i)
[75] *Condominium Property Act*, ss 53(1)(b) and 53(5)
[76] Axxess Bylaws, articles 3(l) and 51(a)
[77] *Condominium Property Act*, s 53(2)(b)

deference. I agree with Boardwalk's submission to the contrary, that a costs decision, like all other aspects of a Master's decision under appeal, is reviewed for correctness.[78]

[122] The costs issue for me includes costs up to the Master's Orders, and costs of the appeal heard by me. The parties have provided me with argument regarding costs up to the Master's Orders only. I would be inefficient and possibly unfair for me to decide the costs issue piecemeal. Therefore, I make no finding regarding costs at this time. If the parties are not able to agree on costs, they may file written arguments on any aspects of costs which remain in dispute, by the following deadlines:

February 21, 2019	Condominium Corporation's submission,
February 28, 2019	Boardwalk's submission, and
March 7, 2019	Condominium Corporation's reply submission, limited to new issues raised in Boardwalk's submission.

[123] In addressing costs, the parties may wish to refer to section 42 of the Act and articles 43 and 49(a) of the Bylaws, as well as any reasonable settlement offers and any proposals to mediate or arbitrate this dispute pursuant to section 69 of the Act.

6. Conclusion

[124] For the reasons set out above, I allow Boardwalk's appeal of the Master's Orders with respect to two declarations, not granted by the Master. I make the following declarations:

1. Boardwalk may exercise its majority voting rights to elect any or all the members of the board, but they must be owners and otherwise qualified pursuant to the Bylaws.
2. Article 47(m)(ii) of the Bylaws is valid, to the extent it permits the Condominium Corporation to levy condo fees on a basis other than in proportion to unit factors, but invalid to the extent it prohibits levying condo fees in proportion to unit factors.

[125] In all other respects, I dismiss Boardwalk's appeal. Costs are reserved.

Heard on the 16th day of November, 2018.
Dated at the City of Edmonton, Alberta this 18th day of January, 2019.

G.S. Dunlop
J.C.Q.B.A.

[78] ***Primrose Drilling Ventures v Carter***, 2008 ABQB 605 at para 14 and 15

Appearances:

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