

Condominium Home Owners Association

A non-profit association serving strata owners since 1976

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Headline: **The New Home Warranty Interim Dividend Payment**

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Pursuant to a court order made September 30, 2003, the Trustee and Interim Receiver for New Home Warranty, KPMG Inc., has been authorized to make interim dividend payments to strata corporations with assessed proofs of claim. As a result, some strata corporations have started to receive a cheque for the interim dividend amount. The question facing many strata councils and property managers is: *how should the interim dividend payment be handled?*

The *Strata Property Act* (the “SPA”) is silent on the issue of how funds received in this circumstance are to be handled. However, in most cases, the Strata Corporation will have raised the funds for the remedial work by way of a special levy. Section 108 of the SPA deals with special levies and section 108(5) states that:

If the amount collected [through the special levy] exceeds that required, or for any other purpose is not fully used for the purpose set out in the resolution, the strata corporation must return the money to the owners in amounts proportional to their contributions.

If the Strata Corporation chose to expand the interpretation of that section to include dividend payments made by NHW, the Strata Corporation must return dividends to the owners in amounts proportional to their contributions. If special levy amounts were raised in accordance with unit entitlement, the return of funds to the owners is made a relatively simple matter. However, there may be situations in which, since the special levy amounts were raised, vendors (past owners) have entered into agreements with purchasers (present owners). If that is the case, then unless there has been some kind of notice of the assignment to the Strata Corporation, it is our view that, as a result of the word “owner” in the section and the definition of an owner under the SPA, the Strata Corporation should pay a strata lot’s share of the funds to the owner as of the date that the payment out is made.

As the payment currently being made is an interim dividend, and at least one further payment is likely, we suggest that, if a strata corporation intends to return the money to the owners in accordance with section 108(5), the payment should be deposited in the Strata Corporation’s contingency reserve fund. The payment should be segregated because the funds are essentially an advance on the total funds to be received from NHW. As further funds are received from NHW (e.g. in the form of a PST rebate or litigation recovery), they can be added to the segregated fund.

In other cases, the Strata Corporation may have paid for the repairs by way of an increased annual budget or money from the contingency reserve fund. If the Strata Corporation increased the monthly strata fees to pay for the repairs, the dividend payments may be considered as a surplus to the operating budget. Section 105(1) of the SPA prescribes how a surplus to the operating fund is to be handled. If the Strata Corporation used contingency reserve funds to pay for the repairs, there may be an obligation to use the dividend payments to repay the fund.

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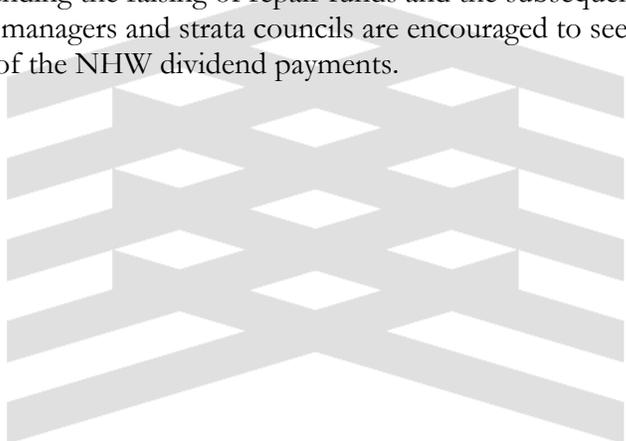
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We have been advised that it is unlikely that the Home Owners Protection Office will pursue reimbursement from an individual owner with respect to the dividend amounts received. Rather than distribute the dividend amount to the owners (if the repair funds were originally raised by special levy) or have the funds treated as surplus to a special levy (if the repair funds were raised through the operating budget), the owners may, by way of 3/4 vote, choose to formally transfer the dividend amounts to the contingency reserve funds.

As noted above, the interim dividend payment is expected to be the first of at least two dividend payments made by KPMG on NHW's behalf. For those strata corporations who have filed Form 2s with the Trustee and are currently involved in litigation to recover repair expenses from those involved in the design and construction of the condominium, there is an obligation to advise the Trustee of any amounts received through the litigation, whether by settlement or otherwise – this information is required to allow the Trustee to calculate final dividend payments to all creditors.

As the circumstances surrounding the raising of repair funds and the subsequent financial priorities will vary by strata corporation, property managers and strata councils are encouraged to seek their own legal advice with respect to the management of the NHW dividend payments.



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