

COVER STORY



# AVOIDING SPECIAL ASSESSMENTS





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A special assessment is a fundraising tool temporarily imposed on owners by a condominium's board of directors to solve a financial crisis. A board must sometimes contemplate making this difficult decision when it is in the best interests of the condominium community it serves. Some of the most common circumstances justifying this avoid-at-all costs method to raise funds are as follows:

- When the reserve fund is “inadequate” or has insufficient funds to complete an unavoidable emergency repair resulting from the unanticipated failure of an expensive common element (e.g., a boiler, chiller, etc.);
- When the reserve fund is “under-funded” such that there are inadequate funds to support an earlier-than-anticipated expenditure (per the approved reserve fund study); and
- When there is an operating fund deficit that is compromising the corporation’s ability to adequately fund the reserve fund, pay operating expenses on time, etc.

Each financially distressed condominium corporation has its own unique circumstances and reasons for imposing a special assessment, so carefully consider and analyze the situation at hand before proceeding down this challenging path. Another overriding principle influencing this important decision is the board’s mandate to

ensure that the corporation remains safe and secure for owners, residents and visitors.

The board ought to make the decision “to levy or not to levy,” and about the timing of the payment, in consultation with the corporation’s team of professionals, including, but not limited to, the engineer, auditor, and solicitor. As part of the due diligence process, the board or the corporation’s solicitor should review the current (registered) bylaws, which often address important aspects and steps (i.e., notice requirements, timing, providing reasons, collection terms, interest charged for late payments, etc.) that the board needs to follow. If the board incorrectly implements the special assessment, it risks rendering the assessment impossible to collect and invalidating any liens registered against defaulting units.

Depending on the urgency of the need for additional funding, this unwelcome financial obligation imposed on all owners could take the form of a one-time lump-sum payment of thousands of dollars or a series of hundred-dollar payments, spread over months, or even years, in addition to the existing monthly maintenance fees payable to the corporation. The payment terms will depend on the how quickly the funds are needed — the greater the urgency, the more quickly the funds must be collected by the condominium corporation. Likewise, the less urgency, the less quickly the funds must be collected.

The board has exclusive authority to impose this levy and once imposed, the funds are collectible by the corporation from owners. The bylaws may also include a provision allowing the corporation to charge interest for late payments (and other costs), with unpaid amounts subject to the same lien process used for outstanding common element fees. If an owner chooses to unilaterally ignore or defer this obligation, within the statutory 90-day period, the corporation would be in a position to register a lien against the unit for the outstanding special assessment amount. If the lien is left unresolved for too long (timing varies depending upon the circumstances of each corporation), the corporation may have no other recourse but to dispose of the unit by way of a power of sale, which may result in the owners losing their home.

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# Consider compressing the collection period of the special assessment, if at all possible, since a lengthy special assessment will cause the corporation to become stigmatized.

To avoid owner push-back, or even a potential rebellion, a well-run corporation should clearly communicate the reasons for the special assessment using various methods (e.g., meetings, notices, newsletters, etc.) and the board should be committed to preparing owners well in advance, no matter how urgent the circumstances. Owners don't want to be blind-sided by a letter from the corporation advising them that as of the first of the subsequent month, they will now be required to pay an additional amount each month, for 12 consecutive months, to their condominium corporation. If mishandled, owners will likely challenge the board's decision to proceed with a special assessment by exercising their rights to requisition a meeting (per section 46 of the Act) to remove one or more board members from office.

Another probable outcome of having a special assessment levied is that resale values within the condominium complex will decline, or at best, remain flat, as this additional financial burden that unit owners have to pay must be disclosed in paragraph 11 of the prescribed status-certificate form, for all prospective buyers to consider prior to firming up their purchase. This disclosure must continue until the special assessment ends. It is thus in the best interest of the condominium corporation for the board to consider compressing the collection period of the special assessment, if at all possible, since a lengthy special assessment will cause the corporation to become stigmatized. This stigma could have negative repercussions such as the denial of mortgage insurance by one or more providers.

To avoid the many problems that special assessments create, boards may take preventive and pre-emptive measures, including, but not limited to:

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- Budgeting wisely using historical data;
- Closely monitoring the corporation's actual financial performance, as compared with the forecasted budget;
- Raising the annual budget steadily, in keeping with utility price escalations, wage and cost-of-living increases, union contracts, and other factors, rather than avoiding inevitable fee increases;
- Employing and seriously considering advice from professional management;
- Consulting with the corporation's professionals (e.g., auditor, engineer, lawyer, etc.) and heed their advice when proffered, especially when the issue relates to complex and important decisions that could have a long-term effect on the financial or physical health of the property;
- Avoid deferred maintenance and embrace preventive maintenance of common elements and assets, as is fiscally viable;
- Make an effort to attend and fully participate in all board meetings to ensure that one is aware of the critical issues and be prepared to carefully consider the pros and cons of each potential option;
- Ensure that one's corporation is in compliance with the Act, including such key requirements as maintaining an 'adequate' reserve fund, holding annual general meetings (AGMs), with the auditor presenting the approved audited financial statements, conducting and completing a reserve fund study at least every three years;
- Stay current with and plan for regulatory and municipal bylaw changes that may have financial implications for the reserve fund;
- Maximize the reserve fund yield by investing in allowable instruments; and
- Communicate with owners to remain transparent and inclusive of the community.

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By following these recommendations, a board can hopefully avoid the unpleasant task of having to levy a special assessment. Although unpleasant, this option is most often preferred to increasing the common element fees, as the latter measure is typically not temporary. Ultimately, one of the best ways to avoid special assessments is for the board to refuse the temptation to take financial short-cuts. Although these short-cuts will likely offer short-term benefits, including popularity with owners, more importantly, they will likely have long-term negative financial repercussions that will haunt the community in the future. □

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