



# Civil Resolution Tribunal

Date Issued: October 17, 2017

File: ST-2016-00119

Type: Strata

Civil Resolution Tribunal

Indexed as: *A.P. v. The Owners, Strata Plan ABC*, 2017 BCCRT 94

BETWEEN:

A.P.

**APPLICANT**

AND:

The Owners, Strata Plan ABC

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Shelley Lopez, Vice Chair

## INTRODUCTION

1. The applicant A.P. (owner) owns strata lot X, also known as unit 701, in the respondent strata corporation The Owners, Strata Plan ABC (strata). This dispute is about the strata's alleged failure to enforce its noise bylaws with respect to the

owner's complaints about noise coming from the unit above, unit 801. The owner is self-represented and the strata is represented by a council member.

2. The parties' names have been initialized in the published version of this decision to protect the identity of a minor who is not a party to this dispute.

## **JURISDICTION AND PROCEDURE**

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 3.6 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness. The tribunal also recognizes any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
4. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I heard this dispute through written submissions because I find there are no significant credibility issues or other reasons that might require an oral hearing.
6. Under section 48.1 of the Act, in resolving this dispute the tribunal may make one or more of the following orders:
  - a) order a party to do something;
  - b) order a party to refrain from doing something;
  - c) order a party to pay money.

7. Section 48.1(2) of the Act is substantially similar to section 164 of the *Strata Property Act* (SPA) and addresses remedies for significant unfairness in strata property disputes. Section 48.1(2) provides that the tribunal has discretion to make an order directed at the strata, the council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights.
8. With the parties' consent, I have proceeded to issue this decision having disabused myself of one piece of evidence that was inadvertently included in the evidence provided to me and which referenced confidential settlement negotiations.

## **ISSUES**

9. These are the issues in this dispute:
  - a. Has the strata conducted an appropriate investigation of the owner's noise complaints about unit 801?
  - b. Has there been a contravention of the noise bylaw?
  - c. Should there be an order that the strata enforce its noise bylaws?
  - d. Should there be an order that the strata arrange for a professional inspection of the unit 801 flooring under their carpets to ensure it meets the requisite criteria?
  - e. Should the owner be reimbursed \$225 he paid in tribunal fees?
  - f. Should the owner be reimbursed \$4,450 in legal expenses the owner incurred before this tribunal dispute?

## **POSITION OF THE PARTIES**

10. The owner wants the strata to enforce its noise bylaws. In particular, the owner says that the strata has failed to properly investigate and respond to the owner's

noise complaints about unit 801, noting in particular that since January 2016, the unit 801 owner has been a strata council member. The owner questions the fairness of the strata “investigating itself”. The owner also says the strata has not produced any documentation of its claimed investigation of unit 801 and the owner’s noise complaints, other than the noise testing that was done with the owner present in November 2016. The owner wants the unit 801 flooring investigated to see if it complies with the strata’s bylaws for underlay. The owner further says that there appears to be nothing in writing to indicate that unit 801 has paid the fine the strata levied against it on July 15, 2017.

11. The strata says that before it can enforce the noise bylaw, the strata must first substantiate a complaint with evidence that the reported noise was unreasonable under bylaw 4.1. Here, the strata was not able to witness the noise first-hand, and so it conducted noise testing that the strata found produced normal results. As for the flooring issue, the strata’s bylaw 9.6 does not specify underlay for carpet or tile, which is the original flooring in unit 801, although unit 801 has underlay under the existing carpet. The strata says the owner is overly sensitive to sound, noting that in the last 10 years the strata has not received other noise complaints apart from extremely rare one-time events such as loud music playing. While the unit 801 owner is on council since January 2016, 2 other council members have investigated and responded to the owner’s noise complaints. As for the fine levied in July 2017 against unit 801, the strata says that it was particularly concerned about a litter complaint, and that the noise issues were still being discussed. Since, the unit 801 owners have advised that they will be responding to the strata’s letter, with the implication that the strata’s position on collecting that fine is not finalized. The strata says that for confidentiality reasons, it does not copy the owner with its communications with unit 801.

## **EVIDENCE & FINDINGS**

12. While I have read all of the material provided, I have only commented below on the evidence and submissions necessary for this decision.

13. The strata is a 48-unit building that has residential units on 13 floors. The owner's unit 701 is on the 7<sup>th</sup> floor. Unit 801, the subject of the owner's noise complaints, is directly above the owner's unit. The strata's council has 6 members, and the strata is self-managed with 3 council members having lived in the building for over 10 years and 2 members having been on council for that time.
14. The strata filed amended bylaws in 2009. The relevant bylaws may be summarized as follows:
  - a. **Bylaw 4.1(b) and (c):** A resident or visitor must not use a strata lot in a way that "causes unreasonable noise" (b) or "unreasonably interferes" with the rights of others to use and enjoy the common property or another strata lot (c).
  - b. **Bylaw 9.6:** Owners may install hardwood or laminate flooring in any area of their strata lot, if an acoustical underlay with a minimum IIC<sup>1</sup> rating of 55 is used.
  - c. **Bylaw 21.3:** No observers may attend those portions of council meetings that deal with bylaw contravention hearings under section 135 of the SPA.
  - d. **Bylaw 27:** The strata may fine an owner or tenant \$200 for each bylaw contravention (bylaw 27.1). The council must, "if it determines in its discretion that a resident is in repeated contravention" of any bylaws, levy fines that must be immediately added to the strata fees (bylaw 27.2).
  - e. **Bylaw 43.2:** Residents are responsible for the conduct of children residing in their strata lot, including ensuring that "noise is kept at a level that will not disturb the quiet enjoyment of others".
15. The owner's noise complaints about unit 801 date back to perhaps 2012 and pre-date the current owner's residency. For those older issues, there is insufficient evidence before me that the owner complained to the strata around the time the

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<sup>1</sup> Impact Insulation Class

noise occurred. I find there was a significant gap in time with only isolated complaints about the former unit 801 occupants that are not sufficiently detailed or documented in the evidence before me.

16. Thus, for the purposes of this dispute, I consider the relevant noise complaints to be those against the current occupants of unit 801, which the owner says began around July 2015, although the noise complaints at that time are not particularized in the evidence before me. In late November 2015, the owner intended to leave his handwritten note outside the door of unit 801, but he says a strata council member intercepted it and said the strata would address it with the unit 801 owners.
17. At this point, I make the following observations from my review of the owner's numerous and detailed notes of his concerns about noise, which on several occasions involved calls to the police. Notably, with perhaps two exceptions in November 2015 and January 2016, none of these noise concerns were relayed to the strata at the time the noise was occurring.
18. First, the owner in late 2015 complained about the sounds of construction, but those types of noise complaints were generally not repeated later, or at least they were not detailed in any of the contemporaneous concerns expressed to the strata. I accept the strata's evidence, which includes a handwritten statement from the unit 801 owner, that there have been no substantial renovations in unit 801 and even if there had been some construction, the related noise was apparently relatively transient.
19. Second, the owner states that "any kinds of noise in this building, however slight, amplifies". The owner submits, "Clearly there are real defects with the flooring and compositions in unit 801 for sound and noise to be transmitted to that extent through carpets and concrete". The strata disputes this claim, noting that in the last 10 years there have been no noise complaints from other units apart from isolated and rare complaints such as due to loud music playing. The strata also says it has confirmed that the flooring in unit 801 is the original carpet (75%, in living room and bedrooms) and tile (25%, in kitchen, bathroom, and hallway), which is

consistent with the statement provided from unit 801. As further discussed below, on a balance of probabilities I accept this evidence.

20. As noted by the strata, the bylaws do not require underlay under carpet or tile, although I also accept the strata's evidence that there is underlay under the carpet because it could be felt when walked upon.
21. Third, the bulk of the owner's noise complaints about unit 801 appear to be about the teenaged occupant, which engages both bylaw 4.1 and bylaw 43.2. The owner has used a variety of adjectives in his numerous noise logs to describe noises: booms, bangs, thuds, crashes, "heavy rapid pounding footfalls", rumblings, dragging and dropping objects, and to a lesser extent hollering and loud voices. Given the owner's detailed logs, I find for the most part that the owner's complaints are about heavy-footed fast walking. The owner has made it clear he is not complaining about the sounds of vacuuming, a garburator, or even loud television or music.
22. Fourth, the owner says his kitchen ceiling plaster has ruptured, and says that is evidence that the noise and related vibrations from unit 801 was so loud that it caused that rupture. The strata says this is speculation and most likely the rupture was due to humidity. The applicant bears the burden of proof in this dispute, and the evidence must be established on a balance of probabilities. I have no expert evidence before me about what might have caused the rupture, and in the circumstances I am not prepared to draw any conclusions about it.
23. I turn then to the timing of the particular noise complaints since 2016, some of which were communicated through the owner's then-lawyer, and the strata's response to them (my bold emphasis added):
  - a. *July 26, 2016*: The owner's lawyer wrote the strata and noted the owner's reports of "numerous incidents of noise" coming from unit 801 above since August 2015, which were said to have been reported by telephone and in writing. The lawyer asked the strata for copies of all correspondence between

the council and the unit 801 owner about the noise and other bylaw breaches and evidence of any fines, and expressly stated this was a request for documents under section 36 of the SPA. The copy of the lawyer's letter provided to the tribunal had a handwritten annotation that no documents were provided to the owner and that none existed. The owner's lawyer further wrote that if the strata had not yet written to the unit 801 owner, the lawyer demanded an explanation as to why the strata had not acted on any of the owner's complaints under the strata's bylaws.

In the evidence before me, the owner called a council member on January 16, 2016 to come listen to the noise that occurred between 7:30p.m. and 9:45 p.m., and the council member declined saying he would attend at unit 801 on his way out that evening. Up to July 26, 2016, there is otherwise no evidence before me of specific complaints being made to the strata at the time the noise was occurring, for the period of January to July 26, 2016, although the owner has separately documented noise occurring on March 18, July 9, and July 18, 2016.

- b. *July 27-August 1, 2016*: In a letter to his lawyer, provided to the tribunal, the owner wrote that on each day during this period, there was noise occurring "day long" and often occurring well into the late evening. While the owner used various descriptions, they amount to noise complaints of heavy walking and jumping, all about the teenaged occupant in unit 801 and his friends. The owner made a police report on July 31, 2016, but there is no indication from that report that the police were able to substantiate the noise concerns.

There is no indication in the evidence before me that the owner's noise complaints arising from the July 27 to August 1, 2016 incidents were reported to the strata while the noise occurred.

- c. *August 5, 2016*: The strata responded to the owner's lawyer, and stated it had "conducted a thorough investigation" of the owner's noise complaints and concluded they were unsubstantiated. Among other things, the strata wrote:



- i. The strata has not been contacted by the police about any of the owner's claimed noise complaints.
  - ii. If the owner wished to pursue the noise concerns further, the strata proposed that he submit evidence of his claims, and agree to council members performing simple noise test by walking, talking, moving chairs etc. within unit 801 and observing the sounds within unit 701.
- d. *September 10, 2016*: At 210 a.m. the owner called the police to report noise from unit 801. According to the police report, the police spoke with someone in unit 801 and advised them of "the incident" and the occupant apologized for it. The owner noted that the police constable acknowledged he knew the unit 801 owner and his son.

There is no indication in the evidence before me that the owner directly reported this noise complaint to the strata at around the time the noise occurred or even the next day.

- e. *November 8, 2016*: The owner's lawyer wrote to the strata following a council hearing with the owner, which they had requested in September 2016, and noted the owner was pleased the strata was going to take further steps to investigate the noise and enforce its noise bylaw. The lawyer confirmed the strata could coordinate with the owner and the unit 801 occupants for noise testing, and, that the strata council would provide the owner with a telephone number that he can call "at a reasonable time" so that a council member could come and hear the sounds made by the teenaged occupant of unit 801 and his friends. The lawyer also confirmed that the council had acknowledged that fines would be appropriate for ongoing bylaw breaches.
- f. *November 26, 2016*: Noise testing was conducted informally, without testing equipment. Two council members, the owner, and two witnesses for the owner were present.

g. *November 28, 2016*: The strata responded to the owner's lawyer's November 8, 2016 letter, noting that despite the owner's allegations the strata does not have sufficient evidence to support a noise violation or associated fine. In particular, the strata stated that they had been advised the unit 801 teenager had apologized to police on September 11, 2016 because he was intimidated by the sudden police presence and "did not quarrel at the time" to say there was in fact no unreasonable noise. The strata noted that unit 801 continued to dispute that its occupants were causing unreasonable noise and that to date the strata had not witnessed the noise problem. The strata said it would levy fines for ongoing bylaw breaches once there was sufficient evidence. The strata then set out its findings from the noise testing:

- i. *'Almost daily foot stomping'*: the noises are mainly associated with "**normal foot traffic**", particularly in the tiled hallway and kitchen. If aggressive jumping were performed on carpeted areas, that could be heard in unit 701 as well.
- ii. *'Frequent booms, bangs, crashes, thuds, knocking, and dropping and rolling of objects' and "hammering, drilling, vibrating sounds ... and loud voices"*: Although not all noises could be reproduced completely, sliding chairs, shutting doors, watching TV and vacuuming noises were made. **The loudest sounds were from sliding chairs and intentional door slamming. The unit 801 owner agreed to put felt tipped boots or equivalent to prevent sliding chair noises and to be mindful of slamming doors** (which he claimed to rarely occur). The strata said "other sounds range from faint to inaudible in volume". The strata wrote that as per its August 5, 2016 letter, there have been substantially no renovations in unit 801, and that the owner had declined the invitation to confirm that fact in person. [The owner disputes that he was given that opportunity to personally inspect unit 801.]

- iii. *“Walking in stiletto shoes”*: The unit 801 owner said shoes were rarely worn inside, and if they were they were low-heeled.
- iv. **The strata concluded the noises observed during testing were reasonable and were identical to noises that would be heard in other units in the building under similar circumstances.** The strata in fact had conducted similar testing between units 801 and 901, to confirm this fact.
- v. The strata stated it believed the owner was particularly sensitive to noise, noting past noise complaints about other neighbouring units due to television noise and noise from dinner guests. The strata wrote that it believed the owner may have been accustomed to the relatively noise-free atmosphere when an elderly person occupied unit 801 for about 2 decades. The strata noted the owner had the telephone numbers of 2 council members that he could use to report any observed unreasonable noise levels.
- h. *November [date indecipherable] 2016*: The owner called the police who spoke with the unit 801 teenager, according to the owner. There is no indication in the evidence before me that the owner directly complained to the strata at the time this noise occurred.
- i. *February 2 or 4, 2017*: The owner wrote heavy walking began around 10:30 a.m. and continued till 2:30 p.m. This day the owner provided a copy of the Dispute Notice to a council member at which time the owner told him about the day’s noise from unit 801. The owner says the unit 801 occupants returned home around 5 p.m. at which time the same noises returned and continued on and off throughout the evening and into the night.
- j. *February 4, 2017*: A handwritten letter from unit 801 states the owner’s noise complaints are unreasonable. Unit 801 says they have not done any major renovations and that the flooring in their unit is original. They added cloth

“slides” under the rubber feet of their kitchen stools. The adult owners have not allowed their teenage son to have multiple friends over when they are not home. They feel harassed by the owner’s ongoing complaints, given the noise tests produced ‘normal’ results. The unit 801 owners say that the building may have been built without sufficient soundproofing, but they cannot be held responsible for that. They say that they are human and cannot be 100% quiet, and will, for instance, occasionally drop a spoon or occasionally wear shoes in the house.

- k. *February 12, 2017*: The strata wrote the owner’s lawyer, noting that for 3 of the police reports made by the owner, there was no noise observed by the police upon their arrival. The strata also noted that the unit 801 residents dispute the claims they caused unreasonable noise. For a 4<sup>th</sup> police report, the report notes no noise was observed by police and that the teenage occupant of unit 801 was advised of the concerns.

The strata says the police reports do not support the owner’s noise complaints. The owner says the police do not share all information with a strata and thus a conclusion adverse to the owner should not be drawn. The owner also submits that the unit 801 teenager must have stopped noise-making when he saw the police cars pull up on the street below. This all said, the fact remains that the police reports in the strata’s hands do not substantiate the owner’s noise complaints.

- l. *March 3, 2017*: The strata wrote the owner’s lawyer to provide a summary of the work done by the strata to resolve the owner’s noise complaints. In particular: the strata had given 2 council members’ numbers to the owner, interviewed the unit 801 owner and his family about the noise complaints, conducted noise tests, visually inspected unit 801 for evidence of substantial renovations and general orderliness, obtained and reviewed the owner’s police reports, and responded to the tribunal’s requests for information. **The strata noted that to date it had not been contacted by the owner to witness any**

**of the unreasonable noises as they occur.** The strata also noted it had not received a response to its November 28, 2016 and February 12, 2017 letters about its findings.

- m. *March 7, 2017:* The owner wrote the strata, and among other things noted that the 3-month delay in his responding to the strata's findings was intentional, so as to see if there were any improvements in the noise and to consider and report accordingly. The owner had also noted his lawyer was no longer representing him. The owner stated that the noise testing done by the strata revealed "loud, audible foot-stomping, jolting, thuds, booming, rumbling" that were all "alarming and disturbing", and as noted above the owner had witnesses to the noise testing. **The owner said his focus was on the "rapid, pounding, heavy footfalls in bare feet or in hard heeled shoes"**. The owner said the noises heard in unit 701 throughout the tests were not the normal average, everyday types of noises. **The owner wrote that in future he would call the police first, not the strata**, given that in 2016 he called a council member on "at least three occasions" who "failed to act and to follow up". These "three occasions" are discussed further below.
- n. *March 20, 2017:* The strata wrote the owner to propose a meeting, given the owner's disagreements set out in his March 7, 2017 letter, and in particular noted that in addition to the owner, his lawyer, and council, the disputing owners of unit 801 should ideally be present so that they can respond directly to the owner's concerns.
- o. *March 27, 2017:* The owner responded to the strata that its proposed meeting would have to be delayed, and noted that the "noises and disturbances" from unit 801 continue daily, and specifically the unit 801 teenager's "running, scampering, dropping objects, rumbles, thuds, loud startling booms" with heavy pounding footfalls continuing each day and night. Given the denials by unit 801, the owner wrote that he saw no purpose in meeting with those owners.

- p. *July 13, 2017*: The owner notes the owners of unit 801 were away at this time, and are therefore relying upon their teenage son for details and information. In the owner's incident report to the strata for this date, the owner described noises beginning at around 6:15 p.m. and that the owner knocked on unit 801's door at around 9:45 pm and spoke to the teenage occupant about the noise and litter from unit 801 that had dropped onto unit 701's balcony. The owner noted he declined the teenager's offer of his phone number so the owner could call if he felt things were too noisy, as the owner felt if the teen was truly sorry he and his friends ought to stop causing the noise.
- q. *July 15, 2017*: The strata wrote the owner acknowledging his "incident report" dated July 13, 2017, along with his detailed log of recent events. In its letter, the strata stated that based on the information provided it would levy a fine of \$200 to unit 801 for violation of bylaw 4.1.

Based on the information before me, it is not clear whether the strata had complied with section 135 of the SPA before levying a fine against unit 801, but the validity of that fine is not before me. The strata did add in its letter that if unit 801 should dispute the incident report, the strata would contact the owner. The strata advised the owner to continue to contact the council with reports of any future incidents. The strata submitted to the tribunal that unit 801 disputes this fine and has requested a council hearing. The strata further explained that the fine was to address the litter, noting the noise complaints were still under discussion.

- r. *August 2017*: The owner called the police and the owner says the police spoke with the resident teenager. Apart from this and the November 2016 occasion, the owner says that all other times the teenager did not answer the door when the police called and remained quiet until the police left. The owner notes police cruisers are visible from unit 801.

24. I turn then to the parties' further submissions.

25. The owner says there were further noise disturbances but he did not call the police about them, because doing so could “possibly result in lasting negative psychological effects” on the resident teenager in unit 801. Given the owner’s allegation is that the strata has failed to properly enforce its noise bylaws, I find there is little I can draw from this vague and broad allegation about additional noise, particularly given the incidents were apparently not brought to the strata’s attention at the material time. My focus must be on the evidence of the complaints made to the strata and when, and what the strata did in response to them.
26. In response to a submission by the strata, the owner says he does not have access to any recording equipment and so was unable to record the offending noise.
27. As noted above, the owner says he invited the strata to unit 701 on “three different occasions” when there was noise from unit 801, but did not specify dates in that particular submission. Elsewhere, the owner said the strata came only twice, once in November 2015 and in November 2016 to do 55 minutes of noise testing and have a 25 minute discussion between the parties and the owner’s witnesses. Given the above chronology, I infer the third invitation occurred on January 16, 2016 but that the strata declined and said they would instead attend at unit 801 directly. The owner says these facts contradict the strata’s claim of having spent about 60 hours investigating the noise complaints.
28. There is little documentation from the strata in this dispute. Other than the February 4, 2017 statement written by the unit 801 owners, all of the strata’s documents are correspondence exchanged with the owner or his lawyer. There are no council meeting minutes or other memos before me that address the strata’s internal investigation of the unit 801 noise complaints. I have only the strata’s submissions, which note they have not copied the owner with respect to its communications with the unit 801 owners, so as to maintain confidentiality.
29. The strata submits that it met with and spoke with the unit 801 owner. The strata submits that it has not acted negligently, given its investigations. The strata

advised the owner that there was no evidence of unreasonable noise from unit 801. As noted above in the correspondence, the strata also advised the owner that should unreasonable noise occur, the owner could contact the strata council to witness the noise first-hand.

30. I find the absence of documentation does not necessarily mean the strata did not spend time on the matter. I accept there were telephone calls and meetings. That said, I do not need to address whether the strata in fact spent 60 hours of time. The issue is whether based on the evidence before me the strata acted reasonably in handling the owner's noise complaints and in making their determination that the evidence did not substantiate a disputed noise complaint.
31. As for the claimed legal fees, the owner provided invoices from his lawyer for legal services between June and November 2016, totaling \$4,455.65. The owner also provided August 14, 2017 invoice from a secretarial company that assisted the owner in July 2017 by typing, proofing, printing, and electronic storage of some of his dispute-related documentation, totaling \$725.00.

## **ANALYSIS**

32. The strata operates through its strata council, including the enforcement of bylaws (sections 4 and 26 of the SPA). Each council member must act honestly and in good faith with a view to the best interests of the strata, and to exercise the care, diligence, and skill of a reasonably prudent person in comparable circumstances (section 31 of the SPA).
33. I turn first to the owner's allegation that the strata was improperly investigating itself, given the unit 801 owner was a council member since January 2016. I find this allegation is not proven, simply because there is no evidence to contradict the strata's evidence that the unit 801 owner did not participate as a council member in the noise complaint investigation or in the strata's decisions. Certainly, the unit 801 owner did not attend the noise testing meeting in unit 701. Further, the tone of the February 4, 2017 letter from unit 801 suggests that they are not participating in



the strata's decision-making. The owner has not provided any evidence to suggest the strata has been improperly swayed by unit 801, other than speculation and his interpretation of the strata's position that to date has not substantiated the owner's noise complaints. Based on the evidence before me, I find the strata has not failed to act in good faith. I say the same of the owner's broad allegations that the strata has been negligent in its investigation of the noise complaints. While it might have been easier to adjudicate this dispute if the strata had maintained more internal documentation of its investigation, there is no requirement for the strata to document the investigation and the evidence above simply does not support that negligence allegation, as discussed further below.

34. I turn then to the issue of what must the strata do when faced with a noise complaint. Once it has been determined that a bylaw contravention has occurred, council does not have the discretion to choose not to enforce a bylaw, as having such discretion would destroy the predictability provided by giving notice to owners of the bylaws by filing them in the Land Title Office. Enforcement of bylaws is mandatory, as set out in section 26 of the SPA.
35. However, in the case before me, the strata has not chosen to not enforce a bylaw, as perhaps suggested by the owner. Rather, the strata council has determined in its discretion that it has not been established there was a contravention of the noise bylaw at all.
36. Section 27(2) of the SPA states that the owners may not interfere with council's discretion to determine, based on the facts of a particular case, whether a person has contravened a bylaw, whether a person should be fined, or the amount of the fine.
37. Section 135 of the SPA sets out a procedure for investigating a complaint, which includes providing the subject owner the opportunity to be heard, before any fine is levied. This protection is for the benefit of the owner that is the subject of the complaint, not the owner making the complaint. Notably, there is otherwise no particular complaint procedure set out in the SPA and a strata council is permitted

to deal with complaints of bylaw violations as the council sees fit, so long as it complies with the principles of procedural fairness and is not “significantly unfair” to any person who appears before the council (*Chorney v. Strata Plan VIS 770*, 2016 BCSC 148).

38. In *Chorney*, the court noted it was “the nature of the investigation and the procedures undertaken by the strata council that the petitioners take issue with and say that the process throughout the investigation was significantly unfair to them”. In that case, the issue was whether second-hand smoke amounted to a nuisance under the bylaws, in the absence of a no-smoking bylaw. In *Chorney*, the petitioner owners asked the court for an order for a “comprehensive complaint procedure” to address the strata’s allegedly egregious handling of their complaints. The court noted the strata’s conclusion that while it took the petitioners’ complaint seriously, “without any real evidence, and with conflicting accounts” it was very hard for the strata to make a judgment in that case. I find that description to be similar to the facts before me. The court in *Chorney* then concluded (my bold emphasis added):

While it is clear the petitioners disagree with the steps taken by council to try and resolve these matters and that another council might very well not have elected to proceed in such a fashion, that is not the test. **The test is whether, in these circumstances, the action taken by the council was significantly unfair.** In this regard, I am not satisfied the petitioners have established that the conduct of council met this threshold level of significantly unfair.

39. The phrase “significantly unfair” has been interpreted to be simply a plain language version of earlier terms “oppressive or unfairly prejudicial” (see *Chow v. Strata Plan LMS 1277*, 2006 BCSC 335).
40. As noted in *Chow*, oppressive conduct is “burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith”. For reasons discussed further below, I cannot conclude that the strata’s conduct falls within any of those

descriptions. Put another way, I cannot conclude that the strata has been significantly unfair towards the owner.

41. In the recent decision in *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763, the court restated the test for determining significant unfairness as set out in *Dollan v. Strata Plan BCS 1589*, 2012 BCCA 44. While that test was considered under section 164 of the SPA, as referenced above I find it would equally apply to an analysis under section 48.1(2) of the Act. In particular, in *Watson* the court stated (my bold emphasis added):

The test under s. 164 of the [SPA] also involves **objective assessment**. [The *Dollan* decision] requires several questions to be answered in that regard:

- 1) What is or was the expectation of the affected owner or tenant?
- 2) Was that expectation on the part of the owner or tenant objectively reasonable?
- 3) If so, was that expectation violated by an action that was significantly unfair?

42. I also note the court's further comments in *Dollan* (my bold emphasis added):

There is no doubt that in making a decision the Strata Corporation must give consideration of the consequences of that decision. However, in my view, **if the decision is made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others. ...**

43. So, what was the owner's expectation of the strata in respect of his noise complaints, and was that expectation objectively reasonable? If it was objectively reasonable, did the strata violate the owner's expectation in a way that was significantly unfair?

44. The owner expected the strata to conduct testing in the flooring of unit 801 and also to require the unit 801 occupants to produce less noise. A significant challenge with the latter position is that the owner's primary complaints are from the sound of heavy, fast walking that the owner says are a problem whenever the unit 801 occupants are home, although his primary focus in 2016 was on the teenaged occupant and his friends. By the owner's own account, walking should not produce the level of noise he experiences, which causes him to question the flooring in unit 801. It would not be reasonable for the strata to conclude a noise bylaw was violated as a result of walking, although continuous jumping and crashing sounds would likely qualify.
45. The primary and significant challenge for the owner is that, with perhaps the exception of January 16, 2016, he has failed to contact the strata while the noise was occurring, even after being given phone numbers to do so. Based on the owner's own log that he later provided, there were a number of occurrences where the alleged noise occurred during the daytime or early evening, and yet he did not contact the strata. I find that based on the owner's own evidence, he invited the strata to unit 701 only three times (November 2015, January 16, 2016, and November 2016), and on 2 of those occasions they attended (November 2015 and for the November 2016 noise testing). Overall, I find the owner has not provided an adequate explanation for why he did not contact the strata to witness the noise first-hand on the alleged numerous other occasions, given his evidence that the noise continued essentially daily.
46. To the extent the owner expects the strata to investigate noise complaints it receives and enforce bylaws when a contravention has been determined, that is a reasonable expectation. However, to the extent the owner expects the strata to act on noise complaints that are not made while the noise is occurring and there is an opportunity to do so, that is not reasonable when the owner knows it is disputed there is unreasonable noise.

47. Notably, as detailed above the strata took significant steps to communicate with the owner and his lawyer in 2016, including the noise testing, and clearly obtained at least the February 4, 2017 response from unit 801. I find that the strata has reasonably attempted to address the owner's noise concerns, given that the strata has not in at least a year and a half been contacted when the noise is occurring.
48. I accept that the owner finds the noises from unit 801 to be unreasonable. However, I find the test is not necessarily just what the owner experiences. Rather, the test is an objective one. A large part of this dispute turns on the differing assessment of what was heard during the November 2016 noise testing. As noted above, the owner did not provide any witness statements to the tribunal although it was open to him to do so. I do not consider it sufficient for the owner to have simply said he could have those witnesses provide evidence if necessary, as the tribunal facilitator explained to the parties that they should provide supporting evidence in writing, including witness statements, so that a final decision could be made. There is no indication the evidence before me that the owner was unable to do so. In the result, I have the owner's statements that the noises heard during testing were alarming and disturbing, and the strata council's contrary evidence that the noises heard were essentially normal. The applicant bears the burden of proof in this dispute and I am unable to conclude on the evidence that the noises heard during the November 2016 noise testing were objectively unreasonable.
49. Moreover, the owner's complaints are that heavy walking is largely causing the unreasonable noise, and by his own account walking should not have that effect. The owner's own evidence is that there must be something wrong with the flooring under unit 801 to cause the unreasonable transmission of noise. The strata and the unit 801 owners have said the unit 801 flooring is original, with carpet and tile. To the extent the owner may be suggesting that in fact unit 801 has installed hardwood or laminate flooring, I am not prepared to accept that the strata and the unit 801 owners have provided obviously false evidence to the tribunal that would be easily determined to be false had I ordered the requested inspection.

50. Even if the owner's expectations were objectively reasonable, I cannot find that the strata acted in a "significantly unfair" manner in handling the noise complaints. That the owner disagrees with the 2 council members' assessment of what was heard during the noise testing is not the test. The question is whether the council members acted significantly unfairly in their investigation and assessment that there was no unreasonable noise. Given the strata's actions in response to the owner's concerns, detailed above, I cannot conclude that they did so, given the meaning of that phrase in the case law. The strata communicated promptly and clearly with the owner and his lawyer. The letter from the unit 801 owners makes it clear they had been informed of the owner's complaints and were responding to it. I place some weight on the undisputed evidence that in this 48-unit building there is no evidence of other ongoing noise complaints about the lack of soundproofing in the building.
51. I turn then to the owner's request for an investigation of the unit 801 flooring. As noted above, the relevant bylaw addresses underlay only for new hardwood or laminate flooring installations, and does not require acoustical underlay for carpet or tile. I have found above unit 801 still has its original flooring, namely carpet and tile, with underlay under the carpet. Given my findings and conclusions above, I am not satisfied that the strata must require unit 801's flooring to be investigated, particularly given I have found there is insufficient evidence before me to support a violation of the noise bylaws. I also note the owner's comment that if further noise testing were ordered, it should be done by a qualified professional with proper equipment. I am not inclined to order such testing, given my conclusions above.
52. Nothing in this decision prevents the owner from making a noise complaint to the strata in future, and in that event it would be in the owner's best interest to do so at the time the noise is occurring.
53. I will next address the owner's claims for expenses.
54. In the Dispute Notice, the owner claimed \$4,500, but in his submissions increased this sum to \$5,405.00. As noted above, the bulk of this amount is for legal fees the

owner incurred in the course of his ongoing noise complaints to the strata, much of which occurred before this tribunal proceeding. Around \$725 is for secretarial services the worker obtained to type up and proof-read his documentation.

55. As noted in the tribunal's rules, the tribunal generally does not provide reimbursement of legal fees. I do not consider the owner's claimed expenses, both before and after this dispute began, to be appropriate reimbursements in this dispute. In any event, the owner has not been successful in the outcome, which is another basis upon which to deny the claimed expenses as well as the claim for reimbursement of tribunal fees.
56. The strata was substantially successful in this dispute. Under section 49 of the Act, and the tribunal's rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable expenses related to the dispute resolution process. In this case, the strata did not claim any fees or dispute-related expenses.

## **DECISION & ORDER**

57. The applicant's dispute is dismissed.

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Shelley Lopez, Tribunal Vice Chair