Civil Resolution Tribunal

Date Issued: June 12, 2017

File: ST-2016-00400

Type: Strata

Civil Resolution Tribunal

Indexed as: *Bourque et al v. McKnight et al*, 2017 BCCRT 26

BETWEEN:

Joseph (Wayne) Bourque and Anne Lloyd

APPLICANTS

AND:

Wendy McKnight and The Owners, Strata Plan VIS 2963

RESPONDENTS

AMENDED REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1) This is the final decision of the Civil Resolution Tribunal (tribunal), following a preliminary decision[1] in which I ordered the strata corporation, The Owners, Strata Plan VIS 2963 (strata), be added as a named respondent.

2) The strata is a duplex as it has only 2 strata lots. The applicants, Joseph (Wayne) Bourque and Anne Lloyd, own Lot B. The respondent owner Wendy McKnight owns Lot

A.

3) That the strata is a duplex is at the core of this dispute, because under the *Strata Property Act* (SPA) and the applicable bylaws, both owners are council members and both must agree before the strata can do anything. In particular, for several years the parties have been deadlocked on a variety of issues related to the repair and maintenance of both common property and of Lot A. Broadly stated, the applicants say the respondent owner has left the property, including the Lot A side of an oceanfront seawall, in an unsightly and potentially unsafe state. In contrast, the respondent owner says her approach has been reasonable.

4) The applicants are self-represented by Mr. Bourque and the respondent Ms. McKnight is represented by legal counsel, Andrew Broadley. Given the circumstances, the strata is represented separately by each council member, namely Mr. Bourque and Mr. Broadley on behalf of Ms. McKnight, and the strata's submissions were provided in the form of further submissions from each council member.

5) Bearing in mind the tribunal's mandate, it is in the best interests of these deadlocked parties for me to give specific reasons and orders to the extent possible. My doing so has lengthened this decision significantly.

JURISDICTION AND PROCEDURE

6) These are the formal written reasons of the tribunal. The tribunal has jurisdiction over strata property claims brought under section 3.6 of the *Civil Resolution Tribunal Act*[1] (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.

7) 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

[1] *Bourque et al v. McKnight*, 2017 CRTBC 19

other way it considers appropriate. The burden of proof is on the applicants and the evidence must be established on a balance of probabilities.

8) 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.

9) 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.

10) Section 48.1(2) of the Act further provides that the tribunal may 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.

ISSUES

11) The issues in this dispute are:

   a) What repairs, if any, should be made to the Lot A side of the seawall and at whose cost?

   b) What professional inspection of the Lot A residence, if any, should occur to address the applicants' concerns about mould and hoarding, and what remedy, if any, should be ordered?

   c) Has the respondent owner improperly used and caused "unsightly conditions" on the Lot A yard and on common property, which the applicants say have caused a nuisance and interfered with their right to enjoy the property? What remedy, if any, should be ordered now?

d) Should the tribunal provide an order to provide for revisions to the strata's bylaws, in particular to establish maintenance standards and a dispute resolution process?

e) Should the respondent owner reimburse the applicants $225 in tribunal fees?

BACKGROUND AND EVIDENCE

12) The duplex is a one-storey oceanfront building. The applicants bought Lot B in 1994, shortly after the strata plan was filed in 1993. In 2008, the respondent owner became the 4th owner of Lot A.

13) To date, the strata has operated informally without complying with the SPA and the applicable bylaws. In particular, there have been no regular strata council meetings, no regular annual general meetings, no strata fees collected, no contingency reserve fund, and no strata bank account. The Lot B owners were unaware of the SPA until these disputes arose in 2010 and up to that point had amicably resolved any issues with the previous owners of Lot A informally. Such agreements included replacement of an electrical line pole on the common property and roof repairs in 2007.

14) The strata plan shows Lot B is to the north of Lot A, with waterfront yards to the west, side yards at the outer north and south boundary edges, and front or street-facing yards to the east. The parties agree that these "private yards" on the strata plan form part of the respective strata lots, as identified on the strata plan. There is an oceanfront seawall that runs the length of the entire strata property. Apart from certain parts of the duplex building itself, the only common property is a paved driveway to the building from the street to the east, which serves to divide the two strata lots, along with an area at the top of the driveway in front of both strata lots. There is no limited common property designated on the strata plan.

15) The strata has never adopted bylaws that replace or amend the Schedule of Standard Bylaws under the SPA. Thus, the Schedule of Standard Bylaws (bylaws) applies. The relevant bylaws may be summarized as follows (my bold emphasis added):

a) *Bylaw 2:* An owner must repair and maintain the owner's strata lot, except for

repair and maintenance that is the strata's responsibility under the bylaws.

b) *Bylaw 3(1):* An owner must not use a strata lot or the common property in a way that i) causes a nuisance or hazard to another person, or ii) unreasonably interferes with the rights of other persons to use and enjoy the common property or another strata lot.

c) *Bylaw 3(2):* An owner must not cause damage, other than reasonable wear and tear, to the common property or to those parts of a strata lot which the strata must repair and maintain.

d) *Bylaw 5*: An owner must obtain the strata's written approval before making an alteration to a strata lot that involves: the building structure or exterior, doors, windows or skylights on the building exterior or that front common property, or common property located within strata lot boundaries.

e) Bylaw 6: An owner must obtain written approval from the strata before making an alteration to common property, and the strata may require as a condition of approval that the owner agree in writing to take responsibility for any related expenses.

f) *Bylaw 7*: An owner must allow a person authorized by the strata to enter the strata lot at a reasonable time, on 48 hours' written notice, to inspect, repair or maintain common property and any portions of a strata lot that are the strata's responsibility to insure or repair and maintain. The notice must include the date and approximate time of entry, and the reason for entry.

g) *Bylaw 8*: The strata must repair and maintain: common property, the structure and exterior of a building, exterior doors, windows and skylights in a strata lot, and fences, railings, and similar structures that enclose yards.

h) *Bylaws 9, 16 & 18*: If the strata plan has fewer than 4 strata lots, all owners are on the strata council. **Here, as the 2 owners are the only 2 council members, all council decisions require both council members to vote in favour**.

i) *Bylaw 29*: A dispute among owners, the strata, or any combination, may be

referred by consent of all disputing parties to a dispute resolution committee that consists of an owner or any number of persons consented to by all disputing parties. The committee must attempt to help the disputing parties to voluntarily end the dispute.

16) There is nothing in the bylaws that specifically addresses how alleged unsightly conditions may be determined and whether or at what point they cause a nuisance or an interference with the use and enjoyment of property.

17) In broad terms, the facts of this case somewhat resemble those in Andrews v. Leno, 2003 BCSC 431 in which the court described the stratified duplex owners as having been at war. In the present case, the parties have maintained civility, whereas in Andrews, the parties' relationship had deteriorated to the point the court felt an administrator was necessary. Nonetheless, the applicants here have tried, largely unsuccessfully, to communicate with the respondent owner in 2010-2011 and since 2015 to seek cooperation in terms of upkeep to Lot A, to the common property, and to the seawall. In response, for the most part the respondent owner has either ignored the applicants or claimed they are improperly harassing her without any legal basis, in that she says she has acted reasonably. She also argues there is nothing the strata can compel her to do under the bylaws because any action requires both council members to agree. Yet, she also says the owners are not permanently deadlocked, but also that mediation is unlikely to resolve their disputes.

18) I mention this backdrop at the outset given the nature of the claims advanced, and in particular the applicants' particular request that the tribunal create revised bylaws and provide for a dispute resolution mechanism. I will say more on this below. For ease of reading, I have grouped the issues related to inspection and unsightly conditions.

Seawall

19) The seawall was in place when the applicants first bought Lot B in 1994. The original seawall was made of interlocking large concrete blocks, two rows high for a total height of 1.5 metres. The seawall runs north to south along the harbor edge, across the entire lengths of both Lot A and B. In 2010, some repairs were done to the seawall with more extensive repairs being done on the Lot B side. At issue now is whether the Lot A side

of the seawall has since then sustained significant further erosion and if it should be repaired to the same extent as the Lot B side. The relevant detail follows.

20) In early 2010, the applicants were concerned that erosion was destabilizing the seawall and at their expense they obtained an expert assessment from S.W. Moore, P. Geoscientist, with C.N. Ryzuk and Associates Ltd. In his March 22, 2010 report, Mr. Moore concluded the seawall was vulnerable and recommended certain repairs. Summaries from Mr. Moore's 2010 report follow (my bold emphasis added):

a) Storms can attack the foreshore to the west of the seawall and there is a strong current in a northeasterly and southwesterly direction associated with tidal exchange. The foreshore, a sand and gravel beach, is in a state of sediment deficit.

b) While the seawall is mostly vertical, there is one area [on the Lot A side] where it has rotated forward slightly and noticeably leaning outwards. At the top of the seawall, there is a noticeable separation between the backside of the top block and adjacent backfill, again indicating the seawall had rotated forward. There is a significant void along the front or toe of the seawall, extending back beneath much of it, for almost the entire seawall length.

c) "**Further erosion along the base of the seawall should be expected unless mitigative measures are undertaken**." The length of time to de-stabilize the seawall is difficult to predict. The seawall could collapse if an extreme storm occurred at high tide.

d) **The seawall backfill was easily probeable** with "considerable organic material".

e) **Suggested mitigation to improve stability**: i) underpin the seawall by removing beach sediment and excavating down into the hard clay by a depth of about 150mm or 6" (done in stages, with each stage in-filled with concrete), **with a new concrete foundation as the result**, ii) excavation behind the seawall to replace the existing materials with free draining material, so that hydrostatic pressures against the backside of the seawall is avoided, and iii) "**Silt abatement measures should be in place as required**".

f) The foreshore is under the jurisdiction of the Federal Department of Fisheries and Oceans (DFO) which recommends work be done between June 15 and September 15, with appropriate advance notice to DFO. No work to be done during high tide.

21) The parties produced many photos of the seawall, spanning from early 2010 before any repairs were done through to January 2017. I find the 2010 pre-repair photos show the following: weeds growing on the Lot A lawn 12" or so behind the seawall, a relatively groomed lawn behind the Lot B side of the seawall, a broken block in the lower seawall row that was lying flat on the Lot A side of the beach, land subsiding behind the entire seawall on the yard side, a gap beneath most of the seawall, and blocks somewhat sagging and separating. I understand from the parties that the weeds on Lot A are scotch broom. Photos at high tide appear to show the water very close to the seawall, and one marked "with 40K winds" shows water spraying over onto Lots A and B.

22) After Mr. Moore's assessment, the parties agreed to the recommended repair of the entire seawall. However, the respondent owner then disputed the scope of work proposed by a contractor Aklark Industries (Aklark), which was somewhat broader than as outlined by Mr. Moore, as further discussed below. Aklark's May 31, 2010 jobsite works proposal stated it specialized in construction contracting and its qualifications have not been disputed, although as discussed below I acknowledge the respondent owner's submission Aklark exaggerated the condition of the seawall.

23) Ultimately, given the respondent owner's objection, in 2010 Aklark repaired the Lot A side of the seawall only to its "original as built" design. At the same time, Aklark repaired the Lot B side of the seawall more completely, according to its proposal as detailed below. As shown in one photo, the applicants note that Aklark's proposed method was used by a property north of the strata, which the applicants say has never shown any destabilization since at least 1994. This evidence is not disputed.

24) Aklark's May 31, 2010 proposal had quoted $20,400 for the recommended seawall repairs on both Lot A and Lot B, with work to start on June 26, 2010 at low tides. In particular, Aklark noted that erosion around the seawall was "extensive and ongoing" and that the seawall footing was not placed deep enough and thus had begun to move

and fall. Aklark recommended three steps to stabilize the seawall:

a) Remove the concrete blocks, excavate below 18" into native soils (clay), and in replacing them include a new third row of concrete blocks below grade.

b) Replace the broken block in the existing seawall.

c) Place drainage media behind the seal and wrap the media with filter fabric. This backfilling reduces any hydrostatic force and increases the dynamic backpressure relief while maintaining a barrier to siftable media.

25) Aklark's proposal and subsequent invoicing was amended to allow for the more limited repairs on the Lot A side. The respondent owner objected to the full repairs because the hardpan clay was deeper than expected and thus the third row of blocks could not be embedded in it as anticipated by Mr. Moore, in that he expected digging would be only to 6" below the surface. She submits that as this "primary recommendation" could not be achieved, the remaining proposed work, such as the addition of filter fabric, was "unnecessarily expensive" and of "questionable long-term value". She also objected that Aklark's proposal was a replacement rather than a repair, and included work to improve aesthetics rather than the seawall stability, such as using slimmer blocks.

26) Other than her own observations, the respondent owner did not provide any evidence to refute Mr. Moore's or Aklark's opinions regarding the seawall's stability. At the end of the day, in 2010 the applicants paid about $11,000 to have the Lot B side of the seawall upgraded to its current state. At the same time, the Lot A side was repaired to its original state, with no backfill/filter fabric and no third row of blocks. Ultimately, for the Lot A side of the seawall repairs done in 2010, the respondent owner paid about $5,000 after a May 2011 mediation.

27) Photos taken four months after the 2010 repairs show the Lot A side of the seawall in similar distress as before the 2010 repairs, whereas the Lot B side shows a new seawall that looks stable with no signs of erosion. There has been no structural assessment of the seawall since the 2010 repairs.

28) After the May 2011 mediation, the applicants say disputes over the use and maintenance of the respondent owner's strata lot and the common property continued,

but formal action was not pursued until 2015 when the applicants wanted to sell Lot B.

29) Photos taken in April 2015 show tall scotch broom growth in a trench behind the seawall on the Lot A side. The applicants say this growth aggravates the erosion, whereas the respondent owner says it slows down the erosion. I have no expert evidence before me either way, other than Mr. Moore's reference to easily probeable materials behind the seawall. Generally, these April 2015 photos show there has been further erosion to the Lot A side of the seawall, both in the void below and on the yard side behind.

30) Citing the Invasive Species Council of BC, the applicants say scotch broom is an invasive plant species that also obstructs their view. Based on the photos, I agree the scotch broom impacts the ocean view from Lot B.

31) Photos taken in late 2016 and January 2017 show further erosion behind the seawall of Lot A, somewhat increased since the 2015 photos. The photos show no erosion behind the Lot B side. In particular, the Lot A side of the seawall is rotating outwards towards the water, more so than in the older photos. One photo shows crushed pea-sized gravel deposited in a patch on the Lot A yard side of the seawall, which the respondent owner says is a reasonable approach to address erosion. Another photo shows the erosion appears to be slightly encroaching, just past the "jog", onto the Lot B side of the seawall.

32) The respondent owner says her January 2017 photos indicate how the scotch broom has acted to prevent erosion and stabilize the ground. I cannot agree. The photos only show scotch broom, about 2 to 3 feet tall, with a large gap or trough measuring about 12" between it and the seawall. It is also unclear what erosion is taking place under the scotch broom branches. In any event, the trough shows significant erosion behind the Lot A side of the seawall.

33) As for the seawall's location, the applicants say the seawall sits within the strata plan, noting a survey post located about 2.5 m inland from a large tree leaning out over water, with the strata plan showing the northwest corner of the "present and natural boundary" extends outwards towards the sea another 12 meters from that survey post that still is in place. On the southwest end of the seawall, the strata plan notes that there was a survey marker 12.25 meters from the present and natural boundary; however, based on

the evidence before me it appears that survey marker no longer exists. The applicants say these measurements indicate the seawall sits within the strata property.

Inspection and unsightly conditions

34) In 2015, the applicants' realtor told them that potential purchasers of Lot B may require an inspection of Lot A, of anything falling under the strata's obligation to repair, maintain, or insure. The applicants in particular want an inspection because they are concerned there may be mould and hoarding inside the Lot A residence. While bylaw 7 permits the strata to do the inspection, the respondent owner has refused and in her council member role blocked the strata from acting. In addition, the realtor described various "unsightly" conditions on the Lot A yard and on the common property that put off potential buyers. Those conditions have in part caused the applicants' suspicion of hoarding in Lot A, along with "significant piles of clutter" the applicants saw inside the Lot A residence when they spoke with the respondent owner at her door. The relevant details follow.

35) Why do the applicants suspect possible mould in the Lot A residence? First, in February 2015 the applicants learned from a roof warranty contractor that a skylight over Lot A had condensation and mould and a photo appears to confirm this, which is undisputed. In late March 2015 however, in the roof area over Lot A the roofing company replaced two skylights (including the one photographed in February 2015) and a steel vent, and conducted a visual attic and roof inspection and no concerns were reported. The building's common property roof is multifaceted, and while the entire roof had been replaced in 2007 after a storm, since 2010 each strata lot owner has essentially looked after the roof area over their strata lot.

36) Second, the applicants suspect mould because for years the respondent owner has not used an air exchange system that the applicants have used, among other methods such as added bathroom and kitchen exhaust fans, to control moisture in their Lot B residence. The respondent owner says she prefers to use a dehumidifier as the air exchange unit did not work well, and says she has not experienced moisture problems.

37) It is undisputed the building was designed with mechanical air exchange systems, one for each strata lot. They are not common property. The applicants say it is not clear a dehumidifier is adequate and they note the strata is required to insure the air exchange

systems, as set out in section 142 of the SPA and in the definition of fixture in the SPA Regulation. As such, the applicants say the strata should be permitted to inspect.

38) The applicants also claim the strata has the right to inspect common property and those areas of the building the strata has the responsibility to repair and maintain, such as the roof, skylights, exterior windows and doors. There is also one central wall dividing the duplex building into Lot A and Lot B. The applicants cited the Canada Mortgage and Housing Corporation (CMHC) "Moisture and Air Guide" and in particular that mould can occur with the "inadequate exchange of air in the home with outdoor air", perhaps due to the absence of kitchen and bath exhaust fans, air exchanger or heat recovery ventilators. The applicants say they are concerned that any excessive moisture in Lot A could spread to Lot B, causing health concerns and structural and finish damage to the building. The applicants say that damage caused by wet rot, fungi, or spores is not covered by the strata's insurance policy and so the strata is responsible for any repairs due to mould.

39) As for the suspected hoarding in Lot A, the applicants cite the International OCD[2] Foundation, which in a document "*What is Compulsive Hoarding*" describes symptoms and effects of hoarding. The potential harm is only generally described as structural damage, fire, or death. It does not explain how hoarding leads to those outcomes. Generally, hoarding is defined in that document as the collection and storage of a large number of items, including those that appear useless or of little value, with disorganized clutter resulting. The applicants say they believe the situation in the Lot A yard "may be an extension of a hoarding situation inside the building".

40) The applicants also rely upon a 2007 District of Sooke Bylaw No. 296, "*Unsightly Premises and Objectionable Situations Bylaw*". In 2015, the applicants raised their hoarding concerns with the Bylaw Officer for the District of Sooke, but were told that the strata would have to resolve the matter as the SPA governed the strata property.

41) Since 2010, the applicants say they have disputed increasing amounts of materials deposited by the respondent owner throughout her yard and on the common property. In attempts to document their concerns and address them with the respondent owner,

[2] OCD, also known as obsessive compulsive disease.

including through legal counsel, the applicants took numerous photos at different points of time between 2010 and December 2016, which were provided to the tribunal. The respondent owner also provided some photos. Many if not most of the items on Lot A generally appear to be useless or of little value. More recent January and March 2017 photos are discussed further below.

42) I turn then to the evidence of unsightly conditions. While I have looked at all of the photos, I will not describe each one in detail. Unless noted otherwise in this decision, I find the applicants' descriptions of the photos to be accurate. Based on the photos, until around the end of December 2016 I find that there was a significant clutter of a wide variety of disorganized items collected in and around Lot A, particularly in the area immediately adjacent to the residence entrance and near or on the common property driveway, but also in the yard facing the street and some unused fencing left lying on the waterfront yard.

43) Without limitation, these items have over time included: broken or unused fencing, piping, rolls of wire mesh (there for years according to the applicants), various buckets and bins often in apparent need of repair or disposal, wood and metal pieces, bricks, what is said to be a washing machine, and some old furniture. It is undisputed that used cat litter was included in the clutter, although I cannot discern this from the photos. A worn children's plastic playground set is also on the Lot A front yard. The applicants say it is broken down and unsafe because: its padding is worn, it is not anchored and could tip, and the mats below it present a tripping hazard. The applicants say it is a lure to neighbourhood children, and they say the respondent owner does not have children and only once in two years have they noticed her with a child at the playground.

44) In the pre-2017 photos, the cluttered items on Lot A were not tucked away out of sight. At times, the clutter appeared to impede access to the Lot A front door. Some photos of certain parts of the Lot A yard indicate the clutter had expanded and worsened over time up until around January 4, 2017 when the respondent owner made a significant effort to clear out most of the clutter and organize what was left.

45) I agree the January 1 and 4, 2017 photos provided by the respondent owner show little moss on her side of the roof and a relatively uncluttered yard. In the latter respect, the

applicants say this improvement was done just after she saw the recent photos taken by the applicants. A more recent March 2017 photo provided by the applicants shows some of the clutter has returned to the Lot A entry way and in front of the respondent owner's garage. The applicants say this has been the pattern: when the clutter is removed, later it is replaced with other items.

46) The pre-2017 photos also show the Lot A shrubbery was generally overgrown and the address standard at the Lot A side of the common property street entrance was dirty and covered in green mildew or algae, as compared to a clean address standard on the Lot B side and relatively groomed shrubbery. The applicants also say the respondent owner had laid down wood debris on the common property without permission, which attracts wasps and small rodents. They also say the respondent owner's "burn pile" in the middle of her yard is too large and that "hog fuel" should be removed. The 2017 photos do not particularly show the current condition of these areas, save for there is still a burn pile of some size.

47) I acknowledge some photos produced by the respondent owner show a corner area of the Lot B yard that appears somewhat unkempt, such as blue tarps or a pile of yard waste, which the applicants explained represented isolated build-up in July and December 2015 and January 2017. They say each instance was limited to a few weeks, quickly cleaned, and never the subject of complaint by the respondent owner. This is not disputed. Having reviewed all of the photos, I find these examples of some clutter in a less visible corner of the Lot B yard are far less significant than the pre-2017 cluttered and unkempt Lot A yard.

48) Other photos show a clothesline the respondent owner bolted to a common property electrical pole that the applicants and a former owner had replaced earlier, which the applicants say was done without their permission. Similarly, the applicants say the respondent owner has without permission altered common property: removed shrubbery, sloppily placed a layer of crushed rock near the driveway, haphazardly erected a fence, and pulled up a water line leaving the broken pipe on the ground. It is unclear to what extent these issues remain.

49) Other photos show that in early 2016 the respondent owner repainted the exterior stucco

of the west-facing Lot A side of the building, which did not match. That she did so without permission is undisputed. After a complaint by the applicants, on March 15, 2016 the respondent owner's lawyer wrote to the applicants saying they were harassing her, but also noted that the respondent owner had repainted the stucco with a better matched paint. However, the applicants say she painted over mould without cleaning it first. The respondent owner has also erected fencing on common property, adjacent to the paved driveway, without permission. The applicants had also complained in March 2016 that the respondent owner had damaged the soffits near her garage entrance by inserting 2 rusty "floor vents" and they asked that the soffit be replaced. It is unclear to what extent these issues remain.

50) As for the roof, the respondent owner says she has acted reasonably and it is the applicants who improperly damaged the roof with "aggressive moss removal". The evidence from the shingle manufacturer and the roofing contractor is that the roof performs best when free of moss and that in severe cases moss can cause moisture damage or even leaks. They say moss should be gently removed. While the Lot B side of the roof appears free of moss, most photos appear to show moss growth on the Lot A side of the roof, as noted by the realtor. However, the 2017 photos of the Lot A side show less moss than previous photos.

51) The applicants say the neighbours take pride in their properties and take considerable effort to maintain them. Photos of several neighbouring properties show groomed yards and well-kept homes. The applicants say that the respondent owner's unsightly conditions are a breach of the "social code" of the neighbourhood, noting that prior owners of Lot A had properly maintained the property.

52) The applicants say they have repeatedly asked the respondent owner to stop parking on the common property driveway, because the noise of the car disrupts their sleep as their bedroom window is close by. The respondent owner has not disputed that despite this request she continued to park there.

53) Since March 2015, the applicants say they have demanded a professional inspection of Lot A, including through legal counsel. At the same time, the respondent owner was advised of the moisture concerns and general state of disrepair. The respondent owner

refused to cooperate in March and May 2015. Similar repeated efforts were made by the applicants to address the issues, at times through legal counsel, through 2015 and 2016, and for the most part the respondent owner did not respond at all, although at least one letter was sent through a legal representative that did not propose any particular resolution or offer any agreement.

54) On May 3, 2015 the applicants obtained a market analysis from a realtor. There is no contrary realtor opinion before me. The applicants' realtor wrote that the sale of Lot B was hampered by the lack of maintenance on Lot A. In particular, the realtor identified the "overgrown gardens, debris build-up, moss on the roof, and overgrown weeds" on Lot A would be "hard to ignore for any potential buyer" coming to look at the Lot B property. The realtor wrote that these matters would greatly affect the buyers even wanting to put in an offer. During the summer of 2015 when Lot B was listed for sale, the applicants say there were only 4 showings and 3 "drive-bys" from potential purchasers. The realtor further advised she had spoken with the potential buyers' realtors who advised that the buyers were "put off" by the condition of Lot A as being "very unkempt" with a lack of roof maintenance, 'garbage and refuse … all over the lawn" and that no buyer would want "to move next to that". The realtor stated that the 3 drive-bys did not make appointments to view the inside of Lot B because they were not prepared to live next to someone who had no pride of ownership. The realtor stated she believed the state of Lot A was a contributing factor as to why Lot B did not sell during its listing. Because Lot B could not be sold due to these issues, the applicant Mr. Bourque assumed half ownership from his brother who needed to move away. Land Title Office documents indicate the property value for Lot B was around $285,000.

Revised bylaws and dispute resolution mechanism

55) The history of the specific issues is summarized above, as is the impact of the "duplex deadlock" and the strata's inability to enforce any bylaws or take any action without unanimous agreement between the two council members.

56) In around October 2015, the applicants asked legal counsel to draft revised bylaws that would permit the strata to exercise its duties under the SPA. Generally, the proposed bylaws are more specific in maintenance standards and allow for the objecting owner to

remedy the situation, at the offending owner's expense, if the offending owner does not do so themselves.

57) In late 2015, the applicants were unsuccessful in having the bylaws considered or approved at a special general meeting they called, at which the respondent owner ultimately sent a proxy. The applicants shortly thereafter decided to pursue dispute resolution with the tribunal.

58) The respondent owner objects to the proposed new bylaws, saying that effectively such new bylaws could unfairly give the applicants unilateral power. In turn, the applicants say that their several claims have only come to the tribunal because the respondent owner has to date acted unilaterally, in that she has exercised a veto power preventing the strata from acting to enforce the existing bylaws.

59) The applicants say "falling short of asking the courts to appoint an administrator" or applying to the tribunal each time there is a dispute, they ask that I order that the bylaws be amended, possibly through mediation between the respondent and the applicants. In addition to objecting to any revision that gives the applicants any ability to act without her agreement, the respondent says mediation is unlikely to assist, although elsewhere she says the strata is not permanently deadlocked.

POSITION OF THE PARTIES

60) The applicants want the respondent owner to pay for seawall repairs on the Lot A side, necessary due to ongoing erosion, which they say should have been done in 2010 as they were then done to the Lot B side. The respondent owner says that she has acted reasonably, the expert opinion from 2010 is no longer valid, and the seawall condition is currently reasonable.

61) The applicants say the respondent owner has caused unsightly conditions on the Lot A yard and on common property. The applicants also are concerned about mould and hoarding within the Lot A residence and they want a professional inspection. The respondent owner denies unsightly conditions currently exist and says an inspection is not warranted or appropriate.

62) The applicants want the bylaws amended to set specific maintenance standards and to set out means for an owner to remedy a bylaw violation at the expense of the offending owner. The respondent owner disagrees with any bylaw amendments that could give the applicants unilateral power, and instead wants to keep the existing bylaws that do not permit the strata to enforce a bylaw or act unless the Lot A and Lot B owners both agree.

ANALYSIS AND DECISION

63) It is undisputed that since 2010 the applicants have spent thousands of dollars in professional and legal assistance in numerous unsuccessful attempts to resolve these disputes with the respondent owner. It is also undisputed that the respondent owner has refused to permit the strata to act because she has never agreed to the applicants' requests, which requests I find reflected a reasonable and fair reading of the bylaws. As noted above, repair and maintenance issues have been addressed *ad hoc,* and after the respondent owner became the Lot A owner in 2008 with much dispute. I find it is clear the informal arrangement has not worked well for these particular parties.

64) The respondent owner inconsistently argues both that the parties are not permanently deadlocked and also that the current bylaws she desires unchanged do not permit any enforcement against her with further mediation unlikely to be successful. She further argues that the applicants have wrongly harassed her over the years about the property conditions, although there was no counterclaim filed. I have reviewed the evidence, including notes and letters given to the respondent owner. Nothing in them amounts to harassment. Overall, I find the applicants have acted more than reasonably in their communications with the respondent owner.

65) Broadly speaking, the strata is responsible for managing and maintaining common property for the benefit of the owners, as set out in sections 3 and 72 of the SPA and bylaw 8. The powers and duties of the strata must be exercised and performed by a council, as set out in section 4 of the SPA, which includes the enforcement of bylaws, as set out in section 26 of the SPA. Of course, to date none of this has in practice happened with this strata.

66) Strata ownership is different than ownership in a detached home. Strata lot owners

must live cooperatively and respectful of their neighbours, as outlined in the strata bylaws. Here, I find the trouble has clearly arisen because the democracy in a duplex has resulted in the respondent owner's refusal to permit the strata to enforce its bylaws. The applicants are entitled to have their claims adjudicated and section 48.1 of the Act permits me to make appropriate orders that override SPA provisions that otherwise require strata council approval.

67) The strata's obligation to repair and maintain under the SPA includes making an article good, whether or not it was sound or good before (*Taychuk v. Owners, Strata Plan LMS 744*, 2002 BCSC 1638 at para. 29).

68) As set out in *Weir v. Owners, Strata Plan NW 17, 2010 BCSC 784*, paras. 28 and 29, the strata's duty to repair and maintain can include replacement rather than repair, if that is reasonable. There can be "good, better or best" solutions to each repair issue. A strata may consider the cost for each approach and its impact on owners, and implement needed repairs within a budget that the owners as a whole can afford. The reasonableness test requires balancing competing interests.

69) After the strata was added as a respondent, the respondent owner cites section 32 of the SPA, which requires that a council member with a direct or indirect interest in a matter "must" abstain from voting. The respondent owner submits that this means there can be no vote at all in a duplex, and that any changes to the SPA or the standard bylaws must be left to the legislature.

70) I find that section 32 of the SPA does not override my ability to make orders, which are permitted under section 48.1 of the Act. Further, section 32 appears to address conflicts of interest where the strata council member may benefit from the outcome of the vote and must in that instance not vote. I do not read section 32 as prohibiting a complainant council member from voting simply because they brought the complaint. Section 136 of the SPA is what is relevant here: if a complaint is made about a council member, that council member must not participate in the vote except where, as here, all owners are on council.

71) The respondent owner also relies upon bylaw 22 that states a council member who acts in good faith cannot be liable for any omission in the performance of the duties of the

strata council. This argument is not relevant, since any orders against the respondent owner directly arise from her conduct as a strata lot owner. In other words, I make no order against the respondent owner that she take action or pay money because of her decisions as a council member to refuse to enforce the bylaws against herself or to direct repairs to property. All orders arise because of her conduct as a strata lot owner.

72) Neither party has sought the appointment of an administrator, which is a matter outside the tribunal's jurisdiction. With the tribunal's mandate in mind, to the extent possible this decision will break the deadlock for the substantive issues arising in this particular dispute. It may be that if the parties continue to be unable to cooperate, an administrator may be an appropriate but expensive solution for the parties.

Seawall

73) The applicants say that the Lot A side of the seawall is in a more distressed situation than it was in 2010. They say the seawall provides protection to both strata lots, but that the Lot A side of the seawall has deteriorated to the point that damage could occur to Lot B. In contrast, the respondent owner says she acted reasonably in 2010 and further that the Lot A side of the seawall is currently in reasonable condition in the circumstances. The applicants seek an order for full repairs of the Lot A side of the seawall, to be done at the respondent owner's expense.

74) There is no quote before me for the requested current work to the Lot A side of the seawall, but based on Aklark's 2010 invoice and the circumstances then present, it could be around $10,000, which is roughly what the applicants paid for the Lot B side. That I do not have a precise quote is not a reason to refuse to order repairs.

75) I will first address the seawall's location, noting the parties' submissions have varied on this point. I find the seawall is located across both strata lots, which I note is historically how the parties treated it. My reasons are set out below.

76) I acknowledge there is no survey identifying the seawall nor is it identified on the strata plan. The respondent owner now submits it is unknown whether the seawall sits on common property or on the strata lots, or, whether it sits on land owned by the Province. To that end, the Province owns the foreshore, as per section 18 of the *Land Act*. The

respondent owner submits that the addition of the seawall did not change the legal boundary of the property. Thus, she submits the uncertainty of the seawall's position makes the strata's responsibility to repair and maintain it uncertain.

77) First, based on the strata plan, the private yards are part of each strata lot as defined on the strata plan. Each private yard wraps around the building to the shoreline. The parties agree the private yards on the strata plan are part of each strata lot.

78) I find the waterfront yards are part of the respective strata lots with the dividing line between the two yards being the solid line from the building to the shoreline as shown on the strata plan. The private waterfront yards owned by each strata lot end at the "present and natural boundary", as noted on the strata plan. Thus, the seawall either sits within the strata lots, or, it sits outside the strata lots and strata property entirely. In other words, the seawall is not common property.

79) In accordance with the definition of "natural boundary" in the *Land Act*, I find the "present and natural boundary" to be the current visible high water mark, which I find is currently on the water side of the seawall. I find the seawall sits on the strata lots' side of the high water mark, spanning both Lot A and Lot B. The evidence regarding the survey post and its location in the applicants' photo and the markings on the strata plan support this conclusion. Despite this finding of fact, nothing in this decision determines actual ownership of the seawall. For clarity, if it is otherwise properly established that the Province of British Columbia owns the seawall, the parties are free to revisit the issue of the repair and maintenance of the seawall.

80) Next, I find that the seawall constitutes a yard enclosure falling within the meaning of bylaw 8(d)(v). As such, the strata must repair and maintain it.

81) I turn then to the central question of what seawall repairs are required. The respondent owner wants nothing done. She submits there is no expert evidence to properly rely upon at this point as Mr. Moore's 2010 assessment could not be carried out as recommended and it is no longer relevant due to the passage of time. In contrast, the applicants' say Mr. Moore's report remains just as valid today, with the photos showing how after Aklark's work in 2010 the erosion stopped on the Lot B side and continued on

the Lot A side. As further explained below, I agree with the applicants.

82) First, I find that the photos showing pre-2010 work and since, make it clear the seawall was not particularly stable and that significant erosion has occurred on the Lot A side since the 2010 repairs. Further, I find the respondent owner's submission that the seawall was stable in 2010 to be inconsistent with Mr. Moore's report identifying a "significant void along the front or toe of the wall … and in fact is in a state of sediment deficit …" Nor is it consistent with Aklark's observation that there was "extensive erosion". I prefer Mr. Moore's and Aklark's more qualified opinions to the respondent owner's own observations and assessment.

83) Second, the respondent owner submits that Mr. Moore's recommendations did not include replacement of the wall or the inclusion of filter fabric and that the risk of collapse was limited to an extreme storm event coupled with a high tide. She relies upon these assertions as the basis to now argue that there was no support in 2010 for Aklark's proposed full repairs and that there is none now. I disagree. I find Mr. Moore's point was that "at present" the wall could collapse in an extreme storm event. He clearly stated that "further erosion could be expected to de-stabilize the wall over time". While Mr. Moore's proposal did not anticipate a third new row of blocks, it did envision digging down and adding a concrete base. I find the new row of blocks reasonably accomplished the same goal. The case law is clear that reasonable repair may include replacement and that repair may include making it better than the original. Mr. Moore's report also called for "silt abatement measures as necessary", which I find reasonably includes the filter fabric and backfill.

84) Overall, Mr. Moore's and Aklark's goals were essentially the same, even though Aklark found deeper digging was required and Aklark used a third row of blocks rather than concrete infill. I do not consider the associated expense to have been unnecessarily expensive in 2010 or now, nor do I consider it to have been of questionable long-term value. I say this given the parties' initial agreement to having the full repairs done and given the cost relative to the strata lots' property value. Certainly, the photos of the Lot B side over time show the value.

85) Third, the respondent owner expressly acknowledges the Lot A side of the seawall has

"experienced ongoing erosion as expected from the observations in the engineering report". She says that she used the erosion "as an opportunity" to fill the eroded area with crushed gravel.

86) This statement shows the respondent owner recognizes ongoing erosion processes were expected on the Lot A side given that she refused to have the more complete repairs done. Her essential response here is that she has adequately addressed the expected erosion with gravel. The difficulty is that there is no expert opinion to suggest that her chosen approach is adequate. Rather, the existence of Mr. Moore's and Aklark's recommendations leads to the contrary conclusion. Moreover, the photos do not indicate the gravel backfill has halted any erosion process.

87) Fourth, I do not agree with the respondent owner that Aklark unreasonably exaggerated Mr. Moore's assessment. Contrary to the respondent owner's submission, I find that the photos support both Mr. Moore's and Aklark's opinions.

88) Fifth, I find that the Lot A side of the seawall portion has significantly eroded both on the water side underneath the concrete blocks and on the yard side with a large void between the yard and the seawall. I come to this conclusion based on the photos, which span from early 2010 to January 2017. Contrary to the respondent owner's submission, I do not find the Lot A side of the seawall to be currently in "sufficiently stable condition". At the same time, based on these same photos and the 2010 expert evidence describing signs of instability, I find the Lot B side of the seawall has not eroded over time and it does appear relatively stable. This is relevant because I find that the method used to repair the Lot B side of the seawall was successful and reasonable.

89) It is true that with cost efficiencies in mind, the "best" solution is not required and that a "good" solution may be good enough. However, I cannot agree with the respondent owner's suggestion that keeping the "as built" design, with the exposed foundation rather than the embedded third row of blocks, was or is a "good solution". The expert evidence and the photos before me simply do not support that argument. Danger of imminent collapse is not the threshold test before me. The test is what must the strata do to reasonably repair and maintain the seawall. Waiting for signs of actual collapse would be unreasonable. I accept that there are signs of continuing significant erosion,

as shown over the years since 2010, and I find that this erosion is sufficient to require repairs to stabilize the Lot A side of the seawall.

90) Overall, I find that Mr. Moore's and Aklark's opinions are not inconsistent and are as relevant today as they were in 2010, in terms of the Lot A side of the seawall. If anything, the passage of time has provided the opportunity for photographic proof of that conclusion. There is notably no expert evidence to the contrary.

91) In summary, I find the Lot A side of the seawall must now be repaired in the same manner as was done on the Lot B side in 2010. I acknowledge that Aklark had used slimmer blocks that may have had only an aesthetic benefit. Nonetheless, at this point, using Aklark's proposal, including the slimmer blocks, makes the most sense and direction to repair the Lot A side of the seawall substantially "the same" also avoids potential future areas of dispute in this highly conflicted strata. I also agree with the applicants that a further assessment would be unnecessary duplication and an unreasonable further expense and delay.

92) Next, I turn to who must bear the cost of the seawall repairs I have ordered. First, I find that the entire seawall ought to have been repaired in 2010 based on Aklark's proposal as it was the only reasonable solution at that time, including the filter fabric and a third row of blocks.

93) Ordinarily each strata lot in a duplex would share half the strata's common expenses. However, here the applicants already paid entirely for the appropriate seawall repairs on the Lot B side, without any contribution from the respondent owner to that portion. As permitted by section 48.1(2) of the Act, I find the respondent owner must bear the entire expense of repairing the Lot A side of the seawall now. I say this because in 2010 the respondent owner made a decision to risk a lesser repair on the Lot A side, a decision that I find was unreasonable and which has proven insufficient. I recognize that my order means the $5,000 the respondent owner paid in 2011 towards the seawall repairs then is now essentially money thrown away. Nonetheless, overall, I find it would be significantly unfair to assess any of the Lot A side seawall repairs to the applicants.

94) As for the scotch broom, the applicants say it had been controlled on the strata property until the respondent owner moved in. The respondent owner says scotch broom helps

stabilize the seawall area and prevents further erosion. I have no expert evidence before me to support this assertion nor do I have any that specifically says it is harmful. However, while he did not specifically refer to weeds, I have Mr. Moore's assessment that referred to easily probeable organic material behind the seawall, which contributed to the erosion concerns.

95) Based on the photos, I find the erosion on the Lot A side of the seawall has continued despite the scotch broom. I find that the scotch broom has done little, if anything, to resolve the erosion issue and may well have aggravated it. The issue of unsightly premises is also a factor and I accept that the scotch broom impedes the applicants' ocean view. In any event, given its invasive nature, which is undisputed, I find the scotch broom in the seawall area should be removed and controlled in future. I further order that no party may plant scotch broom or any other similar weeds in that area, without consent of all parties. My detailed orders are set out at the conclusion of this decision.

Inspection and unsightly conditions

96) The respondent owner's essential position is that the applicants' claims amount to "years of historical grievances" against the respondent owner "that offer no current basis for the relief sought".

97) In particular, the respondent owner argues the standard is reasonableness not perfection, and that she has met that standard. The respondent owner submits the January 2017 photos show Lot A as being reasonably maintained. She does not deny the historical descriptions that I have summarized above. The respondent owner says there is no current basis to suspect mould or hoarding within the Lot A residence and so an inspection is not warranted.

98) I turn then to the substantive submissions. First, it is up to the District of Sooke to investigate and enforce its own bylaws and nothing in the SPA or in this decision prevents it from doing so. That said, nothing prevents the strata from enforcing its existing bylaws in a manner consistent with the District's bylaws that prohibit unsightly premises, which I find would be appropriate. Having reviewed the photos, I also accept the applicants' undisputed evidence about the well-kept nature of the neighbouring

properties and the condition of the strata property before the respondent owner took occupancy. The challenge is in how to specifically identify what must be done now.

99) Second, neither the applicants nor I am a qualified health professional to diagnose the respondent owner with obsessive compulsive disease or anything else, which the applicants acknowledge. However, the absence of medical evidence does not lead to the dismissal of the claim. Given the undisputed definition of hoarding, I am able to conclude that the cluttered Lot A yard conditions until at least December 2016, as summarized above, indicated some signs of hoarding. The question remains whether hoarding in the Lot A yard, or even the piles of clutter the applicants saw inside the respondent owner's entryway, is a basis for an inspection inside the Lot A residence. I find that the answer to that question is no. I say this because the evidence before me does not sufficiently establish that any hoarding inside Lot A is reasonably likely to cause harm to common property or to other strata lot owners or the property. The OCD document summarized above is simply too general in nature. Thus, an inspection of Lot A is not presently warranted on the basis of suspected hoarding. However, that is not the end of the inspection issue.

100) The roof is common property, which the strata must repair and maintain along with exterior windows and skylights. The strata is also responsible for the repair of the interior wall dividing Lot A and Lot B, as per bylaw 8(d)(i) and section 69 of the SPA. Section 149(1)(d) of the SPA also requires the strata to insure fixtures, although I recognize that responsibility to insure does not necessarily mean responsibility to repair. The SPA Regulation defines fixtures to include things attached to a building, including plumbing fixtures. I find the air exchange systems are fixtures, even though each strata lot may have its own. As noted above, the systems are not common property. Based on the CMHC documentation before me, an air exchange system is an important tool to control moisture, and there is no evidence before me that a dehumidifier is adequate, other than the respondent owner's preference and statement she has no moisture problems. Overall, I find that it may be that the air exchange units in both Lot A and Lot B should be maintained and used by the respective strata lot owners, in order to comply with bylaw 2(1). I find whether that is so is best left to an appropriately qualified inspector to decide.

101) Further, it is not disputed that where there has been a leak moisture can collect and over time mould can grow along with wood rot and structural decay. While I accept that the leaking skylight over Lot A was replaced in Lot A in March 2015, it is unknown whether there may be other perhaps unknown moisture problems in either strata lot that may fall within common property. Bylaw 7 expressly contemplates inspections. An annual inspection by a qualified home inspection professional is a relatively small interference that I consider justified to protect the combined interests of both strata lot owners. In fairness, both strata lots should be inspected as the same common property considerations apply to both.

102) My detailed orders are at the end of this decision. However, I will briefly explain here that the expenses associated with any remedies are in some cases to be shared by the parties. This applies to the common property roof, windows, skylights, and to the interior wall dividing Lot A and Lot B. I say this because there is insufficient evidence before me that any damage that is found to those areas is properly the sole responsibility of the respondent owner, in that I cannot conclude she has willfully permitted damage to occur in those areas, although I accept that she has prevented an inspection. I also find the expenses for any necessary repairs to the air exchange units, if the home inspector concludes they should be used, should be borne by the respective strata lot, given the difference in the owners' respective use and maintenance of them and because they are not common property. I consider the above to be the most fair overall solution. As for the cost of the inspections themselves, I find each strata lot should bear the expense associated with their own strata lot, which given the history I consider to be the appropriate order, as permitted under section 48.1(1) and (2) of the Act.

103) I turn then to the issue of unsightly conditions, which the home inspector will also address. The applicants argue the unkempt yards on Lot A and common property (the driveway top area in front of the residences) are a nuisance and interfere with their rights to use and enjoy the property. I recognize that the line where property changes from "sightly" to "unsightly" is not necessarily a clear one. However, based on the historical photos between 2010 and at least December 2016, and the realtor's opinion, I find the evidence is clear the property was unsightly and I agree with the applicants' submission here.

104) The challenge is that in January 2017 the respondent owner did a significant clean-up of her yard, which given the history and that timing I accept was done in response to this tribunal proceeding. I also accept that in March 2017 the respondent owner allowed the clutter to somewhat build up in her yard again, at least based on the one photo provided of the area around her entryway, although the clutter was certainly not as significant as it had been in early January 2017 or prior. Nonetheless, I find that there remain some items that amount to clutter which at least appear to be a nuisance or unreasonably interferes with the applicants' use and enjoyment of their strata lot, and without limitation here I include the worn children's playground. Further, I also find that given the respondent owner's pattern of behaviour in failing to keep the property maintained, my orders must go further and address future maintenance standards.

105) I pause at this point to address the respondent owner's arguments to the effect there is no ability to address unsightly conditions. The respondent owner argues that nuisance is not defined by the SPA, and she submits aesthetic appearance alone would not provide a sufficient basis to support a nuisance claim "without further support of statute" (citing *Christensen v. District of Highlands*, 2000 BCSC 196, at paras. 13 to 16).

106) Christensen was not a strata property dispute. I find the laws of private nuisance are not necessarily determinative here. Rather, the SPA governs this dispute and bylaw 3 clearly prohibits a party from causing a nuisance or interfering with another owner's right to use and enjoy their property. Further, the respondent owner's conduct in leaving the property in an unsightly state was significantly unfair, because it was burdensome, lacked in fair dealing, and was more than a mere prejudice or trifling unfairness (*Reid v. The Owners, Strata Plan LMS* 2503, 2001 BCSC 1578). The respondent owner's conduct meets that threshold. Aesthetic appearance, including the unreasonable obstruction of a view, may well be relevant and in this case I find it is, particularly given the photos and the realtor's opinion. That the District of Sooke's bylaw exists supports this conclusion as does the applicants' inability to sell their property. I also accept the applicants' undisputed evidence about the social standard in the neighbourhood.

107) The respondent owner also argues that any consideration of reasonableness should also consider the condition on Lot B, and the strata's duty to enforce bylaws under

sections 26 and 31 of the SPA requires even and fair enforcement. I agree, but as noted above I do not find the isolated historical circumstances on Lot B to be particularly problematic, bearing in mind that the respondent owner never complained, they were isolated in time, and were far less significant in their unkempt appearance as compared to Lot A. That said, my orders below set the same standard for both strata lots.

108) The applicants recognize it would be difficult to assess what materials need to be removed or stored and to what standards the yards should be maintained. Generally, they ask for an inspection of Lot A and common property and then a professional company to implement the recommendations, all at the respondent owner's expense. I agree, except that below I have addressed the inspection of the entire property by the professional home inspector.

109) In addition to setting out the scope of the issues to be addressed and making recommendations for necessary repairs, without limitation the inspection and recommendations should canvass the following: the air exchange units, the common property electrical pole following the removal of the clothesline, fencing on common property, any yard clutter, the building exterior, and the roof and how moss removal should be handled. I have addressed the seawall above, as I expect a different qualified professional will be required for that project, which is also more time sensitive.

110) My orders regarding the unsightly conditions are detailed at the end of this decision, which will also include my orders for the inspection of the property. My specific orders do not limit any other recommendations that the professional home inspector may make and which should be carried out by the parties as applicable, unless they both agree otherwise.

Bylaw revision and future dispute resolution process

111) The applicants want the bylaws revised so that ongoing deadlock can be avoided, whereas the respondent owner says the SPA requirements effectively require the current status quo, which is that no decision or enforcement can be made at all without agreement by both council members.

112) The applicants ask the tribunal to order amendments to the current bylaws, or that I

possibly order the parties to obtain mediated assistance in adopting new bylaws, that would set clearer maintenance standards, annual inspections, and a mechanism for one owner to remedy another owner's bylaw contravention if the offending owner refuses to do so.

113) I find the respondent owner wants the strata to remain unable to act without her agreement, even where she may be in violation of the bylaws. On the one hand, the respondent owner disagrees the strata is permanently deadlocked and states she is concerned about the upkeep of her home and has a "strong interest" in maintaining and repairing it, as shown by the roofing, seawall repair, window replacement, painting, landscaping and other work she has done on the property. Based on my conclusions above, I cannot agree that the respondent owner has demonstrated a strong interest in the upkeep of her home. Based on the respondent owner's own submissions, I have serious reservations about whether the parties are not permanently deadlocked.

114) I also do not agree with the respondent owner's submission that her interactions with the applicants over the last 7 years amounted to a "pattern of abuse" of the bylaws with the applicants improperly claiming authority of the strata. Overall, I find the applicants acted reasonably in the circumstances.

115) The respondent owner submits that increasing the binding obligations on the strata owners would only serve to increase the number of grounds of dispute. I disagree. The status quo, which effectively gives the respondent owner a veto power before the strata can take any action, is untenable and the lengthy history of the disputes culminating in this tribunal hearing is clearly evidence of that conclusion.

116) The question then is, what now? There has been some further regression in terms of unsightly conditions, as shown in the one March 2017 photo produced by the applicants of the respondent owner's entryway, although that condition is vastly superior to its former state and on its own likely would not cause me to make any sort of prospective order. The challenge here is the history between these parties, in that I accept that the January 2017 cleanup was in response to this dispute and there has been the regression. On a balance of probabilities, based on the existing bylaws alone I find the respondent owner cannot be relied upon to properly maintain "sightly conditions".

117) So, do the bylaws need to be amended, to enable the strata to act? I find the answer is no, at least not at this point. First, I do not find a mediator would likely assist the parties, given that mediation is a voluntary process. The respondent owner expressly submits she does not expect mediation to be successful.

118) Second, while I find that bylaw 29 is inadequate because it is essentially voluntary dispute resolution or mediation that has already proven unsuccessful, I find bylaw amendments are presently unnecessary. Rather, to address the dispute resolution mechanism problem, I order the strata to become a member of the Condominium Homeowners Association (CHOA). Upon referral by a complaining owner, if the parties agree, the parties should follow CHOA's opinion if CHOA provides one, which should address any associated costs. An alternative, if the parties agree in a particular dispute, is for the parties to together choose a third party to provide a decision in a dispute referred by a complaining owner. Here, my intention is for a less formal process than is described in sections 175 to 189 of the SPA. Again, the goal is for an informal but practical solution for day-to-day disputes that may arise. The parties should follow the third party's decision. Finally, given my conclusions above, I find it should be clear to the parties that unsightly conditions may constitute a nuisance and interfere with an owner's right to use and enjoy the property, within the meaning of bylaw 3. I do not find that bylaw amendments are presently further required in that respect. My detailed orders are set out below. For clarity, nothing in this decision prevents a party from referring a dispute to the tribunal or the court, and in particular, any opinion from CHOA or a third party is not binding on the tribunal or a court.

Tribunal fees

119) The applicants want the respondent owner to reimburse them the $225 they paid in tribunal fees. The respondent owner wants this claim dismissed. The applicants have been successful in this dispute and in accordance with the tribunal's rules, I find the respondent owner should reimburse the applicants the $225.

ORDERS

120) **Seawall**:

a) The strata must repair the Lot A side of the seawall in substantially the same manner as was done on the Lot B side in 2010 (the seawall repairs).

b) The strata must make every reasonable effort to have the seawall repairs done in the summer of 2017, within the DFO guidelines, during which process the respondent owner must arrange for the scotch broom removal at her expense.

c) In arranging the seawall repairs, unless the parties agree in writing otherwise, the strata must obtain 3 quotes. The quotes must be from suitable qualified contractors, such as Aklark and similarly qualified contractors. If the parties cannot reasonably agree on a contractor within 14 days of receiving 3 quotes, the applicants may select a contractor to do the seawall repairs, with cost efficiencies in mind, with all correspondence to be copied to the respondent owner.

d) I order that the respondent owner must bear the entire expense of the seawall repairs.

e) I order the respondent owner to maintain control of any weed regrowth on her strata lot in the seawall area.

f) No party may plant, or allow to be planted, any weeds in the seawall area, without written consent of all parties.

g) If the seawall repairs are not completed in 2017, I order:

   a) The strata must have the seawall repairs completed in 2018, within DFO guidelines, in the manner described above.

   b) By September 15, 2017, the respondent owner at her expense must remove the scotch broom, and control any regrowth.

   c) By September 15, 2017, at the respondent owner's expense, the strata must either

i. hire a qualified company to install a non-intrusive erosion control method to prevent further erosion to Lot B, If the parties cannot reasonably agree on a qualified company by September 1, 2017, the applicants may select the contractor to install the non-intrusive erosion control method, with cost efficiencies in mind, with all correspondence to be copied to the respondent owner or,

ii. when the seawall repairs are completed in 2018, pay for any necessary repairs to the Lot B side of the seawall due to encroaching erosion from Lot A.

121) **Inspection and remedies**:

a) Unless the parties agree in writing otherwise, the strata must arrange for annual inspections of each strata lot's residence and yard, to be completed by an appropriately qualified professional home inspector in accordance with bylaw 7 notice requirements.

b) In his role as council member, the applicant Mr. Bourque must in writing consult with the respondent owner regarding the hiring of the home inspector, but if they cannot reasonably agree within 14 days of consultation, Mr. Bourque may act on behalf of the strata to hire the inspector and set the inspection dates, in accordance with bylaw 7 notice requirements.

c) The inspection reports should provide detailed recommendations for repair and maintenance, bearing in mind the District of Sooke's bylaw, including the care of the building, the air exchange units, shrubbery and lawn, address standards at the property entrance, and removal of any excessive yard clutter or unsafe or broken equipment.

d) The first inspections should take place on or before July 31, 2017, or at some other date if the parties all agree in writing, and then annually thereafter within 14 months of the last inspection.

e) The strata must provide the inspection reports for each strata lot to both the Lot A and Lot B owners.

f) Each strata lot will bear the expense associated with the inspection of their strata lot.

g) Within 30 days of receiving the inspection reports, the strata must retain an appropriately qualified contractor to implement the remedies recommended by the home inspector, unless otherwise agreed by the parties in writing.

h) In his role as council member, the applicant Mr. Bourque must in writing consult with the respondent owner regarding the hiring of the contractor, but if they cannot reasonably agree within 14 days of consultation, Mr. Bourque may act on behalf of the strata to hire the contractor and set the dates for work to be done, including work on Lot A, although bylaw 7 notice requirements must be followed.

i) The expense of any remedies recommended by the home inspector are to be borne as follows:

    a) Any Lot A yard maintenance is solely at the expense of the respondent owner.

    b) Any Lot B yard maintenance is solely at the expense of the applicants.

    c) Each strata lot bears the expense of any necessary repairs to their air exchange unit, which unit is to be repaired, maintained and operated by the strata lot owner if that is the recommendation of the inspector.

    d) The expense for any necessary repairs to all common property, including the driveway and roof (including moss removal), windows, skylights, is to be shared equally by the applicants and the respondents, as is the expense for any necessary repairs to the interior wall dividing Lot A and Lot B.

j) Without limiting the possible recommendations of the inspector, I order the applicants and the respondent owner to maintain their respective yards free of excessive clutter and garden overgrowth, in accordance with both the bylaws and the District of Sooke's bylaw.

k) I order the respondent owner to immediately remove, at her expense, any fencing she has placed on common property, unless the parties otherwise agree in writing.

l) I order the respondent owner to immediately remove the clothesline from the common property electrical pole, and if the inspector identifies any repairs are reasonably required to the pole, the respondent owner must bear the expense of those repairs.

m) I order the parties to immediately stop parking any vehicles on common property and further order that both parties must stop any guest or other resident from doing so in future.

n) I order the parties to immediately bring any "burn piles" within legal limits of the District of Sooke and to keep them within legal limits in future.

o) I order the respondent owner to immediately remove any used cat litter from the Lot A yard and I further order that in future she must dispose of it properly in the garbage on a regular basis.

122) **Bylaws**:

a) I dismiss the applicants' claim for bylaw amendments.

b) I order the strata to become a member of the Condominium Homeowners Association (CHOA), with the owners to share the membership cost equally.

c) I order that a complaining owner may refer a dispute to CHOA and if the parties

agree, the parties should follow CHOA's opinion if one is provided, which should address any associated costs.

d) Any party may use CHOA as a resource for the selection of professional inspectors or contractors.

e) I order that, if in a particular dispute the parties agree in writing, the parties may together choose a third party to provide a decision in a dispute referred by a complaining owner.

f) Nothing in this decision prevents a party from bringing a dispute to the tribunal or a court, and any opinion from CHOA or a third party is not binding on the tribunal or court.

123) **Tribunal fees**: The applicants were substantially successful in this dispute. In accordance with the tribunal's rules, I order the respondent owner to pay them the $225 in tribunal fees, within 30 days.

124) Orders for financial compensation can be enforced through the Provincial Court of British Columbia. However, the principal amount must be within the Provincial Court of British Columbia's monetary limit for claims under the *Small Claims Act* (now $35,000). Under section 58 of the Act, the applicant can enforce this final decision by filing in the Provincial Court of British Columbia a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

125) Under section 57 of the Act, a party can also enforce this final tribunal decision by filing, in the Supreme Court of British Columbia, a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect

as an order of the Supreme Court of British Columbia.

Shelley Lopez, Tribunal Vice Chair