



# Civil Resolution Tribunal

Date Issued: September 12, 2017

File ST-2017-00064

Type: Strata

Civil Resolution Tribunal

Indexed as: *Maguire v. The Owners, Strata Plan VIS5830*, 2017 BCCRT 77

BETWEEN:

Darlene Maguire

**APPLICANT**

AND:

The Owners, Strata Plan VIS5830

**RESPONDENT**

---

## REASONS FOR DECISION

---

Tribunal Member:

Patrick Williams

## INTRODUCTION

1. The respondent strata corporation, The Owners, Strata Plan VIS5830 (the strata), comprises 51 strata lots in a complex called Crystal Shores. The strata plan consists of 4 phases; the first registered August 4, 2005 and the fourth registered

April 13, 2017. Phase 1 - 3 comprise townhouse strata lots 1 – 27 in 9 separate buildings. Phase 4 comprises apartment strata lots 28 – 51 in one 3 story building.

2. The applicant Darlene Maguire (the owner) is the registered owner of strata lot 20 and, together with her husband Richard Maguire (Mr. Maguire), a registered owner of strata lot 21. Strata lots 20 and 21 are located in a Phase 3 townhouse shared with strata lot 19.
3. This claim involves the removal and topping of trees. The owner states that trees have been removed and topped without authority, in contravention of a municipal covenant and in a manner that is unfair. The strata states that the landscaping of the strata has included the appropriate removal and pruning of trees and is not unfair to the owner.
4. The owner asks the Civil Resolution Tribunal (tribunal) to make four orders. First, an order that the strata not remove or top any trees. Second, an order that the strata provide copies to the owner of all correspondence between the strata and the City of Courtenay (City) with respect to the removal of trees. Third, an order that the strata provide copies to the owner of all correspondence or reports from “Skyline” or any other contractor or consultant involved in advising on or providing services regarding trees and vegetation. Fourth, an order that the strata replace 28 trees of similar size and species.
5. The strata opposes the orders the owner requests, The strata states that the owner’s past actions taken and previous undertakings has made living at Crystal Shores incredibly difficult for the council to fulfill its normal duties or tend to the owners of the other strata lots.

## **JURISDICTION AND PROCEDURE**

6. These are the tribunal’s formal written reasons. The tribunal has jurisdiction over strata property claims brought under section 3.6 of the *Civil Resolution 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. It must also recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

7. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find there are no significant issues of credibility or other reasons that might require an oral hearing.
8. The tribunal may accept as evidence information it considers relevant, necessary, and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask the parties and witnesses questions and obtain information in any other way it considers appropriate.
9. Under section 48.1 of the Act and tribunal rule 12, in resolving this dispute the tribunal may make one or more of the following orders:
  - a. order a party to do or stop doing something;
  - b. order a party to pay money;
  - c. order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

10. The issues in this dispute are:
  - a. Has the strata, through its council, exceeded its authority under the *Strata Property Act*, 1998 S.B.C., c 43 (SPA)?
  - b. Has the strata breached its contractual obligations to the City of Courtenay?
  - c. Has the strata breached section 36 of the SPA?
  - d. Has the past removal and topping of trees been unfair to the owner?
  - e. Would the future removal of trees be unfair to the owner?

## BACKGROUND AND EVIDENCE

11. Crystal Shores is a community of townhouses and apartments. There are 109 trees presently on the complex and it is adjacent to a treed mature nature reserve. It is surrounded on 3 sides with covenant areas. The present existence of 109 trees is not disputed.
12. The owner purchased strata lots 20 and 21 in May 2011. The owner states that during the period 2011 to 2016, 28 trees have been removed. The owner states that, based upon personal communication from the City of Courtenay, the original development permit noted either 130 or 138 trees. The Development Permit was produced as evidence. I was unable to discern from the schedules to the Development Permit how many trees existed. It is clear that there were a substantial amount of trees, in excess of the present 109.
13. The owner produced among other things, emails, landscape reports, copies of minutes of council meetings, an arborist report, many photographs of trees, relevant bylaws, cost estimates, engineering site plans, development permit and correspondence exchanged between lawyers. The strata in reply has produced among other things, emails, minutes of meetings of council and the strata, photographs, an application to amend the development permit, and a landscape services contract. I have read all the evidence provided. While I have considered all that evidence, I do not plan to refer to each piece of evidence.
14. A review of the evidence leads me to conclude that reconstructing what council has done regarding trees and landscaping since 2005 is an impossible task. There is a lack of information available that goes back 12 years. I have focused on what has taken place since 2013 given the owner has complained of tree removal between 2013 and 2016.
15. The Dispute Notice was filed January 17, 2017 so there may have been a *Limitations Act* issue between June 1, 2013 and January 16, 2016. Given my eventual ruling, the limitation issue is not relevant.

16. The owner requested a council hearing, which was held on January 6, 2017. In a January 18, 2017 letter, the council noted examples of the tree removals due to causing damage to roadway pavement, selected removal of catalpa trees that were declining and a pine tree leaning almost onto the road causing a danger to sight lines.
17. The catalpa trees were intended to be purple beech. They were delivered in error to the complex and were planted by the developer rather than returned. The catalpa trees declined due to winter and wind storms. On June 7, 2017, the strata applied to the City to amend the development permit and noted the catalpa trees and other problems. The other problems included vegetation that compromised driver safety sight lines, vegetation growth that caused infrastructure damage such as gutter damage and the lifting of paving stones and pavement and trees planted too close to buildings providing rodent access and resultant building damage.
18. A comprehensive landscape plan was obtained by the strata. That plan is dated March 2016. It was circulated to all the owners. Although the owner has submitted 28 trees were removed, there is no independent evidence of the removal of that many trees. The owner retained Gye & Associates arborists (Gye) who provided a report dated June 6, 2017.
19. The Gye report identified 14 trees that had been removed and estimated a cost of \$5,200 based upon \$370 per tree. The trees identified were spread throughout the complex. While the report did criticize some unwanted horticultural practices that could be improved, the report also stated "in general, an effort to maintain the landscaping part of the property is noticed".
20. The owner has approached the City of Courtenay to complain of infractions by the strata. The owner argues that the strata has violated Covenant EX096620 in favour of the City of Courtenay (the covenant). I have reviewed the strata plan and the covenant. The covenant addresses certain portions of the strata complex and states no natural vegetation can be altered or removed in the covenant area. There is no evidence that trees have been removed in the covenant areas.

21. I have reviewed the Outlook Engineering and Landscape Architecture plan (Outlook plan) of the complex. The plan is dated March 23, 2017. It depicts the recommended removal of trees in the future as part of the amended development permit application of the strata to the City. The Outlook plan was submitted as part of that application.
22. I have reviewed the City bylaw no. 2461 (the bylaw). Among other things, a permit is required to remove trees. The strata has not obtained such permits in the past. The City of Courtenay has taken no action against the strata. The strata has applied to the City of Courtenay for an amended development permit to address required tree removal and at present that amended development permit is being processed. The strata has agreed that no more trees will be removed until after a decision of this tribunal and that no trees will be removed until the amended development permit is approved, unless removal or tree topping is indicated per s. 71(b) of the SPA.
23. No general meeting of the strata has been held in order to obtain guidance from the owners about the removal of trees. The strata does not intend to hold such a general meeting to obtain such guidance, as the strata states the tree removal is not a significant change to common property under s. 71 of the Act.
24. I have seen no evidence that the owners of the other strata lots have complained of tree removal or that they way support the owner. There is no evidence that the owner has requested the owners collectively by majority vote to direct the council about tree removal, per s. 27(1) of the SPA.
25. The strata produced a witness statement of a representative of the developer. He stated that at each phase of development, landscaping for that stage was completed. He stated that there was no way to know if the original number of trees, on the original plan for where the trees were intended to be planted on the initial development plan 2004, is accurate. He stated that there was initial collaboration between the landscape architect and the landscape contractor as to

the best placement and number of plants due to site influences. He stated that some plants were changed as they were unavailable in the area at that time.

26. The exchange of letters between lawyers for the owner and the strata address issues that go beyond the issues in this tribunal proceeding. I do not intend to address those other issues. One issue to be addressed is the strata's obligation to produce correspondence under section 36 of the SPA. The owner requested all correspondence with respect to tree removal. The strata lawyer in his letter stated that the strata had retained Skyline landscaping company to review landscaping and trees. It stated that in the spring of 2014 Skyline identified those trees that were damaged and ailing and need to be topped or removed. The lawyer's letter indicated that Skyline's report and plan had been circulated and the owners, including the owner, had approved the report in writing.
27. The owner requested a copy of the Skyline report as per s. 36 of the SPA. The strata did not provide it, and eventually stated that a report from Skyline did not exist. The strata stated that the letter of the strata's lawyer had been in error. This appears to be the only report that potentially existed and was not produced to the owner.

## **POSITION OF THE PARTIES**

28. The owner argues that:
  - a. The City Covenant EX96620 has been violated.
  - b. The strata has not provided the Skyline landscape report in violation of s. 36 of the SPA.
  - c. The removal of the trees is a significant change to the appearance of common property. Under s. 71 of the SPA, a resolution by a  $\frac{3}{4}$  vote (3/4 vote) was required unless there were reasonable grounds to believe that immediate change was necessary to ensure safety or prevent significant loss or damage.

- d. The strata removed 28 trees and must replace 28 trees.
- e. Per s. 98 of the SPA, the expense to remove trees can only be an expense that is necessary to ensure safety or prevent significant loss or damage.
- f. Any removal of trees in 2017 would be contrary to sections 71 and 98 of the SPA, and would be significantly unfair to the owner.

29. The strata argues that:

- a. The City of Courtenay has determined that it will take no enforcement action against the strata.
- b. It is not in breach of s. 36. It has provided all correspondence and there is no report from Skyline. It states its lawyer's letter was in error.
- c. The removal of trees is part of the strata's obligations to maintain common property per s. 3 of the SPA. The removal has not been a significant change to the appearance of common property. Crystal Gardens and the surrounding area is very treed and the removal of a few trees is not significant.
- d. The removal of trees that have been identified needed to be removed per s. 71(b) of the SPA. The removal of trees from 2011 – 2014 that council has identified were as follows:
  - i. Three pine trees were removed in front of units 1, 2 and 3. These trees had grown to a height where they had become a traffic hazard/visibility issue. The roots of these trees were also breaking up the pavement.
  - ii. Two pine trees were removed near units 10, 11 and 12 as the roots were starting to break up the pavement.



- iii. One pine tree was removed near units 13, 14 and 15 as the roots were starting to break up the pavement.
  - iv. Two pine trees were removed behind the transformer as they blew over during a storm.
  - v. One pine tree was removed between units 6 and 9 as the roots were lifting patio stones.
  - vi. One cedar tree was removed adjacent to unit 9 because the tree had grown such that it impeded the owner's access to their garage.
  - vii. One catalpa tree near the southeast fire hydrant was removed after it blew over during a storm.
  - viii. Two catalpa trees were removed near unit 12 as they had grown to a height where they impacted water drainage on the roof and eaves troughs.
- e. A total of 28 trees have not been removed. Those trees that have been removed needed to be removed and the reasons for removal are justified.
  - f. No trees have been deliberately topped. Trees that have been topped or de-limbed are a result of extreme weather events such as heavy snowfall or strong winds.
  - g. The replacement of trees will be determined based upon recommendations from professional landscapers.
  - h. It opposes an order that no trees be removed in the future. Removal and replacement of trees is an ongoing issue that is fluid.
  - i. It recognizes that there was poor record keeping/documentation in prior years and the further back one goes in time, the less information exists. The council is committed to better record keeping in the future.

- j. The owner may have more information than council since during the relevant times of complaint either the owner or the owner's husband was on council.
30. The strata states that in accordance with sections 3 and 31 of the SPA, council is committed to act on behalf of the interests of all owners ensuring fiscal responsibility.
31. The strata states that due to the ongoing complaints of the owner the insurance premiums of the strata have increased dramatically, council members have resigned, the property manager has resigned (stating the sole cause was due to the unmanageable actions of the owner), the landscape coordinator will no longer respond to the owner's complaints and owners are concerned that their investments will be affected by the acrimonious discord caused by the owner.

## **ANALYSIS**

### **Has the strata, through its council, exceeded its authority under the SPA?**

32. The strata argues that any tree removal has taken place in compliance with s. 71(b) of the SPA. That section states that a strata can make a substantial change to common property if there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage. The strata has identified the removal of 13 trees, each removal and its justification, as set above. The owner argues that 28 trees were removed. I find that the actual number of trees removed cannot be determined with any certainty.
33. I find that while there may be some instances in which "immediate" change was necessary, there are others that could have awaited a vote of the owners, if the change in appearance was significant. For example, trees that impacted pavement might need immediate removal, but trees that had reached a height that impacted roof drainage need not be immediately removed. Expert evidence is not necessary to determine whether immediate removal was necessary. I find that some trees

needed to be removed per s. 71(b) and some did not need to be removed immediately.

34. Was the removal of trees that did not require immediate removal a violation of s. 71(a) of the SPA because the removal was a significant change to the appearance of the common property?
35. Section 71(a) of the SPA states that a strata must not substantially change the use or appearance of common property, unless a  $\frac{3}{4}$  vote authorizes the change. No  $\frac{3}{4}$  vote has been obtained. The case of *Chan v. Strata Plan VR677* (2 February 2012), Vancouver Registry S115516 (B.C.S.C.) dealt with the objective and subjective factors or significant change in paragraphs 21 – 25. Those factors include visibility or non-visibility to residents or the public; use or enjoyment of a strata, or a number of units as an existing benefit; and an impact on marketability or value of the units due to the change. I find that the removal of the trees does not amount to a significant change in the use or appearance of common property.
36. I find that the community of Crystal Shores and its adjacent nature reserve include many trees. The removal of trees, whether it is 28 as argued by the owner, or a lesser number as argued by the strata, does not affect the visibility to residents or the public. The residents still enjoy the existence of a great number of trees. I find that that the removal of the trees does not impact the marketability or value of the units. The owner bears the burden of proof that the removal of the trees has impacted the market value of the units. The owner has not provided any evidence of impact on market value. Indeed, it could be argued that the culling of trees increases the market value of a strata lot.
37. I find that the council had the authority to remove the trees. The change was not significant and a  $\frac{3}{4}$  vote was not required. Section 3 of the SPA requires a strata corporation to manage and maintain the common property for the benefit of the owners. Section 4 of the SPA states that the powers and duties of a strata corporation must be exercised and performed by a council. Section 31 of the SPA requires a council member to act honestly and in good faith with a view to the best

interests of the strata corporation. I find that the council, on behalf of the strata, has acted within its authority and per its statutory obligations when causing trees to be removed.

38. The owner has argued that the expense of hiring a landscape architect at a cost of \$800.00 to assist with an as yet unapproved revised development plan was contrary to s. 98 of the SPA. Section 98 of the SPA addresses unapproved expenditures; an expense of not more than \$2,000 or 5% of the total budget is permitted, but any larger expense requires a  $\frac{3}{4}$  vote.
39. The owner argues that in the past, tree removal costs had come out of the gardening budget to the detriment of other basic gardening. This is what councils do when governing strata corporations. They follow budgets and react to expenses that are unexpected but necessary. The council manages the common property per s. 3 of the SPA. I find that the council has discharged its statutory obligation and has not acted contrary to section 98 of the SPA.

#### **Has the strata breached its contractual obligations to the City of Courtenay?**

40. I have read the covenant. I find that no trees located in the covenant area have been removed. I have read the City's bylaw. The strata has breached the bylaw by removing trees that were not subject to s. 71(b) of the SPA. Without the appropriate City permits first being obtained, the strata removed trees that did not need to be removed immediately. There is evidence that the owner and Mr. Maguire were on council when some of those breaches occurred. The owner did not object at the time.
41. The City has taken no action with respect to the bylaw infractions and there is no evidence that the City intends to take any action. The present council is working diligently with the City to address future landscaping, which presumably will include the continued removal of trees or topping, where appropriate.
42. The strata does not have a "contract" with the City. However, the strata does have obligations to comply with the bylaw. I find that the strata had an obligation to

comply with the bylaw and that it did not comply. However, I find that there are no consequences of the breach of the bylaw in the past. The strata must comply with the bylaw in the future. I find that, despite the bylaw, the immediate removal of a tree per s. 71(b) of the SPA is available in the proper circumstances.

### **Has the strata breached section 36 of the SPA?**

43. There is little evidence on this issue. The strata said that it had a report from Skyline. The owner requested a copy. A copy was not provided. Subsequently the strata stated it had been in error and that Skyline had not provided a written report. Based upon the evidence provided, I am satisfied that Skyline did not provide a written report. I find that the strata has not breached s. 36 of the SPA by not providing a Skyline report.
44. The owner requested orders that the strata provide all correspondence or reports between itself and the City and from Skyline or any other contractor or consultant involved in providing services regarding trees and vegetation. There is no evidence that the strata has not provided that documentation. The evidence that I have reviewed contains substantial contractor and consulting reports and correspondence (including emails) with the City, all of which have been provided by the strata and the owner.
45. I find that that I do not need to make the orders requested. I find that the strata has not breached section 36. Section 36 of the SPA permits the owner to inspect the records of the strata. I remind the owner that it is appropriate to make requests that the strata provide copies of correspondence or reports, after the owner has inspected them. That way the owner can direct what specific documents need to be provided. I remind the strata that records and documentation must be collected or prepared and retained, as set out in section 35 of the SPA. Any owner is entitled to inspect those records and documents. If upon inspection an owner requests copies of certain documents, the documents must be provided.

## **Has the past removal and topping of trees been unfair to the owner?**

46. With the exception of the breach of the City bylaw, I have found that the strata did not exceed its authority. The removal of trees has otherwise been justified. The breach of the bylaw did not result in any dire consequences. The strata has discharged its statutory obligations in a manner that is in the interests of the owners collectively. The owner has taken issue with the tree removal. No other resident has voiced any disapproval.
47. Section 164 of the SPA does not appear to apply to the tribunal, but section of 48.1(2) of the Act has substantially similar wording regarding “significant unfairness”. The Court of Appeal of British Columbia, in *Dollan v. Strata Plan NBCS 1589*, 2012 BCCA 44, developed a test for the analysis under section 164 of the SPA. Applying that test:
- a. Examined objectively, does the evidence support the asserted reasonable expectations of the owner?
  - b. Does the evidence establish that the reasonable expectation of the owner was violated by the action that was significantly unfair?
48. The owner objects to the removal of trees but I find she did not expect that no trees would be removed. The owner has not stated what she expected. The evidence, examined objectively, does not support an expectation that no trees would be removed. Trees were removed between 2013 and 2016 for various reasons, as noted earlier. No action was taken by the owner until 2017. I find the conduct of the strata is not unfair to the owner.
49. The owner requested a hearing and a hearing was held. The minutes of that meeting reflect that the council heard the owner and addressed her complaints. The council has found that dealing with the owner and her complaints has been challenging and time consuming. Council offered the owner an opportunity to participate on the 2016-2017 council. The owner declined. The council offered the

owner an opportunity to participate on previous landscaping issues. The owner declined.

50. No evidence was produced in support of the removal of any particular tree affecting the owner specifically. It is acknowledged that the strata breached the bylaw, but there is no evidence that the breach was unfair to the owner.
51. I find that the past removal of trees and topping of damaged trees has not been unfair to the owner. The owner has argued that the trees that were removed be replaced. Since I have found the past removal of trees was not inappropriate, an order for replacement trees is not warranted.

**Would the future removal of trees be unfair to the owner?**

52. In *Azura Management (Kelowna) Corp. v. The Owners, Strata Plan KAs 2428*, 2010 BCCA 474, the BC Court of Appeal held at paragraph 20 that jurisdiction under s. 164 of the SPA needed something more than the potential that conduct might be unfair. Section 164 of the SPA does not appear to apply to the tribunal, but section of 48.1(2) of the Act has substantially similar wording regarding “significant unfairness”. The reasoning in *Azura* applies in this case. There is nothing in the evidence to conclude that the strata would act other than in accordance with the best interests of the strata.
53. It is impossible to predict whether a tree might need to be removed. A tree could die. A tree could get blown over or be damaged by heavy snowfall. A tree could compromise driving sightlines or the buildings.
54. Landscaping is fluid and circumstances change. The Outlook plan states that landscapes are dynamic and change as they mature. The strata is working with the City of Courtenay in developing a comprehensive plan and has retained landscaping contractors and architects. The strata has complied with s. 3 of the SPA in the past and there is no reason to believe that the strata will not comply with s. 3 of the SPA in the future.

55. If I were to find that the future removal of trees would be unfair to the owner, I would be predicting the future. Future removal may be unfair, but that determination would have to be made by others after events have occurred. I will not make an order that the strata not remove trees.

## **DECISION AND ORDERS**

56. I order the owner's claims dismissed, except that the strata must comply with the City of Courtenay bylaw no. 2461, as amended from time to time.

57. Under section 49 of the Act, and tribunal rules 14 and 15, 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. No claim for reimbursement has been made so I make no order with respect to payment of tribunal fees and reasonable expenses.

58. Under section 167 of the SPA, an owner who brings a tribunal claim against the strata corporation is not required to contribute to the expenses of bringing that claim. I order the strata to ensure that no part of the strata's expenses with respect to defending this claim are allocated to the owners.

59. Under section 57 of the Act, a party can 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 56.3(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.

60. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia. However, the principal amount or the value of the personal property must be within the Provincial Court of British Columbia's monetary limit for claims under the *Small Claims Act* (currently \$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.

---

Patrick Williams, Tribunal Member