



# Civil Resolution Tribunal

Date Issued: September 28, 2017

File: ST-2016-00276

Type: Strata

Civil Resolution Tribunal

Indexed as: *Page v. Section 1 of The Owners, Strata Plan NW 2099*, 2017 BCCRT 84

**B E T W E E N :**

Marina Page

**APPLICANT**

**A N D :**

Section 1 of The Owners, Strata Plan NW 2099

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Shelley Lopez, Vice Chair

## **INTRODUCTION**

1. The applicant Marina Page (owner) owns unit 608, also known as strata lot 47, in the strata corporation The Owners, Strata Plan NW2099 (strata). After this proceeding was commenced, the parties agreed that the appropriate respondent

was the residential section of the strata, Section 1 of The Owners, Strata Plan NW2099 (section), rather than the strata. I agree and have amended the style of cause accordingly. The owner is self-represented and the section is represented by an executive member.

2. The underlying evidence, which includes several strata council and general meeting minutes, all suggests on its face that it was the strata council that made the relevant decisions at issue in this dispute. However, at my request the parties confirmed through the tribunal facilitator that those strata council meeting minutes actually reflect decisions made by the section executive, rather than the strata council. Given the parties' agreement that the section is the proper respondent, nothing turns on this distinction. Thus, wherever I have referred below to strata council minutes or to strata council members (usually because that was what was written on the document at the time), those should be read as being executive minutes of the section and executive members, respectively.
3. In around 2012, the section began a ground floor landscaping project (Project) that involved the ground floor units of Buildings A and B, all of which are part of the section. The section's "ground floor" sits 3 levels above street level, on top of the commercial section of the strata. This dispute is about certain alterations to the limited common property patios of three residential strata lots in the section, units 5, 6, and 7<sup>1</sup> (collectively, the Patios), which are the only 3 units located on the ground floor of the south elevation of Building B. Beyond the Patios, which sit underneath an outdoor gazebo or canopy, is a landscaped lawn and garden.
4. In particular, at issue are 2 change orders made after the original Project design (collectively, the Changes): 1) the change from a wood to a steel trellised gazebo or canopy over the Patios, and 2) the placement of stairs that the applicant says extended the Patios out by 40" to the benefit of those 3 strata lot owners. The Project was approved by a  $\frac{3}{4}$  vote resolution of the owners. However, the Changes at issue were not approved by a  $\frac{3}{4}$  vote resolution, which the applicant

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<sup>1</sup> These units correspond to strata lots 120, 121, and 122 respectively.

says was contrary to section 71 of the *Strata Property Act* (SPA) because the Changes amounted to a significant change in the use and appearance of common property.

5. The owner asks the Civil Resolution Tribunal (tribunal) for an order declaring that the section permitted common property alterations contrary to section 71 of the SPA. The owner also wants an order that a strata council member Frank Furesz was in a conflict of interest and benefitted from unapproved upgrades to his patio and canopy. The owner further wants an order that the section is not responsible to pay the additional costs of the upgrades. Finally, the owner wants the strata to reimburse her the \$225 she paid in tribunal fees.

## **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* (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 other way it considers appropriate.
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. Through the tribunal facilitator, the applicant has expressly advised that she does not want to add any parties to this dispute, such as Mr. Furesz, owner of unit 7 in the strata or the owners of units 5 and 6. Thus, as referenced above, the only respondent in this decision is the section.

## **ISSUES**

11. There are the issues in this dispute:
- a. Was council member Frank Furesz in a conflict of interest with respect to the contracts associated with the Changes?
  - b. Were the Changes significant alterations to common property that required approval of a  $\frac{3}{4}$  vote resolution, as set out in section 71 of the SPA?
  - c. Should I order that the section is not responsible to pay for the costs of the Changes?
  - d. Should the owner be reimbursed \$225 she paid in tribunal fees?

## **POSITION OF THE PARTIES**

12. The owner says alterations to the Patios and canopy along the south side of Building B included upgrades over original construction that were not approved by the section, and thus were done without compliance with section 71 of the SPA. The owner wants an order that the section is not responsible to pay the additional costs associated with the Changes. While the owner expressly does not want to add parties to this dispute, namely the Patio owners, she states her expectation is that if she is successful the strata or section will pursue those owners to reimburse the contingency reserve fund. The owner also wants an order that strata council

member Frank Furesz was in a conflict of interest and that he benefited from the Changes personally, given his involvement with the relevant contracts. The owner says she did not become aware of the Changes until June 2015, and thereafter she acted reasonably promptly to pursue her dispute, given her health and need to obtain legal advice.

13. The section says the Project was approved by the owners by a  $\frac{3}{4}$  vote, which included removal of wood planters, lattices and steps around the Patios and replacement with granite steps. The section says the change from wood to steel canopy was approved by a council majority and did not amount to a significant change in use or appearance of common property and thus did not require a further  $\frac{3}{4}$  vote. Similarly, the section says the change in shifting the planned steps further south to accommodate the canopy posts without leaving a gap in the stairs was also not a significant change that required a  $\frac{3}{4}$  vote. The section says Mr. Furesz' vote in support of the steel canopy change made no difference as it was already passed by a majority council vote and further Mr. Furesz did not vote on the change to the stairs plan. The strata submits that an order directing the strata or section to later pursue any non-party owners would be inappropriate, particularly given the application of the *Limitation Act* and that the section approved the relevant expenditures 4 years ago. The section also argues that the owner's claims are out of time.

## **EVIDENCE & FINDINGS**

14. While I have read all of the material provided, I have only commented below on the evidence and submissions necessary for this decision.
15. As set out in the tribunal decision plan, the parties agree:
  - a. The strata is not a party to this dispute.
  - b. To complete certain landscaping upgrades, the section passed a special levy at a general meeting held on February 28, 2012.

- c. Before the landscaping was upgraded, the ground floor patios had wooden borders.
  - d. Mr. Furesz owned a ground floor unit in the section (namely, unit 7).
16. Mr. Furesz joined the section executive after the Project had started although he was a member when the relevant Change orders were being voted upon. As noted above, Mr. Furesz is not a party to this dispute.
  17. As set out in Mr. Furesz' statement provided to the tribunal, the 3 Patios are only visible from this landscaped area and not visible from any of the surrounding streets that are 3 levels down. This is not disputed. Contrary to the owner's initial submission, the section says the landscaped area is not commonly used by owners or residents aside from those that live in the units with patios on that level. In later submissions in response to my questions, the owner submitted that she did not visit the south side of Building B herself until June 2015 when she had offered to water plants, in part because the area was mainly used by those with young families.
  18. Prior to the Project, the Patios on the south side of Building B had a wood canopy with acrylic panels and were surrounded by wood planters and lattices that enclosed them. This is not disputed. There were gaps in between the planters with wooden stairs so that the Patios could be accessed from the landscaped area. Upon my inquiry, the section explained that the Patios were the only ones that had a canopy originally and so that was why the Patios were the only ones to receive a replacement in the Project.
  19. I turn now to the relevant chronology.
  20. In November 23, 2010 strata council meeting minutes, the strata noted that the strata's landscape architect, Durante Kreuke, had provided a Summary of Findings with respect to the "Ground Floor Landscape Project", which the strata council decided to present to the owners for approval by a  $\frac{3}{4}$  vote. In a written statement provided to the tribunal by the section, Mr. Furesz states that while he is a

professional architect, he has never had any professional connection to Durante Kreuk, and at no time did he receive any payment or other consideration from the strata or Durante Kreuk for any aspect of the Project. I infer he also means he never received any such consideration from the section. I accept Mr. Furesz' evidence which is undisputed, save for the owner's argument that the Changes amounted to consideration.

21. According to a March 23, 2017 brief letter from the former strata council president to the applicant owner, "all of the architectural drawings were designed by Frank Furesz who volunteered to project manage" the Project. Given its brevity, I questioned whether the drawings referenced were to the original Project design drawings or whether they included the later Changes. Upon my inquiry, the section advised that while Mr. Furesz did give design suggestions for the shifting of the stairs to deal with the drain, Durante Kreuk otherwise prepared all drawings for the Project, including the stairs change order and the associated drawing. Given Durante Kreuk's name is on the drawings before me, I prefer Mr. Furesz' evidence and the section's submission in this respect, which is consistent with the overall evidence before me.
22. In minutes of an annual general meeting (AGM) on February 28, 2011, "a council activity report 2010" referenced "the ground floor improvement project", which had turned out to be more time consuming than anticipated. The minutes state the strata was waiting for the City of Burnaby Engineering to approve some of the vertical structure designs and for a permit of the "roof structure" on the south side of Building B, which I infer to be a reference to the canopy. Mr. Furesz was among those elected to the 6-person strata council for 2011.
23. In September 27, 2011 council meeting minutes, for the "ground floor project" the council decided to approve the "final drawings" and request that Durante Kreuk proceed to tender. The minutes noted that depending on the bidding timeline, a special general meeting (SGM) would be called in November or early December 2011 to vote on the project.

24. As noted in minutes for a February 28, 2012 AGM, a  $\frac{3}{4}$  vote resolution related to the “ground floor improvement project” was presented at this AGM and was passed with 96 in favour and 8 opposed. As noted by the section in later submissions, the minutes note that a “detailed PowerPoint presentation” was presented to the owners present at the meeting that explained the Project. However, presumably due to the passage of time, the section was unable to locate or provide this PowerPoint document to the tribunal. The resolution was described as “to refurbish the retaining walls, facades, partitions and landscaping on the Common Property at the ground floor units”. No further details about the scope of the Project was set out in the resolution, which authorized the strata to spend \$490,000 to complete the “Ground Floor Patio and Landscape Project”, with \$390,000 payable by special levy and the \$100,000 balance from the contingency reserve fund. The evidence indicates the Project was substantially paid for by 2013. At this AGM, Mr. Furesz was re-elected to the 2012 strata council.
25. The Project plans provided by the section as document R23 (Project plans) were not directly appended to the 2012 AGM minutes provided to the tribunal. However, on a balance of probabilities I am satisfied that these Project plans, which are last-dated October 2011 with the notation “to tender”, were in fact presented to the owners in substance at the 2012 AGM. I say this because there are no other plans before me, the date of the Project plans is consistent with the evolution of the Project as detailed above, and because the Project plans are consistent with the description of the Project in the AGM minutes. It may be that the applicant cannot recall what was presented, given the passage of time since 2012 or it may be that the applicant has mis-read the Project plans themselves. In any event, to the extent the applicant may be suggesting the section presented one set of Project plans at the AGM that did not include new canopies and stairs on the Building B south elevation and then in building the Project used a different set (i.e. R23) that did include them, I do not accept that assertion.
26. The Project plans are on their face plans drawn by Durante Kreuk, not Mr. Furesz. It is undisputed that there were no fully exposed stairs to the landscaped area



south of Buildings A and B in the strata's original 1982 design, although there were wooden stairs in the gaps between planters so that the Patios could be accessed from the landscaped area to the south. As noted by Mr. Furesz and Mr. Milburn in their written statements to the tribunal, the Project plans presented to the owners and approved at the February 28, 2012 AGM included:

- a. The removal of wood planters, lattices and steps around the Patios on the south side of Building B and the replacement of those features with granite steps,
- b. The removal and replacement of other wood fixtures around the other Patios on Building A and Building B, and
- c. The removal and replacement of the wood and acrylic canopies on the south side of Building B with new timber and glass canopies.

27. Again, while the owner submits the Project plans presented to the owners did not show steps on the south elevation of Building B, my own examination of the Project plans at R23 is that they clearly show the steps and open access to the lawn.

28. The Project plans (also known as landscape drawings) presented to the owners at the February 2012 AGM also show the boundary of the existing Patios and that the "work boundary" was some distance out towards the lawn, given that the Project plan was to remove the existing plantings and build a new canopy (gazebo) that extended the length of the south elevation. As noted above, the owners approved the Project which only had the south elevation Patios receiving the new canopies with glass covers, although at the time of the vote the canopy was planned to be timber not steel. In later submissions, the section explained that the south elevation was the only one to receive new canopies because it was the only one that had had existing acrylic canopies, and thus the work was simply a replacement.

29. As noted, the Project drawings included “new retaining walls/stairs” in place of the timber retaining wall that was to be removed on the south elevation of Building B. They also included a “new glass/aluminum divider” for each Patio. The steps on Building B’s south elevation in these Project plans do appear to have unbroken lines, as noted by Mr. Furesz in his statement.
30. In a June 22, 2012 email from a Durante Kreuk employee to Mr. Furesz, the employee responded to Mr. Furesz’ email asking for an update on the status of the building permit application. The employee stated that Durante Kreuk now needed to apply for a “PPA” and a “BP” (which I infer are ‘preliminary plan approval’ and ‘building permit’, respectively) for the reason that the gazebo or canopy was “not in the original approved PPA or BP”. I read this to mean that while the Project plans included the canopy, it had not been included in the City of Burnaby’s approval or permit documentation. The employee also wrote that “another hiccup is the canopy has to be made out of non-combustible material, i.e. steel”.
31. In his written statement, Mr. Furesz wrote that he does not recall being concerned one way or the other about what the canopy material was made of, and that the use of steel instead of wood has not affected his use of his patio or the surrounding common property. Mr. Furesz wrote that his main concern was seeing that the Project approved by the owners went ahead. I accept this evidence, which is generally consistent with the documentary evidence before me.
32. As set out in minutes of an August 15, 2012 SGM, the owners approved a  $\frac{3}{4}$  vote resolution (55 in favour, 2 opposed) for an additional special levy of \$250,000 to install a new waterproof membrane, with the intention to complete that work before the completion of the Project. In his statement, Mr. Furesz wrote that the membrane repairs included the removal of the Patios that were concrete slab and their replacement with granite pavers, so as to allow for greater access for future membrane maintenance. I accept this evidence, which again is consistent with the overall evidence before me.

33. January 29, 2013 council meeting minutes provided a general update on the Project, which was said to be nearing completion.
34. A February 12, 2013 change order request, titled “Change Order No. 4” (Canopy CO#4), set out “change from wood/glass to steel/glass canopy”, at an extra cost of \$28,300.00. The attached drawings showed the steel posts of the canopy as going through a third step up from the relevant strata lots.
35. In his statement, Mr. Furesz wrote that he had no involvement with the recommendation set out in the Canopy CO#4 to change the canopy from wood to steel. He also wrote that in early 2013, one of the contractors approached him to advise that during the course of work, they had discovered a drain where the stairs were to be installed. The location of the drain was not known previously. I accept Mr. Furesz’ evidence here, as again it is consistent with the overall evidence, including the email from Durante Kreuk.
36. A February 13, 2013 email from the council president indicates that there were 4 votes in favour of the Canopy CO#4, and she added that Mr. Furesz “will no doubt check in when he comes home from lunch”. Mr. Furesz wrote in his statement that he later voted to approve the Canopy CO#4 to make it unanimous, but that by that point the resolution had already passed. I agree. The president’s email noted that the change in canopy materials from wood to steel was required by the City of Burnaby. That the section understood this requirement flows from Durante Kreuk’s email, not any communication from Mr. Furesz. In seeking the approval, the council member wrote that “this was approved at the SGM in August, but the change order never went through”. However, I asked the parties about whether the Canopy CO#4 was in fact approved at the August 2012 SGM, and they were unable to confirm. On balance, I find that Canopy CO#4 was not approved by the owners at the August SGM.
37. In minutes for a February 26, 2013 AGM, the “president’s report” summarized the Project and the various “non-stop challenges and numerous delays” that arose. The president also noted council wanted to thank Mr. Furesz for the hundreds of

hours he put into the Project. I find Mr. Furesz' involvement with the Project was known to all owners. The president noted that the Project was expensive and was one of the section's largest capital improvements.

38. In April 23, 2013 strata council meeting minutes, it noted the section had spent \$175,836.70 on the Project, as of March 31, 2013. As in similar council meeting minutes, council voted on the approval of invoices, including those from Durante Kreuk. The minutes note that council was aware that work on the Project was slow and that the installation of a new membrane was completed on the south elevation (the area that is the subject of this dispute). The minutes stated that "council is finalizing decisions for the canopy and patio divider manufacturing and installation".
39. In his statement, Mr. Furesz says he was advised that the posts of the canopies would be on the stairs, and that the issue of how the posts and stairs would accommodate each other had not been set out in the original drawings by Durante Kreuk. Mr. Furesz explains in his statement that the original Project design called for steps with unbroken lines, and I agree that this is what the Project plans showed. Mr. Furesz says he suggested to council that instead of carving up the steps, that the steps be pushed slightly further south onto the common property lawn, which would maintain the visual appearance that the owners approved at the February 28, 2012 AGM and allow for easy access to the post bases and drains for maintenance purposes.
40. Mr. Furesz wrote that the council indicated that they were open to all solutions and the council decided to ask Durante Kreuk to consider the problem and present possible solutions. I accept this evidence, and note it is consistent with the documentation of what happened next.
41. On May 3, 2013, Durante Kreuk wrote the strata council president (my bold emphasis added):

Having measured the site twice to be sure, done some precise layout drawings, and considered the detailing options **I have to recommend shifting the stair 10” south to be clear of the drain and the canopy columns. [Mr. Furesz] is right, it does simplify things a great deal.** Otherwise we have the drain under the stair or an ugly gap in the stair, a difficult fit between column and stair. **Burying the column in the stair is not a detail I am comfortable with from a longer term durability point of view.**

42. On May 8, 2013, the strata council president emailed Durante Kreuk with the names of 4 council members (including herself) who had voted to give the “go ahead to make the necessary changes to the canopy shop drawings”. Mr. Furesz was expressly not included in that vote, although he was copied on the email. In his statement, Mr. Furesz wrote that out of an abundance of caution he decided to abstain from the May 8, 2013 council vote on the change to the steps because he had previously suggested the change to council. I accept Mr. Furesz’ evidence, which is supported by the email documentation noted above.
43. May 28, 2013 strata council meeting minutes set out Project update, and noted that charge orders were being finalized for certain works related to irrigation and that shop drawings for the canopy on the south elevation of building B “had to be modified to accommodate drainage” on the south side. The minutes also note that “granite pavers” on this elevation could not be completed until the canopy was installed.
44. On May 30, 2013, the strata council president and the strata council secretary signed “Change Order No. 14” (Stair CO#14), which was later signed as accepted by the contractor on July 18, 2013. The Stair CO#14 was to “relocate the stairs along the south side of the building B south patios” as shown in the attached plan, for an extra cost of \$1,242.00. The Stair CO#14 also included “increase the size of the affected granite paved patios to meet the foot of the **revised stairs**” (my bold emphasis added). The CO#14 notes the original contract amount was \$351,200.00, and the revised contract amount was \$721,601.55, with the largest

change order being CO#1 that totaled \$304,980.00. As noted above, the Canopy CO#4 was \$28,300.00, which was the switch from wood to steel framing for the canopy. Based on the plans attached to the Stair CO#14, there were originally stairs planned and the Stair CO#14 included "Revision: shift stair 10" south".

45. In his statement, Mr. Furesz says that the movement of the stairs has not affected the use of his Patio, which is just as open to the common property landscaped area as it would have been before the Stair CO#14 was approved. Having looked at the plans and change order and the photos provided, I accept this evidence. I say this because the 10" shift of the stairs outwards to give the posts footing on the Patio floor rather than on the steps does not appear to be significant in terms of Mr. Furesz' use of his Patio. This issue is further discussed under my analysis below.
46. July 23, 2013 council meeting minutes provided an update on the ground floor landscape project that was taking longer than expected to complete. Council noted it had sent their contractor a default notice giving them 5 days to rectify "all outstanding issues namely the patio dividers, turf, **steel canopy**, deficiencies etc." (my bold emphasis added).
47. I have reviewed photos of the Changes, as compared to the other patios that have wood canopies. Certainly, there is a noticeable difference in appearance but this is partly attributable to the newer and approved frosted glass patio dividers in the Patios, whereas the existing dividers were horizontal wood slats. The patio dividers are not at issue in this dispute. The photos indicate the use as a canopy or gazebo is the same with steel as it was with wood, and this is not particularly disputed. At issue is the alleged more deluxe appearance.
48. Another council member Mr. Milburn provided a written statement to the tribunal, noting that he was on council during the Project. Mr. Milburn's statement is entirely consistent with Mr. Furesz' statement. Additional comments from Mr. Milburn included:

- a. To his knowledge, Mr. Furesz had no part in the recommendation to change the canopy from wood to steel, which Mr. Milburn understood from Durante Kreuk was a change required by the City of Burnaby to get a building permit.
  - b. At the time of approving the Canopy CO#4, Mr. Milburn did not consider it a significant change at the time, and it still does not strike him as significant.
49. Through the tribunal facilitator, I asked the parties a number of follow-up questions, the answers to which are summarized below.
50. The section says the steel portion of the canopy and concrete stairs were completed by the end of September 2013, and were visible to anyone walking on the south elevation. The section says the glass canopy was installed in early 2014.
51. The owner says she was not aware of when the steel canopy and finalized stairs were in place and visible because she was not on the strata council at the time, and, because they were only visible to the public using that space which was mainly young families. The owner said that while watering plants in June 2015 she noticed the Changes at issue and that in turn prompted her to pursue this dispute. The owner submits that her unit does not face south, and her health was suffering which limited her outdoor activity, as further explanation of why she had not seen the Changes earlier and why she did not pursue the dispute earlier.
52. The strata submits the owner would have been aware or could have easily informed herself about the steel canopy and the stair position by reading the council minutes, including the May 28 and July 23, 2013 council meeting minutes. The owner's further response is that the minutes presented a replacement rather than an upgrade. The owner also says that at the time she accepted that the City of Burnaby required steel supports and thicker glass, and that it was only later that she was told by the City that steel supports were only necessary because thicker glass was chosen.
53. Next, the owner makes it clear that she is not seeking an order that Mr. Furesz and the other 2 owners of the Patios at issue be added as parties to this dispute. The

owner had earlier agreed that the section is the appropriate respondent in place of the strata. Yet, elsewhere in her latest submission the owner states that ultimately the strata is liable for ensuring that the council members receive a  $\frac{3}{4}$  vote to approve the work at issue, and here I infer the owner means the executive members, given the submissions overall.

54. The owner also submits that she is not asking for an order or direction that the strata bring a claim against anyone, including the Patio owners. However, at the same time the owner states that if she is successful, her expectation is that it will be the strata's responsibility to seek a remedy against the 3 Patio owners benefitting from the Changes or alleged 'upgrades'. The owner further reiterates a request that the monies spent on the 'upgrades' be "returned" by the section to the contingency fund, and that "how the strata resolves this issue is its own concern".
55. Regarding timeliness in pursuing the dispute, the owner submits that she started the dispute as soon as she read the tribunal was to be formed to hear and adjudicate strata property matters, since the owner was unable to afford lawyers' fees and start a court action prior to that time. This tribunal assumed jurisdiction over strata property disputes on July 13, 2016. As discussed below, the Dispute Notice was issued on September 8, 2016, which is about 17 months after the owner saw the Changes and began making inquiries, and 3 to 4 years after the section authorized and paid for the Changes.

## **ANALYSIS**

56. Given my ultimate conclusion in this dispute, I find I do not need to address the *Limitation Act* issues that arose and about which the parties provided evidence and submissions.

### **Mr. Furesz' alleged conflict of interest**

57. I will first address the allegation that Mr. Furesz was in a conflict of interest and that I should make an order accordingly. I decline to do so. My reasons follow.



58. Section 32 of the SPA addresses what a council member must do if they have a direct or indirect interest in a contract or transaction with the strata (or section) or in a matter that is the subject of consideration by the strata (or section). In such cases, the council member must fully disclose to the conflict to the council, abstain from voting, and leave the council meeting while the particular contract or matter is discussed unless asked by council to be present and leave while a vote takes place. The SPA does not say that a council member cannot be involved at all in any contracts or transactions.
59. First, while not a party to this dispute, Mr. Furesz did provide a written statement, as discussed above. He stated that the former council president was the “main point person” for the consultants and trades during the Project, but that due to his professional background he would assist. He also stated that Durante Kreuk took responsibility for the Project as the section’s landscape architect. Noting my findings above, I find this to be an accurate description, given the president’s input and role in the decisions made and given Durante Kreuk’s role.
60. Second, all executive members are also owners and may benefit from decisions. Something more is required than the fact that Mr. Furesz might have received some benefit, in order to establish a conflict of interest. This conclusion is consistent with the court’s conclusion in *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183, and I agree with the respondent section that if the conflict provisions apply to any interest of a council member then the strata council’s work would be stymied because everyone would be in a conflict.
61. Mr. Furesz’ involvement was clearly known and disclosed. There were no relevant meetings for Mr. Furesz to leave. Mr. Furesz’ vote in favour of the Canopy CO#4 was superfluous as the other 4 council members had clearly already voted in favour. I accept Mr. Furesz’ evidence that at the time he was not concerned about whether the canopy was steel or wood.
62. There is no indication that Mr. Furesz had a particular interest in the Canopy CO#4 being presented, bearing in mind it was not at his instigation but rather was

suggested by Durante Kreuk due to their understanding that the City of Burnaby required a non-combustible material like steel. Even if Durante Kreuk were mistaken about what the City of Burnaby actually required, that would not be the section's or Mr. Furesz' error.

63. I come to the same conclusion about the Stair CO#14. Mr. Furesz properly abstained from that vote because the shift of the stairs was his suggestion.
64. Further, there was nothing inappropriate in Mr. Furesz providing his professional architect services to the section, which he volunteered. While the owner says Mr. Furesz drew the later drawings related to the change orders at issue, I find this was based on the somewhat general March 23, 2017 letter from the section executive. I prefer the section's later submission, provided at my inquiry, that the original Project plans and the Canopy CO#4 and drawing were drawn by Durante Kreuk, not Mr. Furesz. Certainly, the Project plans and those appended to the Canopy CO#4 and Stair CO#14 were on their face drawn by Durante Kreuk. In any event, nothing turns on whether Mr. Furesz prepared the drawings for Stair CO#14, because as noted elsewhere, Mr. Furesz recused himself from the Stair CO#14 vote.
65. Had Mr. Furesz not volunteered his services, the alternative would have been for the section to pay for those services, and the executive apparently made a decision not to incur that cost, at a savings to all owners. In the circumstances, there was nothing inappropriate in their doing so. The material point here is that the section retained Durante Kreuk, with whom Mr. Furesz had no relationship, and that firm assumed responsibility for the landscape architect design. I find that Mr. Furesz acted honestly and in good faith. I further find that Mr. Furesz did not act in a conflict of interest.

### **Project scope**

66. Section 71 of the SPA provides that the strata or section must not make a significant change in the use or appearance of common property unless the

change is approved by a resolution passed by a  $\frac{3}{4}$  vote at an AGM or SGM ( $\frac{3}{4}$  vote), or there are reasonable grounds to believe immediate change is necessary to ensure safety or prevent significant loss or damage. For the Changes, there is no suggestion that immediate change was necessary within the meaning of section 71.

67. Thus, the issue here is first what the votes at the AGM and SGM covered in terms of Project approval. The next issues, discussed below, are whether the Stair CO#14 or the Canopy CO#4 amounted to a significant change that required approval by a  $\frac{3}{4}$  vote.
68. The February 2011 AGM minutes noted there were delays in the Project because the City of Burnaby was reviewing the canopies and the executive was waiting for a building permit for the canopy over the south elevation of Building B. I accept that the section reasonably believed that the Changes were required, and I do not need to decide if the steel canopy was only necessary because the section chose thicker glass. The section reasonably relied upon its chosen professional Durante Kreuk, who told the section that a non-combustible material like steel was required.
69. I agree with the section that if every change needed to be approved by a  $\frac{3}{4}$  vote during the course of such a Project, then work would inevitably stop, delays would occur, and costs to a strata or section would significantly increase. I find the owners did not intend that every change order would require the time and expense of a  $\frac{3}{4}$  vote.
70. I have found the Project plans were presented to the owners at the 2012 AGM. At that AGM, the  $\frac{3}{4}$  vote resolution approved gave the executive the authority to spend the approved funds on the Project, which I find permitted the executive to approve change orders. I find the exception is for anything that amounts to a “significant change” within the meaning of section 71 of the SPA. Thus, I will next consider whether the Stair CO#14 or the Canopy CO#4 were a “significant

change” in the use or appearance of common property, such that a  $\frac{3}{4}$  vote was required.

#### **The Stair CO#14**

71. Contrary to the applicant’s submission, I have found the Project plans presented to the owners at the February 2012 AGM showed granite steps on the south elevation of Building B, in place of the removed timber retaining wall and plantings. Given the Project plans and the photos provided, I do not agree that the steps are an “integral part” of the Patios, and even if they were, the installation of steps was approved by the owners at that AGM.
72. What is at issue here is the shift of the steps further out towards the lawn, so that the canopy posts could sit on the granite Patio pavers leaving the steps unbroken. I agree that the original Project design contemplated unbroken steps, which is apparent from a review of the plans themselves.
73. I agree with the respondent section’s submission that the boundary of the Patios, designated as limited common property on the strata plan, did not change following completion of the Project. The owners had approved the Project design and so on this issue the only material consideration is whether the shift of the granite steps approximately 10” further out into the common property lawn was a “significant change” within the meaning of section 71 of the SPA. I find it was not.
74. I agree with the respondent that the relevant case law, such as set out in *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333, provides a non-exhaustive list of factors to consider:
  - a. A change would be more significant based on its visibility to residents and towards the general public,
  - b. Whether the change to common property affects the use or enjoyment of a unit or a number of units or an existing benefit of a unit or units,
  - c. Is there a direct interference or disruption as a result of the changed use?

- d. Does the change impact on the marketability or value of the unit?
  - e. The number of units in the building may be significant along with the general use, such as whether it is commercial, residential, or mixed.
75. I acknowledge the applicant's submission that the steps increased the Patios by 40" instead of 10". Based on her annotations on the photos she provided, it appears she calculated the 40" based on the distance of the steps, which is somewhat consistent with her other submission that the steps were not included in the Project. Again, as noted above, I find steps were included in the approved Project. The evidence from Durante Kreuk is that the StairCO#14 resulted in a 10" shift of the steps, giving the appearance of larger Patios although as noted the actual size of the Patios did not change given the boundaries of them did not change on the strata plan. I prefer the evidence of Durante Kreuk on this issue, rather than the owner's own anecdotal observation, which I also find appears to have been based on a misunderstanding.
76. In other words, that the section decided to have the approved steps extend 10" further onto the common property lawn does not change the ownership status of the Patios. Moreover, the additional 10" to accommodate the canopy posts without seating them in the steps does not significantly change the use or appearance of the Patios or of the common property lawn, from what was proposed in the Project plans approved by the owners. The shift in the stairs outward was not particularly noticeable, there was no significant change in use and I note again that the approved Project plans had contemplated steps to an open lawn. I cannot conclude the evidence establishes any impact on marketability as a result of it, as suggested by the owner in her submissions.
77. Overall, I find the Stair CO#14 was not a significant change in use or appearance and it did not require a  $\frac{3}{4}$  vote resolution approved by the owners. The section properly approved the Stair CO#14 as part of the approved Project. I dismiss the owner's claims with respect to the Stair CO#14, and in particular I find the section is not required to return any monies to the contingency fund related to it, either

from the Patio owners or otherwise. The section remains responsible for the costs associated with the Stair CO#14.

#### **The Canopy CO#4**

78. Based on the Foley decision above, I find there is no suggestion that the Canopy CO#4 resulted in a significant change in the use of the canopy. In other words, the use of the canopy was exactly the same as a steel canopy as it would have been had it been built as a wood canopy.
79. The question is whether the change from a wood canopy to a steel canopy amounted to a significant change in the appearance of the common property. It is important to note that a glass canopy cover was approved by the owners as part of the February 2012 AGM vote as that was part of the Project plans, so the issue here is just with respect to the steel posts and canopy roof trellis.
80. Based on the photos provided, I find the change in appearance from timber to steel is certainly noticeable. In my view, the change goes beyond the addition of potted plants and shrubs, which was cited in case law to be insignificant. But is the change significant? I find the steel canopy is visible to anyone using the common property landscaped area surrounding the Patios, which appears to involve more than just the Patio owners but certainly not all owners. It is significant that the owner herself did not notice the steel canopy until June 2015, almost 2 years after it was installed, although I acknowledge her stated health concerns that she said kept her indoors.
81. I have not considered any impact on the marketability of the affected units, as I have no relevant expert opinion before me, such as from a realtor. I do agree that the steel canopy might be considered a somewhat “deluxe” appearance, but it is difficult to separate that change out from the other improvements that were clearly approved in the Project plans. Overall, given the evidence I find that the steel canopy change does not change the Patio owners’ use or enjoyment of their units.

82. As noted in the *Chan v. The Owners, Strata Plan VR677* et al decision<sup>2</sup> cited by the respondent, another relevant factor is how the particular strata (or here, section) has governed itself in the past and what it has allowed in the past. Only one change order related to the Project was the subject of a  $\frac{3}{4}$  vote resolution to obtain a special levy for a significant membrane replacement.
83. I also consider it particularly significant that only the owner, some 3 years later, has expressed concern about the various Changes that were made by the section in 2012 and 2013. Further, section 4 of the SPA indicates that the responsibility for determining whether a proposed alteration constitutes a significant change rests with the section. Here, the strata or section clearly did not consider the change from timber to steel to be significant such that it required a  $\frac{3}{4}$  vote.
84. In *Chan*, one common property issue was the outside boundary of the Chans' balcony, which included an outside railing that overlooked English Bay. The Chans changed the common property to install a different type of glass railing to their deck, which involved large glass panels with no formal railing or posts to block the view. The panels were secured by the insertion on the lower edge of the deck of large round affixing devices to allow for the lack of railings or posts. The court found that "this created a very different exterior to the common property than what was there before to allow the Chans to have the clear glass railing", as compared to decking in the unit above with railing and posts. Later in the decision, the court referenced these as being significant changes made without a  $\frac{3}{4}$  vote. The other owners in the *Chan* decision wanted to change the location of their door, which given the relevant criteria the court concluded was not significant.
85. In this dispute, I find the steel does not create a "very different exterior to the common property" than the timber canopy. Again, the use of the canopy is the same. The steel canopy stands in the same place as the timber canopy would have been had timber been used.

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<sup>2</sup> Vancouver Registry S115516, dated February 2, 2012

86. Overall, given the above factors, I find the Canopy CO#4 did not amount to a significant change in the use or appearance of the limited common property Patios. I have given significant weight to the fact that the section had determined at the time that the steel canopy did not require a  $\frac{3}{4}$  vote and that no other owner has complained in the 4 years since the steel canopy was put in place. The change from wood to steel was only one aspect of changes to the Patios that were otherwise approved by a  $\frac{3}{4}$  vote (save for the Stair CO#14). In conclusion, I find that a  $\frac{3}{4}$  vote was not necessary for the Canopy CO#4. Further, there is no evidence that the section acted in bad faith or in any conflict of interest. The section is not required to return any funds to the contingency reserve fund in respect of the Canopy CO#4, and the section remains responsible for the costs associated with the Canopy CO#4.

### **Remedy**

87. I have addressed the conflict of interest issue above and found Mr. Furesz did not act in a conflict of interest. I have also found that the Changes did not require a  $\frac{3}{4}$  vote and that the section remains responsible for the costs associated with them. The owner therefore is not entitled to the declarations sought.

88. Given this outcome, I find I do not need to address in any substance the owner's request that I find the section is not responsible for the costs associated with the Changes. Bearing in mind the tribunal's mandate to be mindful of the ongoing relationship between parties, I will make the following observations.

89. That the Patio owners may have benefitted from the Changes is not determinative of who should now pay for them. For instance, even if the Canopy CO#4 had required a  $\frac{3}{4}$  vote, I have no evidence upon which I could conclude that those 3 owners should now, roughly 4 years later, be asked for pay for something that they did not improperly request or influence and which the section in good faith authorized at the time. In my view, the only potential outcome had I found a  $\frac{3}{4}$  vote was required would be to order the section to hold a  $\frac{3}{4}$  vote now as to whether the steel canopy should be changed to the originally approved wood canopy, along



with whatever changes would be required to comply with the relevant municipal bylaws and building code. In my view, the cost of any such remedial work would have to be borne by all of the owners in the section, according to unit entitlement, which would include the applicant owner.

90. The owner was unsuccessful in this dispute. In all of the circumstances, I find the owner is not entitled to reimbursement of her tribunal fees. The section has confirmed it does not claim any expenses.

### **DECISION & ORDER**

91. The applicant's dispute is dismissed.

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Shelley Lopez, Tribunal Vice Chair