



# Civil Resolution Tribunal

Date Issued: December 13, 2017

File: ST-2016-00581

Type: Strata

Civil Resolution Tribunal

Indexed as: *Warren v. The Owners, Strata Plan VIS 6261*, 2017 BCCRT 139

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

Colleen Warren

**APPLICANT**

**A N D :**

The Owners, Strata Plan VIS 6261

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Maureen Abraham

## **INTRODUCTION**

1. This claim is a dispute over whether certain exterior portions of a townhouse strata property, including irrigation, hose bibs and heat pumps, are common property that must be maintained by the strata corporation at its expense.

2. The applicant, Colleen Warren (owner) is the registered owner of a townhouse strata lot and is self-represented.
3. The respondent strata corporation, The Owners, Strata Plan VIS 6261 (strata) is represented by an authorized member of the strata corporation.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 3.6 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
5. 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 that there are no significant issues of credibility or other reasons that might require an oral hearing.
6. 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.
7. The applicable tribunal rules are those that were in place at the time this dispute was commenced.
8. Under section 48.1 of the Act and the tribunal rules, 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**

9. The issue in this dispute are:
  - a. What portions, if any, of the townhouse exterior are common property that must be repaired and maintained by the strata?
  - b. Has the strata breached its obligation to repair and maintain the common property around the townhouses?
  - c. Should the strata council have to undertake training?

## **BACKGROUND AND EVIDENCE**

10. The strata complex is made up of four apartment-style buildings and one building of five attached townhouses.
11. The disclosure statement filed by the owner developer in 2005 states that, for common property such as planters and windows on or near balconies which are only accessible from a strata lot, the strata lot owner may be responsible for watering those planters and cleaning those windows.
12. The townhomes each have a rooftop deck, separated and marked by landscaping features. There are low garden beds, as well as rows of planters containing yew hedges. The hedges appear to have been utilized in lieu of a railing at the edge of the rooftop decks, which have low parapets dividing the hedge planters from the edge of the roof.
13. The strata plan filed with the Land Title Registry indicates that the rooftop decks and interior stairway used for access are limited common property. The garden beds and raised planter areas containing hedges are described as common property. The ground level landscaping around the townhouses is likewise common property. The Form B information certificates that the strata provided

various owners of the townhouses over time indicated that there was no owner agreement for maintenance of common property or common assets.

14. The mix of common property and limited common property on the townhouse roof area means that some areas designated on the strata plan as common property are only accessible through a townhouse strata lot, and only usable by that townhouse owner or tenant as a result.
15. The history of the strata is that townhouse owners had previously accepted responsibility for maintaining their townhome's rooftop landscaping. Starting in or about 2015, the owner and other townhome owners objected and said the strata should maintain those rooftop areas. They expressed concern about the risk of falling from the roof edge if required to maintain the raised hedges. They pointed out to the strata that the rooftop landscaping was common property and took the position that the strata could not require the owners to maintain it.
16. Around that same time, the owner took issue with the level of maintenance and repair done by the strata on the exterior areas of the townhouses. She said that it is either ignored or done to a lower standard. She points to demands made by her and her partner for exterior rodent control, caulking review, window cleaning and other maintenance. She also provided evidence that the strata was refusing to repair rooftop hose bibs for the rooftop irrigation system, citing it was an owner responsibility and expense. She provided evidence that the strata was making owners responsible for dryer vent cleaning, which is not recommended according to publications aimed at advising strata owners and councils.
17. The exchange of correspondence and strata council meeting minutes over the following two years indicate that the strata began including more townhouse exterior maintenance in its scope of maintenance. The owner was not content with the speed with which maintenance tasks were reviewed by council or attended to, and, on behalf of all the townhouse owners, delivered a demand setting out a variety of maintenance tasks and deadlines for them to be completed by the strata. Upon her following up on the demands, the strata indicated that they considered

the deadlines arbitrarily imposed and that all maintenance concerns were being dealt with, but not necessarily as a matter of urgency.

18. In early 2016, the strata sought legal advice and received a legal opinion on the strata's maintenance and upkeep responsibility for landscaping on the townhouse roofs. The opinion said that the strata is responsible for the roof as part of the building's exterior structure and common property, but questioned whether the strata wanted responsibility for the rooftop landscaping as it was only for the owner's benefit and not accessible common property.
19. On the basis of its interpretation of the legal opinion, the strata advised the owner that the townhome owners were responsible for the rooftop gardens and irrigation systems. The owner continued to do the maintenance under protest, and pointed out to the strata that she was concerned about liability issues should she do work on the common property. She continued to write the strata council and property manager setting out her concerns, demands for certain maintenance by set deadlines, and the basis for her position that the strata must maintain all the common property and could not shift the responsibility onto the townhouse owners. In the Fall of 2016, she requested a hearing with council to discuss the maintenance obligations and issues.
20. The council told the owner she could have 15 minutes to present her case to the council members. The owner attended and made a presentation. She provided her rationale for the work necessary, as well as referring the strata to the provisions of the *Strata Property Act* (SPA) relevant to common property maintenance.
21. The strata council then wrote the owner confirming its position that it had already dealt with her maintenance concerns and that all outstanding requests were in the process of being addressed, and that owners remained responsible for the rooftop landscaping.
22. The strata's practice is to file a full set amended bylaws with the Land Title Registry, rather than only filing amendments. In 2012, it filed bylaws which state that owners are responsible for repairing and maintaining their own strata lot and

limited common property they have the use of, except for repair and maintenance made the strata's responsibility under the bylaws. Under the bylaws, the strata remains responsible for all maintenance and repair of:

- (a) the structure and exterior of a building,
  - (b) chimneys, stairs, balconies and other things attached to the exterior of a building;
  - (c) doors, windows and skylights on the exterior of a building; and,
  - (d) fences, railings and similar structures that enclose patios, balconies, and yards.
23. The bylaws also state that the strata can enter a strata lot on 48 hours written notice in order to inspect, repair or maintain common property or common assets. The bylaws say that owners are allowed to have patio furniture, plants and art objects of a reasonable size and quantity on their patios, balconies and decks.
24. Although the strata bylaws were amended in 2013, 2014 and 2015, the specific bylaws regarding the common property and maintenance obligations did not change.

## **POSITION OF THE PARTIES**

25. The applicant owner argues that:
- Section 72 of the SPA states that the strata must maintain and repair the common property and there is no authority for the strata to impose maintenance obligations on individual owners for common property;
  - The strata bylaws confirm that the strata must maintain and repair the common property;
  - The rooftop gardens are common property, as designated on the registered strata plan;

- The rooftop irrigation system services the common property and runs through the common property, and is an “other thing” forming part of the common property under s.72 of the SPA;
- The heat pump is attached to, and runs through, the common property roof in order to connect with the townhome’s furnace, and is an “other thing” forming part of the common property under s.72 of the SPA;
- Even though access through the townhomes would be necessary for the strata to do rooftop maintenance, the SPA gives the strata the right to reasonable access under s.77 and owners would be cooperative to permit access in any event;
- A 2011 home inspection done for a previous owner recommended installing higher railings on the roof parapet as a safety issue, and there is a risk of owners falling off the roof if required to maintain the hedges;
- The strata council has been unclear or inconsistent in the past in its approach to the strata’s obligation for common property maintenance and repair and needs guidance; and,
- There is mandatory training for strata councils introduced in Ontario legislation, so it is reasonable to require that the council members get formal training.

26. The applicant requests that I order the strata to repair and maintain the common property, including the rooftop irrigation system and heatpump, that the strata complete the repair and maintenance tasks itemized in her correspondence to them to the same standard as other common property in the strata, that the strata install a safety railing on the owner’s roof parapet, and that the strata arrange council member training through the Condominium Homeowner’s Association open to all owners. She also requests reimbursement of her tribunal fees paid in the amount of \$225.00.

27. The respondent strata argues that:

- The heat pump is not common property: although located on the common property, it is for the exclusive use of a single townhouse;
- Installation of railings on the parapet will not be covered by the new home warranty provider and are a responsibility of the strata to install only if it thinks railings are necessary;
- The roofs on the apartment-style buildings are different from those on the townhouses, and have urgently needed repair. The townhouse roofs are not leaking and so replacing caulking on the owner's townhome has not been a priority;
- The strata has been occupied with dealing with extensive new home warranty claim proceedings in order to remedy deficiencies and other more urgent maintenance issues such as shattered glass panels, leaks and has had to prioritize and manage resources accordingly;
- Unless there is cause to investigate, the strata will assume that building features are satisfactory and there is no objective evidence that a railing on the roof parapet of the owner's townhouse is actually necessary;
- The strata is only responsible for the roof to the top of the final roof membrane layer. Anything above it is the owner's responsibility, such as raised beds and hedges;
- The disclosure statement made it clear that owners should expect to be responsible for maintaining the rooftop gardens, and owners historically agreed;
- The strata only provided services to the rooftop areas at its own discretion and not as an obligation;



- The rooftop gardens only benefit the individual townhouse owners, and the rooftop is limited common property and common property in name only and should be dealt with as though part of the strata lot or as all limited common property for which the owner is responsible; and,
  - The strata council does not need formal training, and is working with a property manager.
28. The evidence is clear that the owner and strata have disagreed in the past on the repair and maintenance of certain other areas, but the strata has now acknowledged responsibility in its submissions for those areas and expanded its scope of maintenance.
29. In response to the acknowledgements, the owner is critical of the strata's approach to repair and maintenance overall, and requested orders from the tribunal that the strata hire independent contractors to review, assess and make recommendations for preventative exterior maintenance and potential issues, such as reviewing railing heights and safety measures. The owner also requests orders confirming that certain elements of the property are included in the areas the strata has acknowledged its responsibility to repair and maintain, and that the strata will be liable in the event of future, potential issues.
30. The evidence submitted by the parties indicates the strata previously refused to accept responsibility for repair and maintenance of some common property around the townhouses, namely: ground floor level landscaping, porch and steps, cleaning of inaccessible windows and the townhouse exterior, exterior railings and glass panels. The strata has acknowledged in its submissions that it is responsible for maintaining and repairing those areas. The owner has requested an order confirming the strata's responsibility.

## ANALYSIS

**Issue: What portions, if any, of the townhouse exterior are common property that must be repaired and maintained by the strata?**

31. The owner says the following asset and areas of the townhome are common property and must be maintained by the strata:
  - (a) Rooftop irrigation system and hose bib;
  - (b) Rooftop parapet/railings;
  - (c) Exterior caulking;
  - (d) Rooftop landscaping; and
  - (e) The townhouse's heat pump.
32. Section 1 of the SPA defines "common property" as including pipes, wires, cables, ducts and other facilities for the passage or provision of water, sewage, drainage, electricity, heating systems and other similar services if they are located within the walls or boundaries between strata lots or common property. If located entirely within a strata lot, the facility must be used in connection with another strata lot or the common property in order to be considered common property.
33. Section 3 of the SPA says that the strata corporation is responsible for managing and maintaining the common property and common assets of the strata for the benefit of all the owners. The strata has no authority to make an owner responsible for maintaining common property, other than limited common property, as set out in section 72(2) of the SPA as there are no regulations permitting it to do so.
34. Section 68 of the SPA defines the boundaries of a strata lot and states that common property includes the exterior of a building. Section 72 of the SPA requires the strata to repair and maintain the common property.
35. The roof parapets, railings and exterior caulking are all components of the exterior shell of the building and are common property which the strata must maintain.

36. The irrigation system is a part of the rooftop landscaped areas which are designated as common property on the strata plan. The hose bib is an integral part of the irrigation system, necessary for the provision of water to the common property landscaping and is located on the common property. The water system is provided for the benefit of the owner as well as for the common property, and so is common property. The hose bib is part of that common property that the strata must repair and maintain.
37. Like the irrigation system, the heat pump is attached to the common property and a part of the internal heating system contained in the townhouse walls. Although the heat pump may only service a single strata lot, it is not within the boundary of the owner's strata lot and forms part of the common property (*Newman v. The Owners, Strata Plan EPS 680*, 2017 BCCRT 122). I find that the strata is responsible for maintaining and repairing the townhouse heat pump.
38. The rooftop landscaping consists of raised planter beds containing hedges and garden beds. Those areas are designated as common property on the strata plan. The designation in the strata plan is not displaced by any representation the developer made in a disclosure statement. The fact that the strata may have to go through the owner's strata lot in order to do maintenance and repair on the rooftop common property does not determine whether it is common property common property, as the SPA allows the strata reasonable access to an owner's strata lot for maintenance purposes.
39. I find the rooftop irrigation system and hose bib, heat pump, rooftop parapet/railings, exterior caulking and rooftop landscaping are all part of the common property which the strata is obligated to repair and maintain under section 72 of the SPA.

**Issue: Has the strata breached its obligation to repair and maintain the common property around the townhouses?**

40. The strata is obligated to repair and maintain the strata's common property and common assets for the benefit of all the owners. The strata carries out this function

through the strata council, whose members must act honestly and in good faith with a view to the best interests of the strata and exercise the care, diligence and skill of a reasonably prudent person in similar circumstances.

41. The strata's obligation to repair and maintain is measured by the test of what is reasonable in all of the circumstances (*The Owners of Strata Plan NWS 254 v. Hall*, 2016 BCSC 2363). In considering what is reasonable, the first thing to look at is the strata council's decision, as approved by the owners. The strata council can consider various approaches to repair and maintenance, and the financial and practical impact each has on the owners and the strata's budget. The strata is not an insurer obligated to fulfil an owner's demand for maintenance, and is entitled to consider whether and how maintenance will be done.
42. The strata has to balance the competing interests of individual owners against the interests of the strata owners as a whole. Sometimes this will mean prioritizing certain maintenance needs before others, or choosing a lower standard of repair or maintenance in order for financial or practical reasons. Some individual owners may be unhappy with the strata's choices, but that does not mean the strata breached its duties.
43. The owner says the strata has failed to maintain and repair the townhouse common property entirely or to the same standard as the rest of the strata. The strata says that it has expanded the scope of maintenance to include more work on the townhouses, but that the owner's demands are not urgently required and the deadlines she imposes are arbitrary.
44. The owner's complaints about maintenance largely pertain to the appearance of the townhouse areas and preventative maintenance. She points out that the townhouse owners have had to wait lengthy periods of time to have certain tasks done while work has been done on the apartment buildings, even though the size of their strata lots result in greater monthly strata fees.
45. The strata has pointed out that the apartment buildings have required urgent maintenance and deficiency repair work, which has taken a lot of their time and

resources. The need to repair leaks in one area of one building may properly be prioritized over superficial maintenance that has been long-outstanding elsewhere in the strata. The minutes reflect that the scope of routine maintenance tasks has been revised to include the townhouse exteriors.

46. I agree with the strata that the owner does not have the right to demand certain maintenance as a priority or impose deadlines for her requests to be fulfilled. Routine maintenance and repair tasks will take time and advance planning on the part of the strata to arrange and finance. Although there is some evidence that the strata may have failed to routinely maintain common areas around the townhouses in the past, the evidence is that the strata has, and continues, to resolve those issues and has now incorporated them into its long term planning as it properly should.
47. The strata is entitled consider the owner's maintenance and repair requests as it is able and with a view to the financial circumstances of the strata and its capacity to manage the strata's overall maintenance needs.
48. Finally, there is no evidence that installation of a parapet rather than a railing on the roof contravened the building code and makes the roof unsafe to use unless immediately fixed. The observations of the owner, and the comment of a private building inspector that a railing would make it safer for children, are not sufficient to demonstrate that the strata is breaching its maintenance obligation by refusing to install a railing at this time. The refusal of the new home warranty program to accept it as a deficiency would suggest that the parapet does not make the rooftop deck areas unfit for their intended purpose.
49. I find that, with the exception of improperly directing the townhouse owners responsible for maintaining common property, the evidence presented by the owner does not prove unequal treatment between the townhome owners and apartment-style owners. I find it would not be appropriate to direct the strata to undertake certain maintenance tasks as a priority or by a set deadline.

**Issue: should the strata council have to undertake training?**

50. The owners thinks that further disputes or issues can be avoided if the strata joins the Condominium Homeowners Association and owners must undertake formal training in order to sit as council members.
51. The owner has shown that the strata council has acted inconsistently and at times has been wrong in its position on the common property and maintenance obligations. This happened despite the strata council working with a property manager.
52. Even though the strata council has a property manager, council is responsible for making decisions. The standard for the strata council members is not perfection in carrying out their duties, but acting honestly and in good faith with a view to the strata's best interests. The strata council sought advice but it was ambivalent with respect to resolving the ongoing issues.
53. I do not think the evidence proves that the council members breached their duty and that a remedy is necessary to prevent further breaches. Although training and membership could generally assist a strata council, whether it is a reasonable expense and use of the council member's time is questionable and best left to the discretion of the strata council members.

**DECISION AND ORDERS**

54. I order that the strata is responsible for the repair and maintenance of:
  - a. those rooftop areas designated as common property on the registered strata plan, specifically the rooftop areas of the townhouse strata lots;
  - b. The rooftop irrigation system, heat pump, hose bib, parapet, garden beds, raised planters and exterior caulking which all form part of the common property; and,

- c. The townhouse ground floor level landscaping, porch and steps, exterior railings and glass panels, inaccessible windows and exterior of the townhouse building.
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- 55. 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. The owner was not successful in getting all the orders sought, but was successful with respect to the key issue of resolving the common property maintenance obligations. The evidence indicates that it was necessary for her to bring this claim in order to resolve ongoing confusion within the strata, for the benefit of all the owners. I therefore order the strata to reimburse the owner for tribunal fees of \$225.00.
  - 56. Under section 167 of the *Strata Property Act* SBC 1998 c.43, an owner who brings a tribunal claim against the strata corporation is not required to contribute to the strata's expenses of bringing that claim. I order the strata to ensure that no part of the strata's expenses with respect to this claim are allocated to the owner.
  - 57. 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 56.5(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.
  - 58. 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.

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Maureen Abraham, Tribunal Member