



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan NW 3164 v. Wondga et al*, 2018 BCCRT 145

B E T W E E N :

The Owners, Strata Plan NW 3164

APPLICANT

A N D :

Peter Wondga and Layne Wondga

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about smoking in a strata lot. The applicant strata corporation, The Owners, Strata Plan NW 3164 (strata) 1 wants an order that the respondents, Peter Wondga and Layne Wondga (collectively, the Wondgas), stop smoking in their strata lot #9, also known as unit 206. The strata also wants the Wondgas to pay \$2,800 in fines for past breaches of its smoking bylaw. The respondents deny they breached the smoking bylaw.
2. The respondents are self-represented and the strata is represented by a council member.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 3.6 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
4. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I heard this dispute through written submissions because I find that there are no significant

1 By consent, the parties agree that the strata should be named as reflected in the style of cause in this decision, rather than as The Owners, Strata Plan The Palms NW3164, as originally named by the applicant strata.

issues of credibility or other reasons that might require an oral hearing. No one requested an oral hearing.

6. 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

7. The issues in this dispute are:
 - a. Have the respondent owners breached the strata's smoking bylaw?
 - b. Should the respondent owners be ordered to stop smoking in their strata lot?
 - c. Should the owners be ordered to pay \$2,800 in levied fines?

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicant bears the burden of proof. While I have reviewed all of the materials submitted, I have only referenced what is necessary to give context to my decision.
9. As further described below, the strata received numerous complaints about smoke from the residents of the strata lot directly above the respondents (the complainants). I accept the complainants smelled cigarette smoke in their unit, which the respondents did not particularly dispute. I find this is supported by the evidence before me including correspondence sent to the strata from the complainants and that of a tradesperson who documented a strong smoke smell when they investigated the Wondga's ducts and stove hood vent.

10. As addressed in the complainant's correspondence, I also accept the smoke was generally most noticeable between 5 and 7 pm and that the smell would intensify in the complainants' unit after witnesses could hear a fan turn on. I find it is more likely than not that the smoke entered the complainants' unit through ducting and vents from a nearby strata lot.
11. I find this dispute is really about whether the strata reasonably concluded the respondents were the source of the smoke in the complainants' unit, something the respondents deny.
12. The strata's smoking bylaw is bylaw 3(9), filed at the Land Title Office on November 24, 2016. The bylaw is effective once filed. The bylaw says that an owner, tenant, occupant or visit must not smoke tobacco or any other substance on the common property, limited common property, or in a strata lot. This was a change from the strata's former bylaw that only prohibited smoking on common property.
13. Thus, before bylaw 3(9) was became effective in November 2016, owners were allowed to smoke on their limited common property patios and within their strata lots.
14. The strata has 21 residential strata lots (units). The respondents' strata lot #9 is a first floor northwest corner unit, with 2 limited common property patios. South of the respondents' strata lot is a boiler room. Thus, there is only one other strata lot adjacent to the respondents', on its east side. The same configuration applies to the complainants' strata lot directly above the respondents', except it has a second adjacent strata lot to the south.
15. The strata's bylaw 23 says the strata may fine an owner or tenant a maximum of \$200 for each bylaw contravention. Bylaw 23(2) says the strata may impose a fine for a continuing contravention every 7 days. Bylaw 24 says a continuing contravention is one that continues, without interruption, for more than 7 days.

Did the respondents breach the smoking bylaw?

16. The strata sent the respondents detailed bylaw infraction letters about the smoking complaints on: October 28, 2016, December 22, 2016, January 18, 2017, and February 8, 2017. In this dispute, the strata does not rely upon the October 28, 2016 letter, presumably because it pre-dates the smoking bylaw at issue. I find the infraction letters at issue complied with the procedural requirements set out in section 135 of the *Strata Property Act* (SPA), which is not disputed.
17. In particular, the strata's December 22, 2016 letter set out the smoking bylaw and that the complaint was about smoke from the respondents' unit "on an ongoing basis, particularly on November 10th and December 18, 2016". The strata stated the respondents must cease smoking in their strata lot immediately. The strata warned that it could enforce the bylaw by levying fines. The strata's subsequent infraction letters were similar.
18. It is undisputed that the respondents received the strata's bylaw infraction letters, and a separate February 8, 2017 fine letter, and chose not to respond until after they received the May 3, 2017 fine letter.
19. In particular, following the strata's May 3, 2017 fine letter, I accept the respondent Layne Wondga asked the strata's council representative if she should give a cheque for the fines to date, evidence the respondents did not dispute. I find that Ms. Wondga would not have offered to pay fines for smoking bylaw breaches if she was of the view those fines were baseless. I therefore place significant weight on this evidence, and that of the complainants and the tradesperson who were directly above the respondents' unit and who smelled smoke and more so when they could hear a fan was turned on.
20. I do not accept respondents' evidence that they assumed these complaints would be handled "casually", because the respondent Peter Wondga had recused himself as he was strata council president between October 2016 and October 2017. Because he was council president, I find Mr. Wondga understood the strata's processes. As discussed below, I find Mr. Wondga incorrectly believed he

was 'grandfathered' and that the smoking bylaw would not apply to him. In any event, as council president I find Mr. Wondga should have known the expected process that the strata would follow to enforce its bylaws and therefore any assumption about "casual" handling was unreasonable.

21. I also do not agree with the respondents' submission that Mr. Wondga failed to respond to the strata's letters because he was unaware that the strata had presumed he was at fault. I find the strata's letters to the respondents made it clear it was investigating the smoking complaints as being the respondents' responsibility. The letters clearly invited the respondents to respond, and they chose not to do so. I find the likely reason for that choice is that they had breached the smoking bylaw, but expected the strata not to enforce the bylaws against them.
22. The respondents do not deny that they are smokers. Mr. Wondga submits the strata's evidence "that we refuse to quit smoking is not correct, nor is it in context". However, Mr. Wondga does not explain the context. Instead, he denies that the Wondgas breached the smoking bylaw, and submit the strata never attended their unit to confirm if the complainants' smoking complaints had any validity. I infer the respondents' submission is that the strata could not have reasonably identified that smoke came from their unit.
23. The strata's evidence that the Wondgas refuse to quit smoking is based on a council member's notes taken during a May 16, 2017 council hearing, held further to Mr. Wondga's May 11, 2017 request to discuss the strata's fines. I accept these notes as being factually accurate, as I find they are in harmony with the overall evidence before me.
24. In particular, according to the council member's notes, Mr. Wondga stated he had been a smoker for the last year and was surprised by the bylaw letters as he thought he would be grandfathered. The notes indicate Mr. Wondga said he cannot defend the times and dates in question and that he is involved in a "silent war" with the complainants. The council member also noted that Mr. Wondga

stated “let me go outside and smoke like before” and “we were good for 11 years”. This is consistent with the November 2016 filing of the bylaw 3(9) amendment.

25. The notes also state that another council member asked Mr. Wondga if there was any way he and his wife could quit smoking, and that Mr. Wondga replied “no” and that he did not reply to the question of whether he realized the severity of second hand smoke to other owners.
26. The strata’s May 16, 2017 council meeting minutes reflect these notes and that the council would seek legal advice as to how to enforce the bylaws. There is no evidence before me to suggest the Wondgas disputed the May 16, 2017 council meeting minutes, until their submissions in this proceeding. I find this supports a conclusion the Wondgas had been smoking in their strata lot, contrary to the bylaw. In other words, if the Wondgas had not been smoking in their strata lot, I find they would have likely disputed the council meeting minutes that indicated they did.
27. Apart from their brief submissions, the respondent’s evidence consisted of 4 letters of support from friends, who each state they had visited the respondents’ home and had not seen smoking or noticed the smell of cigarette smell in it. None of these letters indicate when the friends visited the respondents’ home and, in particular, there is no indication whether their visits were after the strata’s bylaw changed in November 2016. One letter was written by a former owner and it does not state when they moved out of the strata. The letters also do not state whether they visited during the “worst” time of 5 to 7 p.m., as referenced above. That the authors said they did not smell smoke in the respondents’ home when visiting is not determinative.
28. Therefore, while I accept the letters of support were written with an honest belief that the respondents were not smokers in their home, I find I am unable to place significant weight on them.
29. Given the evidence before me, I find the Wondgas were smokers at all material times, which the respondents have not expressly denied. I also accept that Mr.

Wondga stated he and his wife were not likely to quit smoking. As noted, I also accept that the respondents incorrectly assumed they would somehow be 'grandfathered' such that the smoking bylaw would not apply to them. The council member's notes are consistent with the respondents' failure to respond to the strata's bylaw fines.

30. Here, given the respondents failed to respond to the strata's letters until after May 3, 2017, I find the strata did not act unreasonably in accepting the respondents were responsible for the smoke. Given the configuration of the strata and the relative locations of the respondents' and the complainants' units, I find the strata reasonably sent the respondents the bylaw infraction letters, which as noted gave the respondents an opportunity to respond and they chose not to do so.
31. Given the overall evidence before me, I find it is more likely than not that the respondents were smoking in their strata lot at all times material to this dispute. Thus, I find the respondents breached the strata's smoking bylaw.
32. I order the respondents to comply with bylaw 3(9) and in particular to stop smoking in their strata lot.
33. I note the strata likely would have been in a stronger position had council members attended at the respondents' home to investigate the smoke concerns. It is not always possible to "catch in the act" however, and a strata must only act reasonably in its investigation and enforcement, so long as it complies with the SPA and its bylaws. Though not necessary for this dispute, for future smoke complaints, it would generally be prudent for the strata to try to confirm the source of smoke by attending at the relevant unit.

Fines

34. While I find the strata is entitled to an order that the respondents pay some fines, I find the \$2,800 claimed to be excessive. My reasons follow.

35. In particular, the strata's \$2,800 in fines were issued as follows:
- a. **February 8, 2017 letter:** this imposed \$800 in fines, for 16 incidents at \$50 each, further to the strata's January 18, 2017 infraction letter,
 - b. **May 3, 2017 letter:** this imposed \$600 in fines, for 12 incidents at \$50 each, further to the strata's February 8, 2017 infraction letter, and
 - c. **July 21, 2017 letter:** this imposed \$1,400 in fines, for 14 incidents at \$100 each, further to the strata's May 3 and June 1, 2017 infraction letters.
36. The strata's January 18, 2017 infraction letter detailed 16 instances of smoke that occurred at various times on 8 different days, some only hours apart. I find that a daily fine of \$50 or \$400 in total is appropriate, rather than the \$800 imposed in the strata's February 8, 2017 fine letter. While the number of smoking instances is significant, I also find it unreasonable to impose a separate fine for every instance when they are only hours apart.
37. The strata's February 8, 2017 bylaw infraction letter detailed 13 separate events between January 17 and January 31, 2017, on 8 separate days. I find a \$400 fine was appropriate, rather than \$600 as assessed in the strata's May 3, 2017 fine letter, for the same reasons set out above.
38. The strata's May 3, 2017 bylaw infraction letter detailed "ongoing" smoke complaints on 5 days between February 6 and April 8, 2017, at various times, for a total of 6 alleged "separate events".
39. The strata's June 1, 2017 infraction letter detailed 8 alleged separate smoking incidents occurring on 6 days between May 12 and May 28, 2017.
40. As noted above, on July 21, 2017, the strata sent the respondents a letter imposing \$1,400 in fines, \$100 for each of the offences listed in the strata's May 3 and June 1, 2017 letters. I find the strata reasonably increased the amount of the fine to \$100, given the repeated contraventions and the respondents' response at

the council hearing that they would not quit smoking. However, for the same reasons set out above, I find that a total of \$1,000 in fines is appropriate, given the infractions giving rise to the fine letter occurred on 10 separate days.

41. Thus, I find the respondents must pay the strata a total of \$1,800 in fines for breaches of the strata's smoking bylaw, further to the strata's February 8, May 3, and July 21, 2017 fine letters, rather than the \$2,800 sought.
42. The SPA does not permit interest to be charged on fines (though it does for outstanding strata fees and special levies). However, the *Court Order Interest Act* (COIA) applies to tribunal disputes and I find the strata is entitled to pre-judgment interest under the COIA on the \$1,800, as follows: from May 16, 2017 on \$800 and from July 21, 2017 on \$1,000.
43. The strata's subsequent letters to the respondents about smoking bylaw violations are not the subject of the fines claimed in this dispute, and therefore I will not comment upon those later letters. Nothing in this decision prevents the strata from pursuing enforcement for fines that fall outside this dispute, and in any future tribunal proceeding it will be up to the tribunal to determine whether and to what extent any fines are payable.
44. In accordance with the Act and the tribunal's rules, I find the strata as the successful party is entitled to reimbursement of the \$225 it paid in tribunal fees. There were no dispute-related expenses claimed.

ORDERS

45. I order the respondents to comply with the strata's smoking bylaw, and in particular, I order them to immediately stop smoking in their strata lot.
46. Within 30 days of this order, I order the respondents to pay the strata a total of \$2,038.09, broken down as follows:
 - a. \$1,800 in fines for breaches of the strata's smoking bylaw,

- b. \$13.09 in pre-judgment interest under the COIA, and
 - c. \$225 in tribunal fees.
47. The strata is entitled to post-judgment interest, as applicable.
48. 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.
49. 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.

Shelley Lopez, Vice Chair