



# Civil Resolution Tribunal

Date Issued: December 18, 2018

File: ST-2018-002704

Type: Strata

Civil Resolution Tribunal

Indexed as: *Conklin v. The Owners, Strata Plan BCS 3017*, 2018 BCCRT 872

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

John Conklin

**APPLICANT**

**A N D :**

The Owners, Strata Plan BCS 3017

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Megan Volk

## **INTRODUCTION**

1. The applicant, John Conklin (owner), owns a strata lot (lot 17) in a bare land strata corporation known as The Owners, Strata Plan BCS 3017 (strata). At issue in this dispute is whether the strata must remove a pedestrian gate and related asphalt pad and return the space to its original condition.

2. The owner is represented by Anita Musial. The strata is represented by an authorized member of the strata council.
3. For the reasons that follow, I order the strata to remove the pedestrian gate and asphalt pad and to return the space to its original condition within 90 days.

## **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 relationships between parties that may 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. Under section 48.1 of the Act and the tribunal rules, in resolving this dispute the tribunal may make order a party to do or to stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

## ISSUES

8. The issue in this dispute is whether the strata was permitted to place a pedestrian gate on lot 17 and, if not, what the appropriate remedy is.

## BACKGROUND AND EVIDENCE

9. I have reviewed all submissions and evidence provided. I refer only to the relevant evidence and submissions necessary to give context to my decision.
10. The strata is a bare land strata corporation made up of 17 strata lots and a common property driveway in Chilliwack, BC. The strata plan was registered at the Land Title Office on July 29, 2008.
11. The plan shows the strata lot boundaries by reference to survey markers per the *Strata Property Act* (SPA). The front boundary of lot 17 is the strata's driveway, the back boundary is another strata lot, and the side boundaries are a municipal road and 2 other strata lots.
12. At the time of development, a driveway was built with a curb on either side. The curb runs along the front of lot 17. It is undisputed that the strata driveway is common property. Also, at that time, the owner developer built a wood fence along the three remaining boundaries of lot 17, as well as other strata lots. The strata plan and disclosure statement do not identify the fence as common property.
13. In October 2012, as the development neared completion, the owner developer funded the installation of security gates selected by the strata council. Installation was completed by February 2013. On the evidence, I find that the security gate installed on the north side of the complex is one continuous structure made up of 4 posts, 1 pedestrian gate, 1 fixed section of fence, and 2 vehicle gates. Although continuous, I find the pedestrian gate is removable without affecting the rest of the security gate.

14. The security gate extends across the strata's driveway in line with the fence of lot 17. It is undisputed that the pedestrian gate and a small asphalt pad extend onto lot 17.
15. When the pedestrian gate was installed the strata council believed incorrectly that there was an easement registered on lot 17 for the gate. It is undisputed that at that time the strata council advised the owner that there was an easement registered allowing the pedestrian gate to extend onto lot 17 and provided a document allegedly showing the easement.
16. By July 2014 the owner learned that there was no easement for the pedestrian gate and advised the strata council. In January 2015, after conducting their own research, the strata council confirmed that there was no easement.
17. Between November 2014 and February 2018, the pedestrian gate was both locked and unlocked at times as the owner put his own locks on it. The owner developer and strata attempted to negotiate a resolution. All canvassed solutions fell through and the strata council removed the owner's locks on the pedestrian gate.
18. That removal began a bylaw infraction process including a hearing with the owner. At the hearing the owner again requested the strata remove the pedestrian gate. The strata council sent the owner a response following the hearing stating that they could not remove the pedestrian gate without a  $\frac{3}{4}$  vote of members. The response also advised that a land survey was necessary to determine responsibility for the gate.

## **POSITION OF THE PARTIES**

19. The owner asks for an order requiring the strata to remove the pedestrian gate and asphalt and to restore the wood fence and grass to its original condition. The owner says the pedestrian gate is a common asset that encroaches on his property without authority. The owner also asks for reimbursement of the tribunal fees of \$225 and dispute related expenses of \$72.

20. The strata says the owner tacitly consented to allow the strata to use a portion of his lot. The strata also says the pedestrian gate is common property that does not inconvenience the owner and is necessary for the “common good.” Additionally, the strata says that it is unfair for all owners to bear the cost of removing the pedestrian gate and section of asphalt and restoring the owner’s lot. Finally, the strata says that if the fence must be restored a post should be placed on the original survey pin, which it says cannot be located.

## **ANALYSIS**

21. In a civil claim such as this, the owner bears the burden of proof, on a balance of probabilities.
22. The strata says the owner’s dispute is between the owner and the owner developer. While the owner developer paid for the security gate and installation the strata council was aware of the installation and selected the gate and approved its installation. I find the strata, and not the owner developer, is the proper party to this dispute.
23. The parties disagree whether the security gate is common property or a common asset. The strata says the security gate is common property. The owner says it is a common asset. I find I do not need to resolve that dispute here. Whether the security gate is common property or a common asset, it is the strata’s responsibility.
24. The owner says the security gate was not approved as required, under the building scheme. There was insufficient evidence before me to decide this issue.
25. I find the strata required authority or consent to place a portion of the security gate on the owner’s lot. The strata does not say that it had authority. The strata acknowledges that it acted on misinformation but says that the pedestrian gate should not be removed.
26. First, the strata says that since the owner did not “challenge” the easement, he agreed to allow pedestrians to use the gate. On the evidence, I do not accept that

the owner's conduct can be understood in this way. The strata council believed it had an easement and provided the owner with a document they said showed the easement. Objectively, I find it was reasonable for the owner to accept the strata's position given the evidence provided. Once the owner became aware there was no easement he notified the strata of his objection and took steps to stop the strata from using his lot.

27. Second, the strata says that the pedestrian gate is for the common good of all owners and visitors and needs to remain. However, the common good is not a matter for consideration here. In any event, I find the common good to reduce the strata's liability in future or because the strata may be required to have an operational pedestrian gate near the vehicle gate in the future too speculative. Further the safety issues outlined and contemplated by the strata did not relate entirely to the pedestrian gate but other issues in the strata complex. As well, it is open to the strata to move the pedestrian gate to common property or to acquire property for a pedestrian gate.
28. Given my finding above that the strata is a proper party to this dispute, I decline to consider the strata's argument that it would be unfair to all owners to bear the cost of removing the pedestrian gate and section of asphalt, and of restoring the owner's lot.
29. The strata also asks the tribunal to direct the owner to allow unfettered access to the pedestrian gate or in the alternative to direct the owner to grant an easement to the strata. Given that the strata did not file a counterclaim in this action, and my findings above, I decline to consider the strata's requests.
30. Based on my findings above, I order the strata to remove the pedestrian gate and asphalt pad on lot 17 and to restore lot 17 to its original condition at its cost within 90 days.
31. The strata says that if the fence must be restored a post should be placed on the original survey pin, which cannot be located. I see no reason why the fence post

must be on the survey pin. If the strata wants a fence post on the survey pin, the strata can choose to pay for a survey to locate the pin.

32. I note that the owner made a number of allegations regarding the governance of the strata that are unrelated to the orders the owner seeks in this dispute. And, the strata made a number of allegations regarding the owner that were speculative or unrelated to the substance of this dispute. Given the tribunal's mandate of recognizing the ongoing relationship between parties, I encourage the parties to work together in a productive and constructive manner in future for the betterment of their community.
33. In making these findings, I note that under section 189.4 of the SPA, an owner who brings a tribunal claim against a strata corporation is not required to contribute to any monetary order issued against the strata corporation or to any expenses the strata corporation incurs in defending the claim.

## **TRIBUNAL FEES AND EXPENSES**

34. Under section 49 of the Act, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason to depart from that general rule here. I order the strata to reimburse the owner for the tribunal fees totaling \$225. The owner also requested payment of dispute-related expenses for affidavits. No affidavits were provided in this proceeding and as such I make no order for those expenses.

## **DECISION AND ORDERS**

35. I order that:

- a. Within 90 days of the date of this decision, the strata remove the pedestrian gate and asphalt pad located on strata lot 17 and restore strata lot 17 to its original condition at its cost.
  - b. Within 30 days of the date of this decision, the strata pay to the owner \$225 for tribunal fees.
36. The owner is entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.
37. 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.
38. 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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Megan Volk, Tribunal Member