



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan NW 1218 v. Juzkow*, 2019 BCCRT 79

BETWEEN:

The Owners, Strata Plan NW 1218

APPLICANT

AND:

Jody Juzkow

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Lynn Scrivener

INTRODUCTION

1. This is a dispute over the construction of a fence. The applicant, The Owners, Strata Plan NW 1218 (strata) says that the respondent constructed her fence in contravention of its bylaws. The respondent, Jody Juzkow, says that the strata is not enforcing its bylaws in a fair manner.

2. The applicant is represented by a member of its strata council. The respondent is self-represented.

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 121 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 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.
5. 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.
6. Under section 123 of the Act and the tribunal rules, in resolving this dispute the tribunal may make order a party to do or stop doing something, order a party to pay money, order any other terms or conditions the tribunal considers appropriate.

ISSUE

7. The issue in this dispute is whether the applicant is entitled to an order that the respondent build her fence in accordance with the original request and in compliance with the strata's bylaws.

BACKGROUND AND EVIDENCE

8. The strata is comprised of 276 lots in 105 buildings. The respondent purchased strata lot 155, which is located in building 61, in 2017. The strata lot has an adjacent yard area, with some surrounding hedging.
9. The relevant version of the strata's bylaws was filed with the Land Title Office in March of 2010. The preamble to the bylaws states that the common property (CP) behind or beside a strata unit is referred to as the back yard. Bylaw 3 states that a resident shall not cause damage to trees, plants, bushes, flowers or lawns.
10. According to bylaw 7, a resident must obtain the written approval of the strata before making or authorizing an alteration to the strata lot that involves, among other things, fences, railings or similar structures that enclose a patio, deck or yard. Bylaw 8 sets out the requirement for approval for altering CP, including limited common property (LCP). The approval must be in writing, and the alterations must be done in accordance with the design or plans approved by the strata. An owner who alters CP or LCP without adhering strictly to the bylaws must restore the property, at the owner's expense, to the condition prior to the alteration.
11. Bylaw 11 also states that all yard areas adjacent to and surrounding strata lots are CP. Alterations, including the erection of fences or gates, require the written approval of the strata, and such approval will be at the sole discretion of the strata. Schedule C – Construction Guidelines provides additional information about alterations to yards. Item C3, Fences and Gates, sets out that the approved fencing is solid cedar fencing with top latticework at a maximum height of 5 feet. If a fence is constructed in front of a hedge, it must be a minimum of 18 inches away from the hedge to allow for a person to come between the fence and hedge for maintenance purposes.
12. An amendment to Schedule C was filed in March of 2012. According to item C3.10, a wood fence or gate must not touch the ground, and there must be a minimum of 1-inch clearance from the bottom of the gate to the ground.

13. An amendment to bylaw 35.1 in February of 2018 provided for a \$200 fine for each contravention of a bylaw and \$50 for each contravention of a rule.
14. Evidence before me suggests that the strata may be considering changes to its fence-related bylaws, with respect to height, the requirement for lattice, and the minimum distance between the fence and hedging. However, the bylaws that apply to this dispute are the ones that were in effect at the time the respondent built her fence.
15. In July of 2017, the respondent obtained preliminary approval from the strata to build a fence in her backyard. The associated document states that the fence must be a minimum of 18 inches away from the hedging. After the construction of the fence was completed, the strata advised the respondent that several areas of her fence were not the required 18" distance away from the adjacent hedges.
16. In email correspondence between the strata and the respondent, the respondent explained that the placement of her fence and posts was affected by underground utilities and the location of a tree and its roots. The strata requested that the respondent move her fence to bring it into compliance with the bylaws or remove it.
17. On August 22, 2017, the strata issued a bylaw infraction notice to the respondent. The respondent requested a hearing but was unable to attend a September 25, 2017 meeting as scheduled due to childcare issues. The strata heard the respondent at a November 27, 2017 meeting, and later confirmed the previous decision that she must move or remove her fence.
18. The respondent did not remove her fence. The strata then commenced this dispute with the tribunal, seeking an order that the respondent bring her fence into compliance with its bylaws.

POSITION OF THE PARTIES

19. The strata's position is that the respondent constructed her fence in a manner which deviated from the plan approved by the strata and was not in compliance with the

bylaws. The strata says that the fence needed to be 18 inches away from the hedging, but the majority of the fence was built too close. The strata says it has asked the respondent to remove her fence or to make it compliant with the bylaws, but the respondent has refused to do so.

20. The strata requests that I order the respondent to modify her fence in order to bring it into compliance. The strata did not request an order about the payment of fines.
21. The respondent says that her contractor encountered difficulties in terms of tree roots and underground utilities which affected the locations in which the posts for her fence could be installed. She says the strata suggested that she affix the fence to a tree, but notes that this would contravene bylaw 3. The respondent's position is that there is nowhere else to move the fence without violating other bylaws or going against instructions from "Dial Before You Dig" regarding underground utilities.
22. The respondent says the process was unfair to her and that the strata did not provide her with a fair hearing, as they made up their minds in advance, a vote on the matter did not take place, and she was not provided with a written decision. The respondent says that there are 42 other fences in the strata complex that are non-compliant. She also noted that there is an over-height fence on the west side of her property that was built before she purchased her strata lot. As these non-compliant projects are allowed to remain, the respondent says that she is being discriminated against. The respondent expressed the view that the strata is not acting in good faith or enforcing the bylaws in a fair manner.

ANALYSIS

23. There is no dispute that the bylaw's requirement is that a fence be at least 18 inches away from adjacent hedging. Both parties provided photographs of the fence from different locations and perspectives. The angle at which some of the photos were taken makes it difficult to assess the distances involved. However, I accept that some areas of the respondent's fence are 18 or more inches away from the hedges, but other areas do not meet the minimum bylaw requirement. There is no

indication that the placement of the respondent's fence interferes with any other strata lot, and the concern appears to be access to the hedging for maintenance purposes.

24. This is not a situation where the respondent constructed her fence without approval from the strata or did not know about the bylaw. She was fully aware of the requirements, but did not consult with the strata when difficulties arose during the construction process. I agree with the strata's determination that the respondent's fence does not comply fully with its bylaws.
25. The respondent raises concerns about the strata's conduct and states that she did not receive a fair hearing. The respondent provided a recording of the hearing, to which the strata objected as council members were not aware of the recording at the time, and the strata prohibits the recording of meetings. I did not find it necessary to listen to the recording in order to determine this issue. The available evidence establishes that the respondent requested and received a hearing at which she was given an opportunity to provide new evidence. The strata then confirmed its previous decision that the non-compliant fence must be moved or removed. Although the strata does not appear to have provided the respondent with formal written notice of its decision as soon as feasible after the hearing as required by section 135 of the *Strata Property Act* (SPA), I am not satisfied that the hearing process itself was unfair. Given my finding on the alleged significant unfairness issue below, I do not need to consider if the strata properly followed section 135 of the SPA.
26. The next issue to consider is whether the strata's decision that the respondent must move or remove her non-compliant fence was significantly unfair to her. Section 164 of the SPA permits the courts to make orders to remedy or prevent significant unfairness in strata disputes. Section 123(2) of the Act is similar to section 164 of the SPA, and addresses remedies for significant unfairness. Section 123(2) provides that the tribunal has discretion to make an order directed at the strata, the council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights.

27. The courts have determined that “significantly unfair” actions are burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable (see *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128). The British Columbia Court of Appeal considered section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in this case was restated in *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763, as follows: what is or was the expectation of the affected owner or tenant? Was that expectation on the part of the owner or tenant objectively reasonable? If so, was that expectation violated by an action that was significantly unfair? Although not binding upon me, I accept that the test applies to the circumstances in this dispute.
28. In this case, I find that the respondent’s expectation is that she would be treated in the same manner as other strata lot owners with regard to the construction of her fence, and I find that this expectation was objectively reasonable. For the reasons that follow, I am satisfied that the respondent was treated in a significantly unfair manner when the strata determined that she must move or remove her non-compliant fence.
29. The strata did not provide any evidence or response to the respondent’s assertion that there are 42 strata lots with non-compliant fences. In addition, the strata did not dispute the respondent’s statement that the fence constructed by a previous owner on the west side of her yard was not compliant with the bylaws, and that the strata had told her that this would not be a problem as this fence had “passed inspection”. Further, a photo provided by the respondent shows that at least one fence is located within a portion of hedging, with no distance between the fence and hedge, let alone the 18 inches required by the bylaws.
30. The minutes from an August 22, 2018 strata council meeting acknowledge the presence of an unspecified number of non-compliant fences and discuss the possibility of bringing these fences into compliance. There is no indication that the owners of these other non-compliant fences were ordered to move or remove their fences, as is the case for the respondent. It is not clear why the strata is taking a different approach with separate instances of non-compliance.

31. I find that, prior to the respondent constructing her fence, the strata was aware of the presence of non-compliant fences, including the one on the west side of the respondent's own yard. I find that it was significantly unfair for the strata to insist upon the respondent's strict compliance with the bylaws when other non-compliant fences were allowed to remain. Given this significant unfairness, I decline to grant the order requested by the strata.

TRIBUNAL FEES AND EXPENSES

32. The strata requested an order that the respondent reimburse it the \$225.00 paid in tribunal fees. It did not claim for dispute-related expenses. 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. As the strata has not been successful, I decline to make an order for reimbursement of its tribunal fees.

33. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the owner.

DECISION AND ORDERS

34. I dismiss the strata's claims and this dispute.

Lynn Scrivener, Tribunal Member