



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Residential Section of the Owners, Strata Plan N 50 v. Time Share Section of the Owners, Strata Plan N 50, 2019 BCCRT 91*

B E T W E E N :

Residential Section of The Owners, Strata Plan N 50

APPLICANT

A N D :

Time Share Section of The Owners, Strata Plan N 50

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. This dispute arises between 2 sections of a bare land strata corporation. The strata corporation, The Owners, Strata Plan N 50 (strata), was divided into 2 separate sections, by court order, in 1997.
2. The applicant Residential Section of The Owners, Strata Plan N 50 (Residential Section) says the respondent Time Share Section of the Owners, Strata Plan N 50 (Time Share Section) changed the use of limited common property (LCP), physically located in the Time Share Section, without approval.
3. The Residential Section considers the change significant. In effect, the Residential Section also argues that it was significantly unfair to it that the Time Share Section proceeded with the change in use.
4. The Residential Section says that recreational vehicle (RV) sites have been built on an area of the LCP that was designated for recreational facilities, which, by bylaw, its owners are entitled to use. They say the RV sites are not for the benefit of the Time Share Section Owners.
5. A north parcel of land within the Time Share Section LCP that was used as a horseshoe area and children's playground is now used for 3 long term RV sites, and a further 6 long term RV sites were added on another part of the Time Share LCP.
6. The Residential Section seeks an order that the LCP returned to "recreational use for all owners".
7. In response, the Time Share Section says it has the exclusive ability to manage LCP within its boundaries. The Time Share Section says the Residential Section lacks standing to object beyond some limited use and access provisions of the court order, which it says have been preserved.
8. The respondent also says the use of the LCP by the public or Residential Section owners was for a 25-foot pathway/walkway which has been continued and preserved, with a suitable setback. As discussed below, I find this is not entirely

correct, as members of the Residential Section are permitted to use the recreational areas, for a fee.

9. The applicant Residential Section is represented by Maureen Fjeld, who owns a strata lot in the section. The respondent Time Share Section is represented by Wayne Holmgren.

JURISDICTION AND PROCEDURE

10. 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.
11. 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.
12. 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.
13. Tribunal documents incorrectly identified the names of the parties which are separate sections of the strata corporation created under a consent order issued by the BC Supreme Court in October 1997. Given the parties operated on the basis that the correct name of the strata was used in their documents and submissions, I have exercised my discretion under section 61 of the Act to direct the use of the parties' court-ordered name in these proceedings. Accordingly, I have amended the style of cause above.

14. 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.

ISSUES

15. The issues in this dispute are:

- a. Is the Residential Section entitled to any remedy against the Time Share Section for the change in use of LCP located within the Time Share Section?
- b. Was the change in use of the LCP a significant change in use or appearance that would require a $\frac{3}{4}$ vote under section 71 of the *Strata Property Act* (SPA) prior to proceeding?
- c. Was the change in use of the LCP significantly unfair to the Residential Section owners? If so, what is an appropriate remedy?
- d. Is there a requirement for an annual general meeting (AGM) of the strata?
- e. Should I order either party to reimburse the other for tribunal fees or dispute-related expenses?

BYLAWS AND LEGAL FRAMEWORK

Which bylaws apply?

16. The most recent bylaws were registered in December 1998. At that time, the *Condominium Act* RSBC 1996 c. 64 was in effect.

17. On July 1, 2000, the former *Condominium Act* was repealed by the SPA.

18. The SPA and the *Strata Property Regulation*, B.C. Reg. 43/2000 (Regulation) contain transition provisions that are relevant to this issue. Section 293 of the SPA sets out that the SPA and its regulations apply to a strata plan deposited and a strata corporation created under the *Condominium Act*.

19. The strata last filed bylaws in the land title office in 1998. Those bylaws are different than the Standard Bylaws. I will refer to them as the SA Bylaws to distinguish them from the Standard Bylaws.
20. Section 17.11 of the Regulation to SPA provides, in part, that the Standard Bylaws apply effective January 1, 2002, to a limited extent. In this situation, the Standard Bylaws apply only where (a) the previously registered bylaws are different to the Standard Bylaws, and (b) they do not conflict with the law set out in the SPA.
21. The Time Share Section relies on SA Bylaw 8(1)(b) which excludes the strata council from the control, management and administration of “limited common property appurtenant to a section.”
22. Bylaw 15(1) governs LCP. It specifies that each section shall be responsible for the management of LCP designated to that section.
23. In my view, SA Bylaw 8 conflicts with the law under the SPA. I say this because a strata corporation is obliged, under the SPA section 3, to manage and maintain the common property and common assets of the strata for the “benefit of all owners”. As well, section 194 of the SPA says that, after sections are created, the strata corporation retains “its powers and duties in matters of common interest to all the owners.” A bylaw purporting to exclude the strata from the management of LCP entirely appears contrary to both of these SPA duties.
24. Standard Bylaw 6 applies, as there is no different bylaw in the SA bylaws. Standard Bylaw 6 requires an owner to “obtain written approval of the strata corporation before making an alteration” to LCP. I find that the Time Share Section would need written approval from the strata before altering the LCP.
25. SA Bylaw 15(2) says Residential Section members are not entitled to use the Recreational Facilities except as provided in Bylaw 17, with some exceptions involving passing through the area to access the greenbelt. Bylaw 17 permits residential section owners to use the Recreational Facilities for an annual fee.

26. SA Bylaws specify, at 4(f), that the respective section may grant an owner or owners of their section the right to exclusive or non-exclusive use and enjoyment of LCP appurtenant to that section, on reasonable notice, unless the section decides otherwise by unanimous resolution.
27. SA Bylaw 17(2) provides that the Time Share Section is entitled to manage the recreational facilities and the dry sites within its limited common property “in its sole discretion.” The dry sites are specific locations on the strata plan. Based on the evidence, I find that none of the contested RV sites are on the dry sites. The recreational facilities appear to have been installed at locations around the LCP generally, such that the RV sites have changed the use of recreational facilities.
28. I find this bylaw contrary to the SPA and invalid, for the same reasons described above that I found SA Bylaw 8 invalid.
29. SA Bylaw 32(2) says a unanimous resolution of the strata is required to dispose of common property or to designate, amend or terminate LCP.

Court Ordered Settlement Agreement

30. On October 31, 1997, a settlement agreement (Settlement Agreement) was reached between the strata corporation and its residents to divide it into 2 sections, the Residential Section and the Time Share Section. The Settlement Agreement was an order of the British Columbia Supreme Court, by consent.
31. As part of the Settlement Agreement, the common property of the strata became LCP, in two different schedules, for the “exclusive use owners of the strata lots designated thereon.” One Schedule lists the LCP for the Residential Section, the other lists the LCP for the Time Share Section.
32. The agreement formalizing this re-designation of the common property as LCP for each section was signed on December 3, 1998.

33. The Residential Section contains bare land strata lots. The Time Share Section contains time-share RV sites, time-share vacation homes and fee simple residential lots and homes.
34. The Settlement Agreement includes a provision that the designation of LCP for the Residential Section and the Time Share Section cannot be changed, except by unanimous resolution of the strata.
35. LCP is common property designated for the exclusive use of the owners or one or more strata lots.
36. LCP may be used in many different ways, depending on the strata plan and applicable bylaws.

Change in Use or Appearance of LCP

37. Section 71 of the SPA governs the actions of a strata corporation in making significant changes to the use or appearance of common property. Section 71 of the SPA requires a $\frac{3}{4}$ vote at general meeting before significant changes can be made.
38. In *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333 at paragraph 19, the court laid out the criteria for determining whether a change is a significant change in use and appearance under section 71, as follows:
 - a. A change would be more significant based on its visibility or non-visibility to residents and its visibility are non-visibility towards the general public;
 - b. Whether the change to common property affects the use or enjoyment of the unit or number of units or an existing benefit of all unit or units;
 - c. Is there a direct interference or disruption as a result of the change to 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-use;

- f. Consideration should be given as to how the strata corporation has governed itself in the past and what it is followed. For example, has it permitted similar changes in the past? Has it operated on a consensus basis or has it followed the rules regarding meetings, minutes and notices as provided in the SPA.

Annual General Meeting

39. Bylaw 10(1) provides that a strata's AGM must be held on a weekend in October or November either on Strata Plan N 50 or in the Village of Radium Hot Springs, each year.

EVIDENCE AND ANALYSIS

40. I have read all of the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.

Arbitration Clause

41. The SA Bylaws provide that if there is any dispute between the strata, Time Share Section and Residential Section and an owner or owners, the parties "shall, prior to the commencement of a court proceeding, refer to arbitration the dispute between them."
42. Because neither party raised an objection on this basis, I have proceeded to determine the dispute.

Is the Residential Section entitled to a remedy against the Time Share Section for a change in use of LCP located within the Time Share Section?

43. The first question is whether the Residential Section can be entitled to a remedy, against the Time Share Section in respect of the change to the use of LCP located in the Time Share Section.
44. The applicant says that the use of LCP was changed, without notice to the owners in the Residential Section, as follows:

- a. Three long term RV site were added adjacent to the North Service Centre, on an area that was formerly used for recreation.
 - b. A further 6 long term RV sites were added, including a new access road, adjacent to the South Service Centre.
45. The applicant also says the long-term RV sites have also “eliminated the ridge pathway within the LCP” without appropriate approval.
46. The respondent agrees that long term RV sites have been installed on LCP designated to the Time Share Section strata lots. It says that the old tennis courts, play park and old horseshoe area were replaced by enhanced amenities in somewhat different locations. The applicant says it was unaware of these changes until May 2017 when construction started to place utilities for the new RV sites.
47. On May 21, 2017, the Residential Section executive meet with the strata manager and Wayne Holmgren, Time Share Section Developer/Owner. The changes to the LCP of the Time Share Section were discussed.
48. Mr. Holmgren pointed out that the Time Share Section held its AGM in 2006, where the Time Share owners approved the changes to LCP.
49. The applicant says this is not so. They say the Minutes from the 2006 Time Share Section AGM only address the change in usage of the “dry sites” from the Court Ordered Settlement.
50. I find that a meeting was held in the Time Share Section on November 18, 2016 during which a proposal to lease and develop the dry sites was carried by a vote of 94-2. Above, I found that the RV sites in issue were not on the dry sites noted on the strata plan. As such, there is no evidence that these RV site installations were authorized. I do not have evidence before me that the Time Share Section held an SGM or AGM to approve the changes in use to install the 9 RV sites that are the subject of this dispute.

51. The British Columbia Court of Appeal has considered the language of section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44.
52. The test requires an objective assessment based on several questions as follows:
- a. What is or was the expectation of the affected owner or tenant?
 - b. Was that expectation on the part of the owner or tenant objectively reasonable?
 - c. If so, was that expectation violated by an action that was significantly unfair?"
53. I find that the change in use of the LCP is significantly unfair to the Residential Section for 3 reasons.
54. First, I accept the evidence that the change has impacted the appearance of the area previously used by Residential Section owners to access the green belt.
55. Second, the change affects the use and enjoyment by the Residential Section owners of the parts of the LCP that are now occupied by the RVs. This is a change from recreational areas to a more restricted, private type of use that does not allow a substantially similar experience for owners in either section who wish to use the recreational facilities.
56. Third, and of most significance, the Time Share Section proceeded without written authority of the strata as required by Standard Bylaw 6. I also find that the change was made without consultation with the Residential Owners, despite the guarantees to them of some access to and over the LCP. Indeed, I was not given evidence that the change in use was even approved by the Time Share owners.
57. As one particular example regarding the impact of the change of use, SA Bylaw 15(2)(b) provides that members of the Residential Section shall not be prevented from passing over a two metre area located immediately north of the north boundary of Strata Lots 53 and 54 and of the pathway between Strata Lots 54 and 55 for the purpose of access to and from the greenbelt on the west side of Strata Lots 43 to 48

and 51 to 53. As well, the Time Share Section shall not obstruct access over the existing pathway between Strata Lots 76 and 77, which pathway shall remain.

58. With respect to the 6 RV sites roughly to the northwest of strata lot 53 in the Time Share Section, there is an obligation on the Time Share Section to preserve a two-meter area to permit members of the Residential Section to pass through in order to access the greenbelt on west of Strata Lots 43 to 48 and 51 to 53.
59. Based on the photographs filed in evidence, the RV sites have been fenced off. I was unable to find that the 2 metre area had been preserved to permit members of the Residential Section to pass through to access the greenbelt. I find that the new installation requires a substantial detour from the route that owners used previously. I find that the Residential Section owners were affected contrary to their reasonable expectations and therefore treated in a significantly unfair manner contrary to section 164 of the SPA.
60. As well, vehicle access appears to have been restricted by the installation of a turnstile and gate.
61. Even if these changes could be justified, the changes to LCP were not properly authorized. The Time Share section proceeded in violation of Standard Bylaw 6. Nor was the change authorized by a $\frac{3}{4}$ vote under section 71 of the SPA, which I have found was required due to the significant nature of the changes.
62. I find that the Time Share Section must restore the LCP where the 9 RV sites were placed, returning those portions of the LCP to recreational use, for all owners, within 90 days of this decision.

Annual General Meeting Claim

63. Regarding the second claim for an annual general meeting to be held in Radium every year in either October or November. The applicant says Bylaw 10(1) requires it.
64. The respondent says an AGM is held in each section every year.

65. The respondent says that based on section 8(3) of the Bylaws, it is sufficient for each section to hold an AGM each year, and then to have council from each section meet every November to resolve any mutual issues.
66. I agree with the applicant that the SPA and bylaws require the strata to hold an AGM annually, and to fulfil the requirements of Bylaw 10(1) the AGM may be held on site or in Radium Hot Springs in October or November. Bylaw 8(3) says that the duties of the strata and strata council shall be minimal and may be delegated to the sections where reasonably practical. It does not excuse the strata from the AGM obligation, unless this is properly delegated or waived under section 41 of the SPA.
67. Should the strata decide to delegate its duties surrounding its AGM, it is at the strata's discretion to amend the bylaws accordingly.
68. Since the strata was not a named respondent, I make no order regarding the applicant's claim about the strata's AGM.

DECISION AND ORDERS

69. I order that, within 90 days of the date of this Order, the strata restore the LCP where the 9 RV sites were placed to recreational use for the benefit of all owners.
70. 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 in this case to deviate from the general rule. I order the respondent Time Share Section to pay the applicant Residential Section \$225 in tribunal fees.
71. 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.

72. 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.

Julie K. Gibson, Tribunal Member