Civil Resolution Tribunal

Date Issued: February 1, 2019

File: ST-2017-004203 and ST-2018-000635

Type: Strata

Civil Resolution Tribunal

Indexed as: *Section 1 of The Owners, Strata Plan BCS 3495 et al v. The Owners, Strata Plan BCS 3495,* 2019 BCCRT 133

B E T W E E N :

Section 1 of The Owners, Strata Plan BCS 3495, Nesha Enterprises Ltd. and Coquitlam Holding Ltd.

APPLICANTS

A N D :

The Owners, Strata Plan BCS 3495

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kate Campbell

INTRODUCTION

1. This decision addresses 2 disputes that I considered together. Both disputes relate generally to parking in the strata complex.

2. The respondent in both disputes is the strata corporation, The Owners, Strata Plan BCS 3495 (strata). The applicants in both disputes are Section 1 of The Owners, Strata Plan BCS 3495 (Commercial Section), Nesha Enterprises Ltd. (Nesha) and Coquitlam Holding Ltd. (Coquitlam Holding). Nesha owns 1 strata lot in the commercial section of the strata corporation, and Coquitlam Holding owns 3 strata lots in the commercial section.

3. The applicants say bylaw amendments relating to visitor parking voted on at the strata's annual general meeting (AGM) held April 2017 are unenforceable, because the voting process was unfair, and was not conducted in accordance with the requirements of the *Strata Property Act* (SPA).

4. The strata says notice of the April 2017 AGM was given to all owners in accordance with the SPA, and the AGM minutes show the bylaw changes were accepted unanimously by all residential and commercial owners present at the AGM. The strata says the bylaw changes should therefore stand.

5. The applicants also say that in September 2012, the developer took back 18 visitor parking stalls from the common property parking area, sold them to individual owners, and installed metal fencing around them to limit access. The applicants say neither the strata nor the developer had authority to take these actions, which have resulted in business losses due to lack of parking access. The applicants say these actions were significantly unfair to them, and required a ¾ vote resolution as it was a significant change to common property. The applicants seek an order that the strata remove the cage and parking stalls, or alternately an order that they be relocated.

6. The strata denies that its actions were significantly unfair, and says the strata council is made up of lay people without legal training. The strata says any remedies the applicants may be entitled to in relation to the parking cage lie against the developer rather than the strata. The strata also says the developer obtained the proper municipal permits for the cage, and that the cage does not impede access to visitor parking. It says all owners in the strata corporation voted in 2016

and 2017 not to relocate the cage, and the tribunal should not interfere with those democratic decisions by owners.

7. The applicants are represented by a lawyer, Oscar Miklos. The strata is represented by a strata council member.

8. For the reasons set out below, I find that the April 2017 bylaw amendments are unenforceable, as they were not approved in accordance with section 128(1)(c) of the SPA. The bylaws that were in effect immediately prior to April 18, 2017 are the applicable bylaws.

9. I also find that the strata must call a general meeting to allow strata lot owners to consider a ¾ vote resolution on whether to keep the parking cage in its current configuration.

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 these disputes 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. Under section 123 of the Act and the tribunal rules, in resolving these disputes 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.

14. Tribunal documents incorrectly show the name of the commercial section as "Strata Corporation Commercial Section of Strata Plan BCS 3495. Based on section 193(4) of the SPA and strata bylaw 1.1, the correct legal name of the commercial section is Section 1 of the Owners, Strata Plan BCS 3495. 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 to direct the use of the section's correct legal name in these proceedings. Accordingly, I have amended the style of cause above.

ISSUES

15. The issues in these disputes are:

    a. Were the April 2017 bylaw amendments approved in accordance with section 128 of the SPA?

    b. Must the strata remove or relocate the parking cage?

EVIDENCE, FINDINGS AND ANALYSIS

Were the April 2017 bylaw amendments approved in accordance with section 128 of the SPA?

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

17. The strata is a phased strata corporation made up of 3 separate phases. The strata plan for phase 1 was filed in July 2009. The strata plans for phases 2 and 3 were filed in July 2012 and September 2014 respectively.

18. On May 24, 2017, the strata filed amendments to bylaws 7.4(8) and 7.4(9) at the Land Title Office. These amendments were voted on by owners at the strata's April 18, 2017 AGM.

19. Bylaws 7.4(8) and 7.4(9) were not part of the strata's original bylaws. They were created and filed with the LTO in 2011. Until April 2017, these bylaws stated as follows:

> (8) First Level Visitor Parking: Visitor's Parking shall be limited to a maximum of three (3) hours on the first level, from 6:00 a.m. to 12:00 (midnight). There will be no parking on the first level between the hours of 12:00 am. and 6:00 a.m. Violators will be towed at their own expense without further warning. Visitor's Parking Passes are not required for parking on this level.
>
> (9) Second Level Visitor Parking: Nine (9) spots will be reserved for the Commercial section from 6:00 a.m. until midnight on the second level Visitor's Parking. The remaining spots are strictly for use by Visitors with a Visitor's Parking pass displayed.

20. The April 2017 amendments deleted bylaw 7.4(9), and changed bylaw 7.4(8) to allow for overnight visitor's parking on the first level with a parking pass. The applicants are particularly concerned about the deletion of bylaw 7.4(9), as that change removes all second level visitor parking, including 9 stalls reserved for the commercial section during the day.

21. The applicants say the voting on these amendments at the April 2017 AGM was flawed in 3 ways. First, the vote was held hastily, without proper explanation to the owners about the substance of the amendment. Second, as only 1 vote was held, the bylaw amendments were not approved through ¾ vote resolutions passed by both residential and non-residential owners, contrary to section 128(1)(c) of the SPA. Third, the preamble to the bylaw amendment resolution said the vote was only for residential section owners, even though the amendments affected both the residential and commercial sections of the strata.

22. I find that any haste in voting or lack of explanation about the bylaw amendments at the April 2017 AGM does not affect the validity of the amendments. The wording of the amendments was provided to owners in writing in advance of the meeting, and there is no SPA provision requiring further explanation.

23. I agree that the preamble to the amendment resolution, in the versions set out in the AGM notice, the AGM minutes, and the documents filed with the LTO, states, "BE IT RESOLVED by a ¾ vote resolution of The Owners, Strata Plan BCS 3495 – Residential Section". I accept the strata's explanation that this was a drafting error, and there is no dispute that the April 2017 AGM was a meeting of all owners, not just the residential section.

24. I agree with the applicants that this reference to "residential section" in the resolution's preamble is improper, as the bylaw amendments clearly affect both the residential and commercial sections. Section 197(2) of the SPA states that the bylaws may only be amended by 1 section of a strata corporation if the bylaw amendment is in respect of a matter that relates solely to the section. The amendments to bylaw 7.4(8) affected both sections, and bylaw 7.4(9) specifically removed parking stalls previously reserved for the commercial section during the day. Therefore, I find the bylaw amendments were in respect of matters relating to both sections of the strata. While the heading of part 7 of the strata's bylaws states, "Bylaws Applicable to Residential Strata Lots", I find this is not determinative, as bylaw 7.4(9) specifically relates to parking allocated to commercial owners. This anomaly appears to be the result of changes to the part 7 bylaws enacted in the years between 2009 and 2017.

25. The parties agree that despite the incorrect preamble, both residential and commercial section owners voted on the amendment resolution at the April 2017 AGM. The applicants dispute the fact that the AGM minutes record the results of the vote as unanimous. However, I find it is not necessary to determine whether the vote was unanimous, as I find that the vote was invalid because it was not conducted in accordance with section 128(1)(c) of the SPA.

26. Under sections 126 and 128(1)(c) of the SPA, the only way to pass bylaw amendments applicable to the whole strata corporation, in a strata corporation with both residential and non-residential strata lots, is to hold separate votes for residential and non-residential owners. Section 128(1)(c) states as follows:

> (c) in the case of a strata plan composed of both residential and nonresidential strata lots, by both a resolution passed by a 3/4 vote of the residential strata lots and a resolution passed by a 3/4 vote of the nonresidential strata lots, or as otherwise provided in the bylaws for the nonresidential strata lots.

27. The strata admits that only 1 vote was held, and not 2 separate votes as required in section 128(1)(c). They say the amendments should stand anyway because there was "minimum compliance" with the SPA as a whole, and the majority of residential and non-residential owners present voted in favour of the changes. I disagree. There was not minimum compliance with the SPA, since section 128(1)(c) was not followed.

28. In *C.2K Holdings Ltd. v. The Owners, Strata Plan K 577*, 2018 BCCRT 236A, a tribunal member allowed a bylaw amendment to stand even though there had been only 1 vote of residential and non-residential owners, contrary to section 128(1)(c) of the SPA. I note that *C2.K* is not a binding precedent. Also, I find it can be partially distinguished on its facts, as the strata in *C2.K* did not have separate residential and commercial sections.

29. In *Omnicare Pharmacy Ltd. v. The Owners, Strata Plan LMS 2854*, 2017 BCSC 256, the BC Supreme Court considered a situation where a strata had voted to amend its bylaws, but the vote was not passed by a ¾ vote of non-residential owners, as required in section 128(1)(c) of the SPA. The court held that the amended bylaws were therefore invalid. Similarly, in *Commercial Section of the Owners, Strata Plan LMS 1991 v. The Owners, Strata Plan LMS 1991*, 2018 BCCRT 333, the strata had separate commercial and residential sections, and the tribunal member found that a bylaw amendment passed with only 1 vote was invalid as it did not meet the requirements of section 128(1)(c). The tribunal member cited

the BC Court of Appeal's decision in *Norenger Development (Canada) Inc. v. The Owners, Strata Plan NW3271*, 2016 BCCA 118 at para. 3, which she said made it clear that the democratic right to vote lies "at the very core of a strata corporation's constitutional structure." The tribunal member said in paragraph 38, "I find a commercial section owner has the democratic right to vote separately from the residential owners and to have its voice heard". She concluded that bylaw amendments passed without a separate vote of commercial owners were invalid.

30. I am persuaded by the reasoning in *Commercial Section of the Owners, Strata Plan LMS 1991*, and rely on it. I therefore find that the amendments to bylaws 7.4(8) and 7.4(9) filed with the LTO on May 24, 2017 are unenforceable. I find that the versions of bylaws 7.4(8) and 7.4(9) that were in effect immediately prior to April 18, 2017 continue to apply.

31. It remains open to the strata to amend these bylaws, pursuant to Part 7 of the SPA. The applicants asked for an order that the strata comply with the SPA's voting procedures in future. I decline to make that order, as the SPA is already binding on the parties and an order would not change that.

Must the strata remove or relocate the parking cage?

Background

32. The strata corporation is comprised of several buildings, built in 3 phases. The strata plan shows that phase 1 included a concrete parking structure, adjacent to the main tower building. All of the commercial strata lots are located in phases 1 and 2.

33. Photos provided by the parties show that on the ground floor of the parking structure, there is a large area that is closed in by metal fencing, accessible by an overhead electric gate or by a pedestrian door. The parties agree that the fenced area, which they refer to as the "parking cage", contains 18 parking stalls. The parties also agree that the parking stalls inside the cage are currently used by residential strata lot owners.

34. The applicants seek an order that the strata remove the cage and parking stalls, or alternately that the strata relocate the cage and stalls.

35. The applicants say that in September 2012, shortly after phase 2 was completed, the strata council wrongly allowed the developer (Intergulf Development) to take back 18 parking stalls that were part of the common property parkade. The applicants say Intergulf Development then sold these parking stalls to purchasers of strata lots in the third phase building, and installed the metal cage around them. The applicants says the strata and Intergulf Development had no legal authority for these actions, and that the strata's ongoing refusal to rectify the situation is a significant unfairness.

36. The applicants say the cage is in the middle of the parkade, and is the first thing visible to anyone entering the parkade through 1 of the 2 main entrances. The applicants submit the cage causes traffic flow problems, and prejudices them because they rely on readily available and clearly visible customer parking to successfully operate their businesses.

37. The applicants also say the strata failed to obtain the necessary ¾ vote resolution in favour of installing the cage, which was a significant change in the use and appearance of common property, contrary to section 71 of the SPA.

Legal Status of Parking Stalls

38. The applicants bear the burden of proving their claims. I find the applicants have not proven their assertion that Intergulf Development "took back" 18 common property parking stalls from the strata corporation and sold them to purchasers of new strata lots. In particular, there is no record of such parking stall sales in evidence before me, and no evidence that the stalls are owned by individual strata lot owners.

39. The strata plan shows that that the entire parking cage, on which the fencing is located, is included within a large common property parking area. None of this area was ever designated as limited common property.

40. The strata says Intergulf Development leased the parking stalls, including the 18 disputed stalls, to a subsidiary corporation in July 2009, and the subsidiary then executed partial assignments of that lease to individual strata lot owners.

41. The written lease document (lease), which was provided in evidence, confirms that on July 10, 2009, Intergulf Development Corp. leased parking stalls and storage areas to Intergulf Financial Corp. This lease was executed 3 days before the phase 1 strata plan was deposited at the LTO. The lease includes the following terms (emphasis added):

    a. The lease lasts until the strata corporation is dissolved, or for 999 years, whichever is earlier.

    b. Intergulf Development agreed to lease Intergulf Financial "all of the parking stalls" and the associated drive aisles in the parking facility, as shown outlined in heavy black line on the parking/storage area plan (attached to the lease as schedule A).

    c. Title to the strata corporation's common property would be encumbered by the lease.

    d. Intergulf Financial could grant partial assignments of the lease, such as for individual parking stalls, to others, including strata lot owners.

42. The applicants say that this lease does not include the parking stalls that are now inside the cage. I disagree. First, the evidence provided does not establish that the parking cage is outside the area marked with heavy black line. Second, and more significantly, the text of the lease specifically says that all parking stalls in the parking facility were part of the July 2009 lease. For that reason, I find that Intergulf Financial had a leasehold interest in all of the parking stalls at issue, and was contractually entitled to assign individual parking stalls to others.

43. For these reasons, I reject the applicants' submission that Intergulf Development wrongfully sold the parking stalls. There is no evidence before me about how the disputed parking stalls were assigned to specific strata lot owners, so I make no

findings about that, other than to note that the lease generally allowed Intergulf Financial to make such assignments.

44. The applicants say that Intergulf Development installed the parking cage fencing in September 2012. The strata did not refute that assertion.

Significant Unfairness

45. The applicants submit that the strata's actions in allowing Intergulf Development to "take back" 18 parking stalls and install a cage around them without legal authority constituted a significant unfairness against them.

46. Section 164 of the SPA and section 123(2) of the *Civil Resolution Tribunal Act* allow the court or the tribunal to make an order necessary to prevent or remedy a significantly unfair action. However, since I have found that the parking stalls were not sold, and that Intergulf Finance had authority to assign them under the terms of the lease, I find the applicants have not established their claim of significant unfairness.

Significant Change

47. Under section 71 of the SPA, a strata corporation must not make a significant change in the use or appearance of common property unless the change is approved by a ¾ vote resolution at an AGM or special general meeting (SGM), or there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage.

48. The strata did not raise the "immediate change" argument, and I find it does not apply. However, I find that installing the parking cage fencing constituted a significant change to the use and appearance of common property, which required a ¾ vote resolution.

49. Criteria for determining what is a significant change in use or appearance as contemplated in section 71 of the SPA were set out in *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333 at paragraph 19:

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.

50. In *Foley,* some strata lot owners commenced litigation after another owner installed a deck and railing on a common property roof area adjoining his strata lot. The court found this action was a significant change requiring a ¾ vote resolution, even though the strata corporation did not install the deck or railing, and did not grant permission in advance. The strata's subsequent decision to permit the deck and railing to remain in place brought the action within section 71 of the SPA. I find that reasoning applicable to the facts in this dispute, as the strata did not install the parking cage, but allowed it to remain.

51. In the dispute before me, the photos provided in evidence show that the parking cage is clearly visible to anyone entering the parking facility, including the applicants' customers. The fencing impedes access, and changes an open area into a locked area accessible only with a key or fob. The applicants assert that the fencing changes traffic flow, which the strata did not particularly dispute, other than to say the municipality approved the cage.

52. For these reasons, and based on the factors set out in *Foley*, I find that installing the parking cage fencing constituted a significant change to the use and appearance of common property.

53. In making this finding, I note that the cage was installed in September 2012, after the phase 2 strata plan was deposited at the LTO on July 6, 2012. Section 228 of the SPA provides that once a new phase of a strata plan is deposited at the LTO, the strata corporation then includes both the original phase and the new phase. Thus, the strata corporation, with its elected strata council, was in place when the parking cage was installed. Paragraph 3.1 of the lease says that after the deposit of the phase 1 strata plan, the strata corporation will assume full responsibility for the control, management, and administration of the parking facility. For these reasons, I find the strata corporation had authority over Intergulf Development's decision to install the parking cage fencing in September 2012. This means that the parking cage installation fell within section 71 of the SPA, and required a ¾ vote resolution. No such resolution was ever put forward.

54. As argued by the strata, there are numerous court decisions setting out the importance of maintaining democratic governance of strata corporations. For example, the court in *Foley* quoted paragraph 12 of *Lum v. Strata Plan VR519 (Owners of)*, 2001 BCSC 493 at para. 12:

> the democratic government of the strata community should not be overridden by the Court except where absolutely necessary.

55. In *Foley,* the court said it was important that strata lot owners attempt to resolve their differences by following the procedures set out in their bylaws and the SPA. Therefore, instead of ordering the disputed deck and railings to be removed, the court ordered the strata to call an SGM and have owners vote on a ¾ vote resolution on whether the change was acceptable. The tribunal has similarly found that the appropriate remedy for a violation of section 71 is not to order the change reversed, but instead to order that a ¾ vote resolution be put to strata lot owners, as

should have occurred at the time of the change: see for example *Kazakoff v. The Owners, Strata Plan KAS 880*, 2018 BCCRT 12.

56. I agree with the reasoning in *Foley* and *Kazakoff,* and adopt it. I find the strata must hold a general meeting and allow the strata owners to consider a 3/4 vote resolution on whether to keep the parking cage, in its current location and form. All of the regular SPA requirements for such meetings and voting, including notice, will apply.

57. If, at a properly held meeting, the parking cage, in its current form, is approved by a ¾ majority vote, then the matter is ended and the cage can remain as it is currently. If the parking cage is not approved, then the strata must remove the metal fencing and doors.

58. Nothing in this decision prevents the strata from putting forward further ¾ vote resolutions on whether to alter or move the parking cage, as occurred at general meetings in 2016 and 2017.

DECISION AND ORDERS

59. The strata corporation must comply with the provisions in section 189.4 of the SPA, and therefore may not charge dispute-related expenses against the applicants.

60. The amendments to bylaws 7.4(8) and 7.4(9) filed with the LTO on May 24, 2017 are unenforceable. The versions of bylaws 7.4(8) and 7.4(9) that were in effect immediately prior to April 18, 2017 continue to apply.

61. Within 45 days of this decision, the strata must call a general meeting to consider approval of the current parking cage by ¾ vote resolution under section 71 of the SPA. If the ¾ vote resolution passes the matter will end. If the ¾ vote resolution fails, I order the strata to remove the metal cage fencing and doors within 60 days of the date of the general meeting. The cost of this removal will be at the expense of the strata, including the applicants.

62. 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. As the

applicants were partially successful in these disputes, I order the strata to reimburse the applicants half of their tribunal fees, which equals $175.

63. 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.

64. 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.

Kate Campbell, Tribunal Member