



# Civil Resolution Tribunal

Date Issued: April 26, 2019

File: ST-2018-007595

Type: Strata

Civil Resolution Tribunal

Indexed as: *Merk v. The Owners, Strata Plan NW 1263*, 2019 BCCRT 500

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

Alice Merk

**APPLICANT**

**A N D :**

The Owners, Strata Plan NW 1263

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Eric Regehr

## **INTRODUCTION**

1. The applicant, Alice Merk, is the owner of strata lot 6 in the respondent strata corporation, The Owners, Strata Plan NW 1263 (strata). The applicant put a hot tub and gazebo on her patio, which the strata says was in breach of the *Strata Property Act* (SPA) and the strata's bylaws. The applicant asks for an order allowing her to keep the hot tub and gazebo and compensation of \$9,000. The strata asks that the

hot tub and gazebo be removed and that I dismiss the applicant's request for compensation.

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

## **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. The applicable tribunal rules are those that were in place at the time this dispute was commenced.
7. Under section 123 of the Act and the tribunal rules, in resolving this dispute the tribunal may 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**

8. The issues in this dispute are:
  - a. Did the applicant breach the bylaws by installing a hot tub and gazebo on her patio?
  - b. What remedy, if any, is appropriate?

## **BACKGROUND AND EVIDENCE**

9. In a civil claim such as this, the applicant must prove her case on a balance of probabilities. While I have read all of the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision.
10. The strata consists of 52 townhome-style strata lots in 5 buildings in Richmond that was constructed in the early 1980s.
11. On the strata plan filed with the Land Title Office (LTO), none of the strata's common property was designated as limited common property (LCP) for the exclusive use of a strata lot. There has not been a resolution to designate any common property as LCP under section 74 of the SPA registered at the LTO. However, in practice, it appears each owner uses the area immediately in front of and behind the strata lot as their exclusive property.
12. The strata filed a complete set of bylaws in the LTO on December 4, 2001, which replaced all previously filed bylaws. The relevant portions of the bylaws are:
  - a. Bylaw 3.3(p): An owner may not use or install in or about a strata lot any shades or awnings except as approved by strata council.
  - b. Bylaw 6.1: An owner may place planters, patio furniture or other similar items within any part of the owner's LCP.
  - c. Bylaw 11.1: An owner must obtain written approval from the strata before making an alteration to common property.

- d. Bylaw 12.5: An owner who alters common property without strict compliance with the bylaws must restore the common property to its condition before the alteration at the owner's sole expense.
13. The strata has filed several bylaw amendments since December 4, 2001, but none are relevant to this dispute.
  14. On August 14, 2017, the applicant asked the strata council to tell her whether there was a bylaw restricting the installation of a hot tub. The strata's property manager responded by identifying some issues that strata corporations commonly have with hot tubs, such as noise, vibration, chemical smell, drainage and liability.
  15. On August 20, 2018, the property manager emailed the applicant as the strata's painters were unable to access the applicant's fence because of the gazebo and hot tub. The property manager said that the strata had not approved the hot tub and that it "may be an issue".
  16. On September 12, 2018, the property manager wrote to the applicant. The property manager advised that the strata council decided not to approve the hot tub and gazebo and demanded that they be removed. The strata invited the applicant to propose a bylaw amendment about hot tubs.
  17. The applicant wrote the strata on September 13, 2018, requesting a hearing about the hot tub and gazebo. The applicant said that the hot tub did not breach any of the strata's bylaws and asked if there had been a complaint. She said that she did not alter common property because there is no additional wiring for the hot tub. She said that the hot tub and gazebo were akin to patio furniture.
  18. The strata council held a hearing on October 3, 2018. After hearing from the applicant, the strata did not change its position. The strata provided the applicant with the minutes of the hearing, which included its decision.
  19. At the strata's annual general meeting held on December 8, 2018, the owners considered a bylaw amendment that the applicant proposed. The applicant's

proposed bylaw amendment would permit hot tubs but with certain limitations and requirements. The resolution failed with 3 owners in favour and 21 opposed.

## **POSITION OF THE PARTIES AND ANALYSIS**

### ***Did the applicant breach the bylaws by installing a hot tub and gazebo on her patio?***

20. The strata argues that the hot tub and gazebo are alterations to common property that required strata approval. The strata says that by installing the hot tub and gazebo without strata approval, the applicant breached bylaws 3.3(p), 6.1 and 13.1.
21. The applicant says that neither the hot tub nor the gazebo is an alteration to common property because they are both freestanding and moveable items.
22. In *The Owners, Strata Plan LMS 4255 v. Newell*, 2012 BCSC 1542, the Court considered whether a hot tub was an “alteration” to common property within the meaning of a similar bylaw to bylaw 13.1. The owner asserted that the hot tub was freestanding and did not require alterations to the building’s plumbing or electrical systems, which the strata corporation did not dispute. The strata corporation argued that because the hot tub was installed using a crane to the 37<sup>th</sup> floor, it effectively became a permanent part of the owner’s deck even if it technically could be moved. The Court found that the hot tub was not designed to be permanent and was therefore not an alteration that required strata approval.
23. The only significant distinction between *Newell* and this dispute is that the owner in *Newell* installed his hot tub on his LCP, whereas the applicant’s hot tub is located on common property. It is well established that owners can expect to exert more control over LCP than over common property: see *Moure v. The Owners, Strata Plan NW2099*, 2003 BCSC 1364. However, I find that the Court’s reasoning in *Newell* does not turn on the fact that the owner’s deck was LCP. Since *Newell* is binding on me, I find that the applicant’s installation of the hot tub was not an alteration of common property within the meaning of the bylaws.

24. As for the gazebo, there is no evidence that the structure is permanent or affixed to the building. I agree with the applicant that it is similar to a patio umbrella. I find that it is not an alteration of common property within the meaning of the bylaws. The strata raises the concern that the gazebo has impeded its contractors from inspecting and painting the building. The applicant must cooperate with the strata to ensure that the strata is able to fulfill its repair and maintenance obligations.
25. The strata also relies on bylaw 3.3(p), which prohibits awnings or shades in or about a strata lot. I find that the plain and ordinary meaning of awnings and shades are objects that are affixed to a building, window or doorway to provide shelter. I find that this bylaw does not capture free-standing structures like the gazebo. In addition, because the gazebo is a freestanding structure on common property, I find that it is not “in or about” the applicant’s strata lot.
26. The strata also relies on bylaw 6.1, which applies to LCP, not common property. As mentioned above, there is no LCP in the strata, so it appears that bylaw 6.1 does not apply to any of the patios in the strata. In any event, bylaw 6.1 does not set out an exhaustive list of what an owner may put on their patio. I find that bylaw 6.1 does not prohibit the applicant from putting the hot tub or gazebo on her patio just because hot tubs and gazebos are not specifically listed.
27. The strata also raises questions about whether the hot tub and gazebo might increase their insurance, damage the underlying patio cement slab or affect drainage. The strata’s questions are legitimate but are not supported by evidence. I note that bylaw 3.3(j) prohibits an owner from doing anything that will raise the strata’s rate of insurance. I make no finding about whether the installation of the hot tub or gazebo may breach bylaw 3.3(j) and the strata is at liberty to bring a new dispute to the tribunal if it believes that the hot tub or gazebo has caused their insurance rates to increase.
28. I also note that the strata previously raised concerns about things like noise and odour. The strata has bylaws prohibiting unreasonable noise (bylaw 3.1(b)) and undue smell or vibration (bylaw 3.3(c)). The applicant insists that the hot tub is quiet

and creates no odour. I make no finding about whether the applicant's use of the hot may breach any other bylaws.

29. Therefore, I find that the applicant's installation of a hot tub and gazebo does not breach bylaw 3.3(p), 6.1 or 13.1.

***What remedy, if any, is appropriate?***

30. As mentioned above, the applicant requested monetary orders. She asked for \$1,000 to permit her to keep her gazebo and \$8,000 to permit her to keep the hot tub. She does not explain why she attached a monetary amount to these requested orders. I find that there is no basis for the applicant to recover any money from the strata for the installation of the hot tub and gazebo even though she has been successful in this dispute.

31. I find that the appropriate remedy is a declaratory order that the hot tub and gazebo were not alterations within the meaning of bylaw 13.1 and do not otherwise breach bylaws 3.3(p) or 6.1.

**TRIBUNAL FEES AND EXPENSES**

32. 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 therefore order the strata to reimburse the applicant for tribunal fees of \$225. The applicant did not claim any dispute-related expenses.

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 order that:

- a. The hot tub and gazebo that the applicant installed on the common property patio behind strata lot 6 are not alterations within the meaning of bylaw 13.1.
  - b. The applicant did not breach bylaw 3.3(p), 6.1 or 13.1 by installing the hot tub and gazebo on the common property patio behind strata lot 6.
  - c. Within 14 days of the date of this decision, the strata pay the applicant \$225 in tribunal fees.
35. The applicant is entitled to post judgement interest under the *Court Order Interest Act*, as applicable.
36. 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.
37. 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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Eric Regehr, Tribunal Member