



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Rutherford v. The Owners, Strata Plan 170*, 2019 BCCRT 531

B E T W E E N :

Amy Rutherford

APPLICANT

A N D :

The Owners, Strata Plan 170

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kate Campbell

INTRODUCTION

1. The applicant, Amy Rutherford (owner) owns a strata lot in the respondent strata corporation, The Owners, Strata Plan 170 (strata).

2. The owner seeks an order that the strata permit her to rent out her second bedroom as a short-term rental, for up to 10 days per month, in order to supplement her income.
3. The strata says its bylaws prohibit short-term rentals and commercial activity that noticeably increase non-residential traffic. The strata says that while the owner applied for a hardship exemption to the rental bylaws, the strata council concluded that sufficient hardship did not exist. The strata also says that the hardship exemption provisions in section 144 of the *Strata Property Act* (SPA) do not apply to bylaws that prohibit commercial use.
4. The owner is self-represented. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

5. 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.
6. 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.
7. 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.

8. 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

9. The issues in this dispute are:
 - a. Should the owner be permitted to rent out her second bedroom for short-term rentals, for up to 10 days per month?
 - b. Is the strata entitled to charge legal fees against the owner's strata lot account?

Preliminary Matters

10. The owner objects to some of the documents provided by the strata, as they contain arguments in addition to evidence. I have considered those arguments as part of the strata's submissions in this dispute, rather than as evidence. The owner also objects to information the strata provided about an ongoing matter before the BC Human Rights Tribunal. In the context of this administrative proceeding, these documents are admissible as evidence, but they are not determinative of the issues before me in this dispute so I place no weight on them.
11. The owner also objects to the dispute response form the strata filed on November 9, 2018, as it is labelled on the tribunal's evidence portal as coming from "Strata 170 c/o Alan Reakes". The owner correctly submits that as property manager, Mr. Reakes is not eligible to be a party to this dispute. Mr. Reakes is not a party or an approved representative, and I find that his name was merely used on the form as part of the strata's contact information. Also, I note that nothing on that form is determinative of this dispute, as it merely sets out the strata's response to the owner's claim. I therefore find it is not necessary to remove this document from the evidence portal, but I place no weight on it in making this decision.

EVIDENCE, FINDINGS AND ANALYSIS

12. I have read all of the evidence provided but refer only to evidence I find relevant to provide context for my decision. In a civil proceeding such as this, the applicant owner must prove her claims on a balance of probabilities.

Short-Term Rentals

13. The owner says she should be granted a hardship exemption, so that she can rent out the second bedroom in her strata lot up to 10 days per month. She provided evidence that she has a longstanding psychological disability, which I accept. She says she has financial hardship, which I also accept. The owner says that for these reasons, the strata council was unreasonable in denying her application for a hardship exemption to the rental bylaws.

14. The owner's written hardship application was dated July 31, 2018, and requested an exemption to the rental restriction bylaw under s. 144 of the SPA, on the grounds that the restriction caused the owner undue hardship. The owner sought permission to rent out 1 room in her strata lot using AirBnB, for up to 10 days per month, in order to supplement her income. The letter said the owner could only work part-time due to her permanent disabilities. The letter lists the nature of the disabilities, and said those conditions precluded the owner from having a full-time roommate. The letter said the modest AirBnB income would allow the owner to stay in her home and connected with her support system, and would decrease the stress caused by her tight budget. A letter from the owner's psychiatrist, Dr. Emes, was attached to the hardship application. Dr. Emes said having a part-time AirBnB rental would benefit the owner's mental health, and he confirmed that the owner can only work part-time due to her provincial disability pension.

15. The strata council president provided a written response denying the owner's hardship application. That letter said the circumstances listed in the owner's application did not demonstrate financial hardship.

16. In its submissions, the strata says bylaws 45.1 and 47.1 prohibit all rentals, including short-term rentals such as AirBnB. I will address these bylaws in turn. The owner says the strata does not have a bylaw specifically addressing short-term rentals.
17. Bylaw 45.1 is the strata's rental restriction bylaw. It states as follows (my bold emphasis):

Subject to the provisions of this bylaw, all strata lots shall be owner-occupied and **rentals, tenancies, or licenses of occupancy of any sort whatsoever are absolutely prohibited**, with the following considerations and exceptions:

- (a) where cases of undue physical or financial hardship of a personal nature arise, the owner may make a written request to the council for permission to rent a strata lot for a limited period of time, and where evidence of such hardship has been provided, the council shall not unreasonably withhold permission for limited rental;
- (b) In the event that an owner is granted permission to lease or rent due to hardship such rental shall be for a period of one year or less.

If the owner experiencing difficulties deems an extension to the one-year limit necessary, a written request may be made to the strata council no later than the last day of the tenth month of the original one-year period.

A request to extend the one-year limit must be accompanied with evidence of continuing hardship.

18. The strata says that bylaw 45.1 prohibits all rentals, including short-term rentals such as AirBnB stays. The owner says rental bylaw 45.1 does not prohibit short-term rentals, because AirBnB customers are not "tenants", as defined in the *Residential Tenancy Act*. I agree, based on the reasoning in *The Owners, Strata Plan VR812 v. Yu*, 2017 BCCRT 82. Previous tribunal decisions are not binding precedents, but I find Yu provides useful guidance on the subject of strata bylaws

and AirBnB activity. In *Yu*, a tribunal vice chair relied on the reasoning in *HighStreet Accommodations Ltd. v. The Owners, Strata Plan BCS2478*, 2017 BCSC 1039, and concluded that AirBnB use is a “licence use”, rather than a “tenant use” (para. 30). Because it was not a rental use, the vice chair concluded that the owner’s AirBnB activities were not covered by section 141 of the SPA, which governs how strata corporations may and may not restrict strata lot rentals.

19. Similarly, in *HighStreet*, the court found that section 143 of the SPA does not apply to license uses. Section 143 says that existing tenants are not subject to new rental restriction bylaws passed by strata corporations, and that such rental restrictions do not apply to any strata lot for 1 year after they are first passed.
20. Following *HighStreet* and *Yu*, I conclude that the owner’s past and proposed short-term AirBnB use is not a rental or tenancy use, but rather is a licence use. Bylaw 45.1 says, “rentals, tenancies, or licenses of occupancy of any sort whatsoever are absolutely prohibited”. For this reason, I conclude that the owner’s AirBnB use, as a “license of occupancy”, is prohibited under bylaw 45.1.

Hardship Exemption

21. I find the owner is not entitled to a hardship exemption because her proposed use is a license of occupancy, rather than a rental.
22. Section 144 of the SPA permits an owner to apply to a strata corporation for an exemption from a rental restriction on the grounds the bylaw causes hardship to the owner. Since I have found that the owner’s proposed AirBnB use is not a rental use, but is instead a licence use, the provisions of section 144 do not apply. This is clearly explained in paragraph 31 of *The Owners, Strata Plan BCS 3625 v. Wiltsey et al*, 2018 BCCRT 155:
23. The courts have found that the obligations and protections of Part 8 will only apply where the renter receives exclusive possession and control of the property (also known as legal possession) (*HighStreet Accommodations Ltd. v. The Owners, Strata Plan BCS 2478, 2017 BCSC 10*). Short-term accommodations do not

typically give the guest exclusive possession and control of the property, but rather only a licence to occupy the property for a specified period of time. The court has found the provisions of Part 8 do not apply to licencing arrangements. It follows that bylaws created pursuant to section 141, such as the rental limitation bylaws, will not apply to licencing arrangements.

24. I find that the same reasoning applies in this dispute. Section 144 of the SPA, which permits hardship exemptions, also appears in Part 8 of the SPA, which sets out the key SPA provisions governing rentals. Since the AirBnB use in these circumstances is not a rental, a hardship exemption from the rental restriction bylaw would not permit AirBnB use.
25. Similarly, while bylaw 45.1 sets allows an owner to request permission to rent a strata lot for a limited period of time due to undue physical or financial hardship. In this case, the owner is not seeking to rent out her strata lot, but instead seeks permission for short-term AirBnB stays. As previously explained, this is a license use, and not a rental, so the hardship exemption for rentals set out in bylaw 45.1 does not apply.

Commercial Use Bylaw

26. Even if the owner's AirBnB was permissible under bylaw 45.1 (which I find it is not), I find it is prohibited under bylaw 471.
27. Bylaw 47.1 says an owner, tenant, occupant, or visitor shall not "Carry out any commercial, professional or business activities in any strata lot that noticeably increases non-resident traffic to the building."
28. Section 1(1) of the SPA defines "residential strata lot" as a strata lot designed or intended to be used primarily as a residence. I find the owner's strata lot is a residential strata lot within the meaning of the SPA. In *Yu*, a tribunal vice chair determined that the use of a strata lot as an AirBnB rental was not use as a "private dwelling home". Similarly, in *Nanaimo (Regional District) v. Saccomani*, 2018 BCSC 752 and *Whistler (Resort Municipality) v. Wright*, 2003 BCSC 1192, the BC

Supreme Court held that residential use, as defined in municipal bylaws, did not include use for vacation rentals.

29. Based on the reasoning in these cases, which I find persuasive, and the definition of “residential strata lot” in the SPA, I find that I find that the AirBnB use proposed by the owner is not a residential use, but instead is a commercial or business activity, subject to bylaw 47.1.
30. The owner says bylaw 47.1 cannot be reasonably applied, because it does not define what constitutes a “noticeable increase” in building traffic. The owner says that a noticeable increase could only be legitimately caused by a full-time business operation, such as a hair stylist or massage therapist. She says she would only allow up to 2 people to stay in her rented room for up to 10 days per month, which would not cause a noticeable increase in building traffic.
31. I do not accept the owner’ submission on this point. While it is not entirely specific and somewhat subjective, I find the term “noticeable increase” to be sufficiently clear based on its plain meaning. The *Oxford Dictionary*, online edition (en.oxforddictionaries.com), defines “noticeable” as “easily seen or noticed; clear or apparent.”
32. The owner proposes renting out her second bedroom up to 10 days per month, to up to 2 people at a time, with a minimum stay of 2 to 3 days (although I note that this final limit was not included in the hardship application materials provided to the strata.) The owner says this means that a maximum of 10 guests could be present within each month. The strata plan shows there are 33 strata lots in total, contained in a single 5-storey building with a shared parking garage. I find that 10 people per month in a building of that size and configuration would be “easily seen or noticed” by other residents, and therefore would constitute a “noticeable increase in building traffic”, as contemplated in bylaw 47.1
33. For these reasons, I find the owner’s proposed AirBnB use is prohibited by bylaw 47.1. I agree with the strata that there is no provision in the SPA or bylaws that allows for an exemption from bylaw 47.1, due to hardship or any other reason.

34. For these reasons, I conclude that the owner's requested AirBnB use is not permissible, as it is contrary to bylaws 45.1 and 47.1.

Legal Fees

35. Documents in evidence show that the strata charged \$625.60 in legal fees against the owner's strata lot account. I find that these charges are not permitted under the SPA, and I order them, as well as any related interest or collection charges, to be removed.

36. Section 167 of the SPA says that an owner who sues the strata corporation is not required to contribute to the strata's expenses in defending the suit. Section 189.4 of the SPA gives the tribunal specific authority to apply section 167. The provided invoices show that all the legal fees were incurred after the owner filed her dispute with the tribunal on October 15, 2018. The itemized bills show that the amounts charged back to the owner all relate to the owner's litigation about the denied AirBnB request.

37. Based section 167 of the SPA, I find the strata is not entitled to charge its legal fees to the owner.

38. Section 133(2) of the SPA says the strata may require that the reasonable costs of remedying a bylaw contravention be paid by the person who may be fined for the contravention. However, I find this is not applicable in this case, as the strata did not follow the requirements of section 135 of the SPA. Section 135 says a strata must not impose a fine against a person or require a person to pay the costs of remedying a bylaw contravention unless the strata has received a complaint about the contravention, given the owner or tenant written particulars of the complaint, and provided a reasonable opportunity to respond (including a hearing, if requested).

39. In *Louhimo v. The Owners, Strata Plan PG 33*, 2019 BCCRT 491, a strata charged cleanup costs related to a parking lot fuel spill back to the owner, under section 133 of the SPA. The tribunal member found that the owner was not required to pay, because by merely providing a copy of the bill to the owner, the strata was requiring

the owner to pay the costs of remedying a bylaw contravention without first providing the notice required under section 135 of the Act.

40. I find that the same reasoning applies in this dispute. The strata council discussed the owner's AirBnB activities with the owner at a May 23, 2018 strata council meeting, and there was a warning about a potential bylaw fine of up to \$500 per week for short-term rentals set out in the meeting minutes. However, the strata never gave the owner notice that she would be charged for legal fees. There is no documentation setting out a warning that the owner would be charged fines or costs for any bylaw breach. Also, since the legal fees were not incurred until after the owner filed her tribunal dispute, and long after she agreed to cease AirBnB activities in May 2018, I find the strata's legal fees were not a cost of remedying a bylaw infraction, and can therefore not be charged to the owner under section 133 of the SPA.
41. For these reasons, I conclude the strata was not permitted to charge its legal fees to the owner's strata lot account, and must remove these charges.

CONCLUSION

42. The owner's proposed AirBnB use is not permitted, as it is contrary to bylaws 45.1 and 47.1.
43. The strata is not permitted to charge legal fees to the owner's strata lot account, and must remove these charges.

Tribunal Fees and Dispute-Related Expenses

44. 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. The owner was partially successful in this dispute, so I order the strata to reimburse half of her tribunal fees, which equals \$62.50.
45. 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

46. I order the following:

- a. The strata must immediately remove any legal fees charged against the owner's strata lot account, as well as any related interest or collection fees.
- b. Within 30 days of this decision, the strata must reimburse the owner \$62.50 for tribunal fees.

47. The owner is entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.

48. 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.

49. 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