



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Leo v. The Owners, Strata Plan BCS 2988*, 2019 BCCRT 784

B E T W E E N :

Cindy Leo

APPLICANT

A N D :

The Owners, Strata Plan BCS 2988

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Lynn Scrivener

INTRODUCTION

1. This is a dispute about alleged changes to common property (CP) and strata governance. The applicant, Cindy Leo, says that the respondent, The Owners, Strata Plan BCS 2988 (strata) made significant changes to CP hedges without following the proper procedures, made changes to the number of strata council

members, and has acted inappropriately with respect to proxies. She seeks orders that the strata replace the hedges and maintain them at a height of 6 feet, rescind the decision to have 6 members on the strata council, appoint her to the strata council, and retain proxies for 3 years following each annual general meeting (AGM). The strata disagrees with the applicant's claims.

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

7. The issues in this dispute are:
 - a. whether the strata should be ordered to replace the street-facing hedge and maintain it at a height of 6 feet;
 - b. whether the strata should be ordered to appoint the applicant to the strata council; and
 - c. whether the strata should be ordered to retain proxies for 3 years following each annual general meeting (AGM).

BACKGROUND AND EVIDENCE

8. The applicant holds a leasehold interest in strata lot 7, which is a ground floor unit close to the building's entrance. According to the strata plan, there is a CP landscaped area between the limited common property (LCP) terrace attached to the applicant's strata lot and the boundary of the strata property. Photographs in evidence show that the landscaped area consists of concrete planters with various hedges, shrubs and trees planted in them. A public sidewalk abuts the landscaped area.
9. The strata has adopted the Schedule of Standard Bylaws from the SPA, and has filed a number of amendments with the Land Title Office, none of which apply to this dispute. Bylaw 8 provides that the strata must repair and maintain CP. Bylaw 9 states that the council must have at least 3 and not more than 7 members.
10. In 2016, the strata's landscaping contractor recommended that the hedges in the landscaped area be trimmed in the spring of 2017. These hedges had not been trimmed since they were planted, and the landscaping contractor was of the view that this was necessary maintenance. The strata accepted this recommendation.
11. In March of 2017, while the applicant's strata lot was listed for sale, the strata's landscape contractor trimmed the hedges in the CP landscaped area. The applicant

says she did not receive any offers on her property after this occurred. The applicant says that the reduced height of the hedges made her terrace and living room much more visible from the street, and believes that this affected her ability to sell her strata lot.

12. The applicant corresponded with the strata about the reason for the trimming and her belief that it amounted to a significant change to CP that was made without the necessary $\frac{3}{4}$ vote. In September of 2017, the applicant requested that the strata replace the trimmed hedges. The strata's position was that the trimming was maintenance and would promote the health of the hedges.
13. At the November 21, 2017 AGM, a motion passed that only 6 members would be elected to the strata council, a reduction from the previous 7. Seven owners put their names forward for election: 5 owners who were existing strata council members, 1 new owner, and the applicant. The applicant was the unsuccessful candidate in the vote.
14. The applicant requested and received a hearing to discuss the hedges and the change to the number of members on the strata council. The strata determined that the hedge trimming was not a significant change and the motion to reduce the size of the strata council was not an unfair act.
15. At the 2018 AGM, the strata again passed a motion to have 6 members on the strata council. The 6 previous members of the council and the applicant stood for election. The applicant was the unsuccessful candidate.
16. During this time, the applicant developed concerns about the proxy voting process. The strata's AGMs have a number of strata lot owners represented by proxies, some of which are held by strata council members. The applicant says she has heard rumours about the inappropriate use of proxies, and wants this issue investigated.

POSITION OF THE PARTIES

17. The applicant's position is that the trimming of the hedges went beyond mere maintenance and amounted to a significant change to CP. She says this change has been detrimental to her as it has increased the visibility of her strata lot from the street and has resulted in increased noise. According to the applicant, 1 section of hedging remains stunted after the trimming, has sparse foliage, and does not seem to be increasing in height. The applicant says the existing hedges should be replaced and maintained at a height of 6 feet.
18. The applicant submits that the 2017 and 2018 motions that 6 strata council members should be elected were the result of her complaint about the hedges, and were aimed at preventing her from becoming a member of the strata council. She points out that an even number of members raises the possibility of a split vote. Her position is that this motion was an unfair act, and the appropriate remedy is to strike down the motion. As there were only 7 candidates for the elections, the applicant says she should be appointed by default.
19. The applicant says that she has heard rumours about the use of proxies, including proxies being assigned to one person but held by another and an owner providing proxies believing that they would be used for one thing but they were actually to be used for another. She says that on at least 1 occasion an owner who had issued a proxy ended up attending an AGM to demand her proxy back. The applicant seeks an order that proxies be retained for 3 years on a temporary basis in order to review how proxies are collected and used in the strata. She says that the system can either be fixed to ensure due diligence or the rumours ended.
20. The strata denies that trimming the hedges was a significant change, and says that it was maintenance as recommended by the landscaping contractor. The strata states that, as the hedges are healthy and growing to a height of over 5 feet, there is no need to replace them. The strata says that the applicant was never promised privacy from plants in the front of her strata lot, and notes that any issues with increased visibility and noise were temporary in nature. According to the strata,

landscaping is a maintenance issue and has never before been the subject of a $\frac{3}{4}$ vote. It says the decision to trim the hedging was made for the benefit of all owners.

21. The strata says the motion to have 6 members on the strata council was proposed due to concerns about obtaining the necessary quorum at meetings, and was passed in compliance with the SPA. The strata says the election process was conducted fairly and without discrimination, and there is no certainty that the applicant would have been elected to council even if there had been 7 vacancies. The strata's position is that the appointment of the applicant to the strata council would be unfair to owners, who should have the right to determine who serves on their strata council.
22. The strata provided statements from strata council members about how they encourage owners to attend strata meetings and, if unsuccessful, provide proxies. According to the strata, the property manager scrutinizes the proxies and destroys the hard copies at the end of each meeting. The strata says the applicant's report of rumours about problems with proxies as described by the applicant are hearsay and should be given no weight. The strata says there was a situation in 2017 where the family member of an owner signed a proxy without the authority to do so, and later came to the AGM to retrieve the proxy. In 2018, the actual owner of the strata lot signed the proxy.
23. The strata says its proxy form is compliant with the SPA. It says that proxies are not retained as they belong to the owner and the holder. If they were retained, the proxies would not be made available to inspect due to privacy considerations. The strata's position is that it would be impracticable and unnecessary to retain proxies and that its current practice of destroying proxies should be continued.

ANALYSIS

Hedge Trimming

24. There is no dispute that the responsibility for maintaining the CP landscaping in question lies with the strata, in accordance with bylaw 8. The parties hold differing

views as to whether the trimming of the hedges amounted to a significant change to this area of CP.

25. Section 71 of the SPA states that a strata corporation must not make a significant change in the use or appearance of CP unless the change is approved by a resolution passed by a $\frac{3}{4}$ vote 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.
26. The determination of whether the trimming of the hedges amounts to a significant change turns on the particular facts of this case. The criteria for determining what amounts to a significant change in use and appearance were paraphrased at paragraph 19 of *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333, as follows:
 - a. a change would be more significant based on its visibility or non-visibility to residents and its visibility or non-visibility towards the general public;
 - b. whether the change to CP affects the use or enjoyment of the unit or a number of units or an existing benefit of a unit or units;
 - c. whether there is a direct interference or disruption as a result of the change to use;
 - d. whether the change impacts 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 to how the strata corporation has governed itself in the past and what it has allowed.
27. The applicant attributes the lack of offers on, and sale of, her strata lot to the hedge trimming. There is no evidence before me from a realtor or other expert to comment on the possible impact of the trimming on the marketability of the strata lot. The fact that the real estate market was particularly active during the time frame in question

does not establish that trimming adversely affected the value of the applicant's strata lot or her ability to sell it.

28. The photographs in evidence establish that the applicant's terrace and strata lot were more visible from the street (and vice versa) after the hedges were trimmed. However, the photographs also establish that her strata lot and terrace were partially visible from the street prior to the trimming due to the spacing of the planters and the presence of a glass gate. I do not find that the increased visibility amounts to a direct interference or disruption with the applicant's ability to use or enjoy her strata lot or LCP terrace. This is so despite the applicant's stated preference to keep her blinds closed after the trimming.
29. The courts have drawn a distinction between temporary and permanent changes when assessing whether a significant change has occurred. The decoration of a property with potted plants and shrubbery has been found to not constitute a significant change to CP (see *Reid v. The Owners, Strata Plan LMS 2503*, 2001 BCSC 1578, affirmed 2003 BCCA 126). By contract, the planting of trees and garden beds was found to be a significant change when they appropriated a large portion of CP for the benefit of one owner (*Anthony v. Schnapp*, 2016 BCSC 1830).
30. While the applicant suggests that the change in height of the hedges is permanent (particularly for one area), I find that this is not supported by the photographs in evidence. These images show substantial regrowth of the trimmed portion of the hedges. Although the height of the hedging was changed temporarily, I am satisfied that the overall landscaping scheme in the front of the building was unchanged. There is still a landscaped area as described on the strata plan, and it is filled with a variety of plants.
31. I find that the trimming of the hedges did not amount to a significant change to CP that necessitated a $\frac{3}{4}$ vote resolution. The fact that the hedges had not been trimmed previously by the landscaping contractor does not alter my conclusion. Accordingly, I dismiss the applicant's claim in this regard.

Strata Council Size & Composition

32. As noted above, bylaw 9 requires the strata to have between 3 and 7 strata council members. Evidence from the strata shows that the council operated with 7 members in the past, but there were concerns with obtaining quorum at some meetings. This was confirmed by attendance records.
33. According to the minutes of the 2017 AGM, a motion to nominate 6 council members as opposed to 7 passed, with 21 voting in favour and 5 opposed. A similar motion passed at the 2018 AGM, with 24 owners voting in favour, 1 opposed, and 1 abstention. The evidence does not support the applicant's assertion that these motions were somehow aimed at preventing her participation in the strata council.
34. It is apparent that the majority of the ownership agreed with the decision to limit the size of the strata council to 6 members. In effect, they decided to amend bylaw 9. According to section 128 of the SPA, in the case of a strata plan composed entirely of residential strata lots, amendments to bylaws must be approved at an AGM or SGM by a resolution passed by a $\frac{3}{4}$ vote. If approved, the amendment must be filed at the Land Title Office in the prescribed form. Until that filing occurs, the amendment has no effect.
35. The motions to have a 6-member strata council were not presented as a $\frac{3}{4}$ vote resolutions at the 2017 and 2018 AGMs. In addition, the appropriate forms were not filed at the Land Title Office. As such, the amendments to bylaw 9 presently have no effect. In order to rectify this situation, the strata must, within 6 months of the date of this decision, convene an AGM or SGM to consider a $\frac{3}{4}$ vote resolution on the size of the strata council and the possible amendment of bylaw 9. If the motion to amend bylaw 9 is successful, the strata must file the requisite documentation at the Land Title Office.
36. Although I have found that there were procedural issues with the motions to change to the size of the strata council, I do not accept that the applicant would have been successful in obtaining a position on council had these motions not been brought. It is possible that, had there been 7 available positions, more owners may have stood

for election and the applicant may not have been elected in any event. I dismiss the applicant's request that she be appointed to the strata council. Nothing in my decision would prevent the applicant from putting her name forward for a subsequent election of the strata council.

Proxies

37. According to section 56 of the SPA, an order who appoints a proxy must do so in writing and the proxy must be signed by the person appointing the proxy. A proxy may be either general or for a specific meeting or resolution, and it may be revoked at any time. Proxies do not fall within the scope of records a strata is required to maintain under section 35 of the SPA.
38. Although there was an issue with a proxy on 1 occasion, it would appear that this was inadvertent and the problem was rectified. I find that the applicant's report of rumours of additional issues is not substantiated by the evidence. I find that the applicant has not established the presence of a problem which would necessitate the retention of proxies or the examination of the strata's processes in this regard. I therefore dismiss this claim.

TRIBUNAL FEES AND EXPENSES

39. 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 applicant was not successful, I dismiss her claim for reimbursement of her tribunal fees.
40. The respondent did not claim tribunal fees, but made a claim for dispute-related expenses of \$135.98. A portion of these expenses (\$30.98) was claimed for a gardening book and the remaining \$105.00 was described as "potential further expense". I do not find the claim for the gardening book to be reasonable, as the need to trim the hedges in question had been established already by the evidence from the landscape contractor. The further \$105.00 in expenses has not been

substantiated. Accordingly, I dismiss the respondent's claims for reimbursement of dispute-related expenses.

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

DECISION AND ORDERS

42. The strata must, within 6 months of the date of this decision, convene an AGM or SGM to consider a $\frac{3}{4}$ vote resolution on the size of the strata council and the possible amendment of bylaw 9. If the motion to amend bylaw 9 is successful, the strata must file the requisite documentation at the Land Title Office.
43. I dismiss the remainder of the applicant's claims.
44. I dismiss the respondent's claim for reimbursement of dispute-related expenses.

Lynn Scrivener, Tribunal Member