Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

GREGORY GILLESPIE

APPLICANT

A N D :

The Owners, Strata Plan LMS 3778

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Sarah Orr

INTRODUCTION

1. The applicant, Gregory Gillespie (owner), owns strata lot 21 in the respondent strata corporation, The Owners, Strata Plan LMS 3778 (strata).

2. The owner is a former strata council member. He has numerous concerns about the strata's accounting of the funds it raised through a special levy approved at its

February 2016 special general meeting (special levy) for its courtyard membrane replacement project (project). He wants the strata to do the following:

a. rescind its allegedly false explanation of a $29,000 estimate,

b. distribute to all owners a comprehensive breakdown of the special levy expenditures,

c. conduct a financial and procedural review of the special levy and the project,

d. correct inaccuracies in its September 7, 2017 council meeting minutes, and

e. formally consider all of the tribunal's recommendations for future projects and procedures.

3. The strata admits that it made some accounting errors and misallocated some of the special levy funds during the project, but it says it has since rectified these errors, and there is nothing to remedy.

4. The owner is self-represented and the strata is represented by D.B., its council president.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims under section 121 of the Civil Resolution Tribunal Act (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The tribunal must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the tribunal's 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. Some of the evidence in this dispute amounts to a "he said, they said" scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined

solely by the test of whose personal demeanor in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the recent decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized the tribunal's process and that oral hearings are not necessarily required where credibility is in issue.

7. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The tribunal may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

8. The applicable tribunal rules are those that were in place at the time this dispute was commenced.

9. Under section 123 of the CRTA 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, or order any other terms or conditions the tribunal considers appropriate.

10. One of the remedies the owner requests is for the strata to formally consider all of the tribunal's recommendations for future projects and procedures. However, it is not the tribunal's role to provide the parties with recommendations or advice for future conduct. Rather, my role as an adjudicator is to assess each of the owner's claims and requested remedies based on the evidence submitted and make any necessary orders as required by law. I address each of the owner's substantive claims in this manner below. I make no findings or decisions about future conduct in this decision.

11. I also note that in his submissions the owner makes many allegations against the strata's property manager, however he has not named the property management

company or any individual representatives of that company as parties to this dispute. I therefore decline to address these allegations in my decision.

ISSUES

12. The issues in this dispute are:

    a. Did the strata misallocate $29,000 of the funds from the first special levy which were meant for phase 1 of the project, and if so, what is an appropriate remedy?

    b. Has the strata failed to provide the owners with a full accounting of the special levy expenses as required by a majority resolution passed at the July 2017 special general meeting (SGM)? If so, what is an appropriate remedy?

    c. Is the strata required to conduct a financial and procedural review of the special levy and courtyard membrane replacement project?

    d. Are the minutes from the strata's September 7, 2017 council meeting inaccurate, and if so, what is an appropriate remedy?

EVIDENCE AND ANALYSIS

13. In a civil claim like this one, the owner must prove his claim on a balance of probabilities. This means the tribunal must find it is more likely than not that the owner's position is correct.

14. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision. For the following reasons, I dismiss the applicant's claims.

15. The strata was created in 1999. In June 2002 the strata repealed and replaced all previous bylaws with new bylaws filed in the Land Title Office (LTO), and it has filed many subsequent amendments with the LTO.

16. In 2015 the strata experienced problems with water leaking in its parkade and courtyard areas. On December 8, 2015, Grantson Construction Group (Grantson) sent the strata an estimate for various phases of a project to address these problems. Phase 1 of the project was for urgent repairs of water leaks in the parkade exhaust shafts for an estimated budget of $17,988.00 plus 5% GST. Phase 2 of the project was to remove trees and shrubs for an estimated budget of $6,968.00 plus 5% GST. Phase 3 of the project was to replace the lower courtyard and parkade membrane for an estimated budget of $157,876.00 + 5% GST. Grantson's total estimate for all 3 phases of the project including GST was $191,973.60.

17. At some point the strata received an estimate of $47,000 for phase 4 of the project to build an enclosed area for the recycling bins inside the courtyard.

18. On December 22, 2015 Grantson invoiced the strata $9,443.70, which was 50% of the phase 1 estimate. The strata paid this amount from its operating fund on the same date. The strata says it deemed this to be emergency repair work, and that it was authorized to pay for it out of the operating fund under section 98 (3) of the SPA. It says its intention was to use this funding as a temporary measure until funds for the full project were raised through a special levy.

19. Section 98 (3) of the SPA allows the strata to make an unapproved expenditure out of its operating fund or contingency reserve fund (CRF) if there are reasonable grounds to believe an immediate expenditure is necessary to ensure safety or prevent significant loss or damage. The owner does not specifically dispute the strata's right to pay for the December 22, 2015 invoice out of the operating fund, and on the evidence before me I am satisfied that the strata made this expenditure in accordance with section 98 (3) of the SPA.

20. On February 1, 2016 Grantson sent the strata 3 separate invoices all dated January 29, 2016 and related to phase 1. The first invoice was for $9,443.70 for the final 50% of phase 1. The second invoice was for $5,142.90 for a change order related

to phase 1. The third invoice was for $6,286.35 for a second change order related to phase 1.

21. On February 2, 2016, the strata paid the full amounts of these 3 invoices, $20,872.95, out of its CRF on the basis that they were immediate expenditures necessary to stop water from leaking into the parkade and causing damage. Again, on the evidence before me I find the strata made these expenditures in accordance with section 98 (3) of the SPA.

22. The total cost of phase 1, including the 2 change orders, was $30,316.65.

23. On February 2, 2016 the strata sent the owners notice of an SGM on February 23, 2016. The purpose of the meeting was to vote on 2 special resolutions, one of which is not relevant to this dispute. The relevant special resolution was to approve an expenditure of $241,000 for all 4 phases of the project which included $29,000 to replace the funds the strata had already spent from the CRF for phase 1. This $241,000 expenditure was proposed to be funded through a special levy assessed in 2 installments due April 1, 2016 and May 1, 2016 (special levy).

24. The minutes from the February 23, 2016 SGM show the owners approved the special levy resolution with a ¾ vote.

25. In April 2016, Grantson invoiced the strata $7,316.40 for phase 2 of the project, and the strata paid the full amount of this invoice from the special levy funds.

26. In May 2016 Grantson invoiced the strata $71,616.93 for 35% of the work on phase 3 and part of the work on phase 4, and the strata paid the full amount of this invoice from the special levy funds.

27. In early November 2016, Grantson invoiced the strata $58,019.43 for additional work on phase 3, and the strata paid the full amount of this invoice from the special levy funds.

28. In November 2016, once Grantson started removing materials from the strata's lower courtyard to prepare for the membrane replacement, it learned that the upper

courtyard membrane was also leaking. The evidence is that the negative hydrostatic pressure of water draining from the upper courtyard caused pressure on the new lower courtyard membrane allowing water under the membrane and causing damage. Grantson's engineer would not sign off on the lower courtyard membrane replacement until the upper courtyard was repaired, so Grantson determined that the upper courtyard membrane required replacing before the lower courtyard.

29. On November 17, 2016 Grantson sent the strata an estimate for $44,977 plus 5% GST for a change order for phase 3 of the project for excavation work in the upper courtyard to determine the extent of the membrane damage in the upper courtyard.

30. At the strata's November 17, 2016 council meeting the council approved a motion to borrow $48,000 from the CRF to pay for the excavation work in the upper courtyard on the basis that it was required to prevent further damage to the work already completed on the lower courtyard. The minutes indicate that once Grantson completed this excavation work it would prepare a scope of work for the upper courtyard membrane repair.

31. On November 18, 2016, Grantson invoiced the strata $47,225.85 for the phase 3 change order. On November 21, 2016, the strata paid the full amount of this invoice from its CRF.

32. In early 2017 the owner raised concerns about the council's approval of the $47,225.85 CRF payment in November 2016. He said the expenditure violated section 98 (3) of the SPA because the excavation work was delayed and turned out not to be an emergency. He says even if the expenditure was an emergency, only the minimum amount required should have been spent, as required by section 98 (5) of the SPA. After obtaining legal advice on this matter, the strata council approved a motion to repay the $47,225.85 CRF expenditure from November 2016 out of the special levy funds, which it did.

33. In March 2017, the strata's property management company invoiced the strata $960.96 for administrative costs associated with the special levy funds, and the strata paid this amount out of the special levy funds.

34. On May 15, 2017, Grantson invoiced the strata $70,691.20 for work on the project. On June 8, 2017, the strata paid $50,000 of the $70,691.20 invoice from the special levy funds, and the $20,691.20 balance of the invoice from the operating fund surplus from the previous year.

35. On July 31, 2017 the strata held an SGM at which the owners approved by a ¾ vote an expenditure of $419,000 to replace the upper courtyard membrane (phase 3.1), to be funded by another special levy (second special levy). Grantson was to be the contractor and start work on phase 3.1 of the project in August 2017. The owner does not take issue with the strata's accounting of the funds from the second special levy in this dispute.

36. At the July 31, 2017 SGM, the owners also approved a motion by majority vote for the strata to provide the owners with a full accounting of the expenses paid from the first special levy. The motion did not set a deadline for the strata to do this or provide any details about the nature or detail required for this accounting.

37. At the strata council's November 9, 2017 meeting it approved the transfer of $20,872.95 from the prior year's operating fund surplus to the CRF. This transfer was to repay the strata's February 2, 2016 emergency CRF expenditure to complete phase 1 of the project.

38. On February 13, 2018, the strata issued a letter to the owners explaining its accounting of the special levy funds.

39. At the May 16, 2018 AGM the owners approved a third special levy for the landscaping phase of the project. The owner does not take issue with the strata's accounting of the third special levy in this dispute.

40. On March 29, 2019, the strata sent a revised version of its February 13, 2018 letter to the owner attempting to address his concerns. In April 2019 it posted this revised letter to its website which is accessible by all owners.

Did the strata misallocate $29,000 of the funds from the first special levy which were meant for phase 1 of the project, and if so, what is an appropriate remedy?

41. The owner has 2 main concerns about the strata's allocation of $29,000 from the special levy which were meant for phase 1 of the project. First, he says the strata knowingly included inaccurate information in the resolution for the special levy at its February 2016 SGM. It is undisputed that the strata paid $9,443.70 out of its operating fund in December 2015 for the first part of phase 1, and $20,872.95 from its CRF on February 2, 2016 for the remaining work on phase 1, for a total of $30,316.65. February 2, 2016 is the same date the strata sent the owners notice of its February 2016 SGM. The resolution in the SGM notice includes an estimated allocation of $29,000 for phase 1. The owner says the strata knew the full cost of phase 1 at the time it sent the SGM notice and at the time of the SGM but failed to notify owners of the exact cost.

42. The strata says it prepared the SGM notice on or about January 28, 2016, at which time the strata believed the estimate for all of phase 1 was $29,000. It says the strata did not receive the phase 1 invoices until February 1, 2016, at which time it was too late to change the SGM notices. The owner says the strata should have notified the owners of the exact cost of phase 1 at the SGM because it had that information at the time. I agree.

43. However, the strata explained this error to the owners in its February 2018 and March 2019 letters. I find the balance of the evidence demonstrates that while they were disorganized and perhaps did not follow the best accounting practices, the strata council and its property manager generally tried to be transparent with the owners throughout the entire project. I find there is no evidence the strata intentionally misled the owners at the February 2016 SGM about the cost of phase 1. I find the strata's explanation that it overlooked the discrepancy between the estimate and the actual cost for phase 1 is reasonable in the circumstances. The SGM was over 3 years ago, and the actual discrepancy between the $29,000 allocated for phase 1 and the $30,316.65 cost of phase 1 was less than $1,500. The

strata has already spent the special levy funds, completed work on the project, and notified the owners of this accounting error. I find there is nothing to remedy.

44. The owner's second concern with the $29,000 allocation for phase 1 is that the strata never transferred the $20,872.95 from the special levy funds to repay the CRF for its February 1, 2016 expenditures for phase 1. The owner notified the strata of this error in September 2017, but by that time there were insufficient funds remaining from the special levy, so the council voted to repay the CRF out of its operating fund at its November 9, 2017 council meeting. The strata explained this error to the owners in its February 2018 and March 2019 letters.

45. The strata says it always intended to refund the CRF the $20,872.95 the strata had spent on phase 1 using the amount allocated in the special levy resolution, but it accidentally failed to do so. Again, the balance of the evidence shows the strata council generally did its best to manage a major construction project and tried to be transparent with the owners. I find the strata's explanation is reasonable in the circumstances, and I find there is no evidence that the strata intentionally delayed this transfer.

46. Given my earlier finding that the February 1, 2016 $20,872.95 expenditure from the CRF complied with section 98 (3) of the SPA, the strata was not required to repay the CRF under the SPA. However, the owners approved the special levy on the basis that $29,000 would be allocated to phase 1, and the strata ended up spending that money on other phases of the project.

47. Since receiving notice of the strata's accounting error in the February 2018 letter, the owners approved a third special levy related to the project. I find that if the majority of the owners were concerned about the strata's accounting errors related to the special levy funds, they would not have approved an additional special levy. As noted above, the work on the project has been completed and the special levy funds spent. In the circumstances, I find the strata has reasonably explained to the owners its misallocation of $29,000 of the special levy funds, and I find there is nothing to remedy. I dismiss this claim.

Has the strata failed to provide the owners with a full accounting of the special levy expenses as required by a majority resolution passed at the July 2017 SGM? If so, what is an appropriate remedy?

48. At the July 31, 2017 SGM, the owners approved a motion for the strata to provide "a full accounting of the expenses paid" from the special levy. The owner says the strata has failed to do so.

49. The strata says this motion was vague and did not specifically state what was required by a "full accounting." It says its February 2018 and March 2019 letters to the owners fulfilled its obligation. For the following reasons, I agree.

General Accounting Issues

50. The owner took issue with the contents of the February 13, 2018 letter for various reasons. He said the strata incorrectly attributed the costs of the emergency excavation and permits for tree removal to the wrong invoices, omitted the cost of the City of Vancouver's inquiry about tree permits, and omitted various non-emergency expenses in Grantson's May 15, 2017 invoice. I agree with the owner's critiques of the February 13, 2018 letter, but I find the strata corrected these errors and omissions in the revised March 2019 letter.

51. The owner says the March 2019 letter still contains inaccuracies. Essentially, he says the strata took responsibility for discovering and correcting its various accounting errors when in fact it was the owner who notified the strata of the errors. However, for the purposes of providing the owners with an accurate accounting of the special levy funds, I find it is irrelevant who discovered each of the accounting errors. What matters is that the errors were discovered, addressed, and communicated to the owners. I find the March 2019 letter fulfils the strata's obligation in this regard.

52. The owner has numerous concerns with the strata's June 8, 2017 expenditure of $20,691.20 from the CRF to pay part of Grantson's May 15, 2017 invoice. The evidence shows that a council member, M.B., authorized the property manager to

make this payment. The owner says M.B. lost the authority to do so as of the May 29, 2017 AGM. He also says the work included in the May 15, 2017 invoice was not for emergency repairs, and therefore the strata's expenditure from its CRF was in breach of the SPA.

53. The strata says payment from the CRF was allowed by its bylaw 22.34 which is essentially a restatement of section 98 (3) of the SPA.

54. The minutes from the May 29, 2017 AGM show that M.B. was re-elected to council. However, on the evidence before me it does not appear that the rest of council had the opportunity to vote on the June 8, 2017 expenditure, so it does not appear that council properly approved the expenditure. There is also no indication in the evidence that the work included in the May 15, 2017 invoice was for emergency repairs, and therefore I find the expenditure from the CRF was in breach of section 98 (3) of the SPA. While I find the owner's concerns about this expenditure were valid, the money has already been spent, and the work completed. All of this has been communicated to the owners, and as noted above, the owners have since approved 2 additional special levies to complete the work on the project. I find that requiring the strata to provide a more detailed accounting of the special levy funds would do nothing to remedy this error.

Permit Issues

55. The owner also says the strata did not obtain building permits despite paying Grantson consulting fees related to permits. However, I find the fact that the strata may not have obtained the permits does not render the strata's accounting of these expenditures inaccurate. I find there is insufficient evidence about the permits the strata required or eventually obtained to establish that it unnecessarily spent special levy funds on permits or consulting related to permits. I also find the February 2018 and March 2019 letters disclose all expenditures from the special levy funds, including those related to consultation for permits.

Recycling and Bike Building Issues

56. Finally, the owner wants to know how much money the strata spent on a bike shed mentioned in the January 31, 2017 minutes as part of the project update, because he says it was not an approved expenditure from the special levy funds. He also wants more details about the design and planning of the recycling shed, and he says the owners voted not to build this shed at the May 2018 AGM.

57. The strata says it has accounted for all expenditures on the garbage and recycling building and that any reference to a bike shed in the January 31, 2017 minutes was an error. On the balance of the evidence, I agree. In its March 2019 letter to the owners the strata disclosed its expenditures on the garbage and recycling building, which was phase 4 of the project. All of these expenditures were made in 2016 and 2017, before the May 2018 AGM. I find the strata has accounted for expenditures related to phase 4 as required by the July 31, 2017 motion. That motion did not require the strata to provide details of the design and planning of the recycling shed. If the owner wants this information, he is free to request it from the strata in accordance with section 35 of the SPA.

58. I appreciate that the owner has been frustrated over the past several years with the strata's disorganization and accounting errors related to the project. I also appreciate his concern that had he not raised some of the accounting errors with the strata, they might never have been discovered. However, I note that council members are volunteers required only to do their best to serve the strata's best interests, and they may not have any prior accounting or project management experience. I also note that the reason stratas are required to provide minutes and financial statements to the owners is so that the owners may hold the strata accountable for its decisions. The fact that the owner discovered accounting errors and the strata has responded to and rectified those errors means the system is generally working as it is meant to.

59. In summary, I find the strata's February 2018 and March 2019 letters to the owners fulfilled its responsibility to provide them with a full accounting of the special levy funds. I dismiss the applicant's claim.

Is the strata required to conduct a financial and procedural review of the special levy funds and courtyard membrane replacement project?

60. The owner wants the strata to conduct a financial and procedural review of the special levy funds and the courtyard membrane replacement project. He suggests that the strata should call a volunteer owners' committee and call one or more meetings with a mediator. He also wants the tribunal to suggest solutions.

61. The strata says it is not the tribunal's role to make such recommendations, and that it may be outside the tribunal's jurisdiction to do so, as it is akin to asking for a court-appointed administrator. The strata also says, and the evidence shows, that it has approved an independent financial audit of the strata's 2015/2016 financial statements and general accounting policies, funding for which was approved in the 2018/2019 budget. The strata says the audit will cover the special levy funds and the phase 1 expenditures.

62. I find there is no requirement in the SPA or the bylaws for the strata to conduct a financial or procedural review of the special levy funds and the courtyard membrane project. I have already found that the strata has communicated its accounting errors related to the special levy funds to the owners through its February 2018 and March 2019 letters and rectified the accounting errors to the extent it was able to do so. I find the fact that the strata has arranged for an audit of the 2015/2016 financial statements shows that it has taken its accounting errors and the owner's concerns seriously. The results of that audit are not in evidence. In the circumstances I find there would be no benefit in ordering the strata to establish an owners' committee or engage a mediator. As noted above, it is not the tribunal's role to suggest solutions for the parties. For all of these reasons, I dismiss this claim.

Are the minutes from the strata's September 7, 2017 council meeting inaccurate, and if so, what is an appropriate remedy?

63. The owner says the minutes from the September 7, 2017 council meeting (minutes) are inaccurate as they omit his September 1, 2017 letter to council and the property manager's concerns about the special levy funds. He wants the strata to amend the minutes to accurately reflect his queries to council and the property manager.

64. The strata says the minutes are accurate and do not require revisions.

65. The owner submitted one version of the minutes which state that the council received correspondence from an owner concerned about financial discrepancies with the special levy funds. They state that the owner's concerns included a lack of statement of earnings and CRF drawdowns and transfers. They also state that the property manager had done a forensic review and would write a letter to the owner for the council, and possibly legal counsel, to review to determine whether it followed proper protocols. The owner says this paragraph was removed from the revised version of the minutes which was approved at the January 29, 2018 council meeting.

66. The strata submitted a statement from N.L., who was a council member at the time. She said she did not recall discussing the owner's September 1, 2017 letter at the September 7, 2017 meeting. She says that on September 25, 2017 the property manager sent the council members a version of the minutes which did not refer to the owner's letter. She says that to her knowledge, none of the council members commented on the minutes or proposed any revisions. N.L. said that at some point after September 25, 2017, unbeknownst to her, the minutes were edited to include reference to the owner's letter and that edited version of the minutes was distributed to the owners. N.L. said she did not learn the minutes had been edited until November 2017.

67. At the strata's November 9, 2017 council meeting, 3 members resigned, and a new member was appointed. The strata says that after that meeting, the council decided to remove the paragraph referring to the owner's September 1, 2017 letter from the

minutes because to their knowledge it contained incorrect information. At the council's January 29, 2018 meeting it approved the revised version of the September 7, 2017 minutes which did not include the paragraph in question. It is this version of the minutes that the owner says must be amended.

68. In *Kayne v. The Owners, Strata Plan LMS 2374*, 2007 BCSC 1610 (CanLII), the court said minutes of council meetings must record the strata council's decisions, but the details of the discussions leading to those decisions are not required to be included in the minutes. The only direct evidence of what happened at the September 7, 2017 meeting is N.L.'s statement. I find her version of events is reasonable, and I find the balance of the evidence supports her statement and the strata's explanation for revising the minutes. The owner's September 1, 2017 email is in evidence, and it is undisputed that he sent it, however on the evidence before me I find that the council did not discuss this letter at its September 7, 2017 meeting. While I appreciate the owner is frustrated by the breakdown in communication amongst council members at that time, I find it would be inappropriate to revise the minutes to include reference to his letter when I have found that council did not discuss the letter at that meeting. I dismiss this claim.

TRIBUNAL FEES, EXPENSES

69. Under section 49 of the CRTA, 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 not to follow the general rule. Since the owner was unsuccessful, I find he not entitled to reimbursement of his tribunal fees. He did not claim and dispute-related expenses.

DECISION AND ORDERS

70. I dismiss the owner's claims and this dispute.

Sarah Orr, Tribunal Member