Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Affluence Properties Inc. v. The Owners, Strata Plan LMS 2765*, 2020 BCCRT 175

B E T W E E N :

AFFLUENCE PROPERTIES INC.

APPLICANT

A N D :

The Owners, Strata Plan LMS 2765

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Chad McCarthy

INTRODUCTION

1. The applicant company, Affluence Properties Inc. (owner), owns a strata lot in the respondent strata corporation, The Owners, Strata Plan LMS 2765 (strata). The strata is a shopping mall made up of commercial strata lots.

2. The owner has provided accounting services and mailbox rentals in the strata lot for many years. The strata council says the strata bylaws prohibit changing the permitted use of the strata lot to accounting services and an online auto trading business, as requested by the owner. The owner disagrees with the strata council's decision. The owner also disagrees with a later strata council decision, that the bylaws prohibit changing the use of the strata lot to "packaged office." The owner says these decisions were unfair.

3. The owner seeks an order that the strata allow the proposed new uses of the strata lot. The owner also claims compensation for loss of rental income it would have received under the proposed new strata lot uses from June 2019 to November 2019. The strata denies the claims, and says it properly interpreted the bylaws, which prohibit changes resulting in multiple uses of a single strata lot.

4. The owner is represented by one of its directors, and 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 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 in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

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. 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.

9. SPA section 189.1(2) requires an owner to request a strata council hearing before seeking dispute resolution with the tribunal, unless the tribunal directs otherwise. The owner did not explicitly request a hearing following the strata council's decisions that are in dispute.

10. However, I find that email correspondence between the owner, the strata manager, and the strata council was essentially a council hearing in this case. While the *Strata Property Regulation* says that a hearing for the purposes of SPA section 135(1)(e) means an opportunity to be heard in person at a council meeting, this in-person requirement does not apply to hearings under SPA section 189.1(2). The owner requested decisions of the council, was able to argue his position via email, and received written decisions from the council, as required by SPA section 34.1. The owner argued the strata council did not issue one of its written decisions within the 2 weeks required in bylaw 42.1, but I find nothing turns on this except perhaps additional damages for lost rental income, which I address below. Notably, the strata did not argue that a council hearing was not held, or that the owner was prevented from bringing this dispute to the tribunal. I find, in this case, that the SPA council hearing requirement has been satisfied, and I direct that any further requirement for a council hearing does not apply to this dispute.

ISSUES

11. The issues in this dispute are:

    a. Was the strata council's decision not to permit use of the strata lot for accounting services and an online auto trading business inconsistent with the strata bylaws?

    b. Was the strata council's decision not to permit use of the strata lot for a packaged office business inconsistent with the strata bylaws?

    c. Does the strata owe the owner $2,700.00 for loss of rental income from June 2019 to November 2019?

EVIDENCE AND ANALYSIS

12. In a civil claim such as this, the applicant (owner) bears the burden of proving its claim on a balance of probabilities. I have read all the parties' evidence and submissions, but I refer only to the evidence and arguments to the extent necessary to explain my decision.

Was the strata council's decision not to permit use of the strata lot for accounting services and an online auto trading business inconsistent with the strata bylaws?

13. This dispute is about strata bylaws that restrict the use of strata lots in the strata. Bylaw 42.1 says that an owner must apply to, and obtain written approval from, the strata council in order to change the use of the strata lot to one not specifically contemplated by the initial purchase agreement between the developer and the first purchaser of the strata lot. The owner is the first purchaser of the strata lot.

14. Bylaw 44.2(c) prohibits owners from applying for more than one use for a strata lot. The parties often refer to this bylaw as 44.2(a), but the amendment filed with the Land Title Office (LTO) on October 26, 2010 shows that this bylaw is numbered

44.2(c). The strata has not filed a bylaw 44.2(c) numbering amendment with the LTO since then.

15. Although bylaw 44.3 does not apply to the owner's single strata lot, I note that it prohibits mixed usage, which I find means more than one use, of a "unit" consisting of two or more strata lots.

16. In this case, the owner says it did not apply to the strata council for a change in the use of its strata lot, which it says has always been "general office." The owner says its single "general office" use has always included two different businesses, namely accounting services and mailbox rentals. The owner argues that it simply wants to change the mailbox rentals to an online auto trading business, which is still a general office use. The strata says this change is not permitted, as the bylaws do not allow changes resulting in multiple strata lot uses.

17. The term "use" is not defined in the bylaws, or in the *Strata Property Act* (SPA). However, the bylaws do contain examples of different types of use of a strata lot.

18. In bylaw 41.1, "use" refers to specific types of businesses (such as a pet shop, a funeral home and related services, an aquarium, and a massage parlour), the goods sold by a business (such as guns and ammunition, or activity pertaining to marijuana), and specific categories of business (such as a business that produces excessive obnoxious smells or disturbing noises, or an illegal business). Bylaw 5.3 mentions strata lot uses such as financial business, medical or dental clinics, entertainment businesses, full service or take out restaurants, business offices, and educational facilities.

19. Given the wording of the bylaws, I find that they anticipate only a single type of use in each strata lot. This is consistent with bylaws 44.2 and 44.3, which prohibit changes resulting in multiple uses of strata lots, and mixed usage of multi-strata lot units. On the evidence before me, I am satisfied that a "use" of a strata lot in the bylaws refers to a single, specific business in a particular field. I find "use" does not mean a category of business under which many individual businesses may operate.

20. Given this finding, I do not consider multiple "general office" uses to be a single use within the meaning of the bylaws. General office use is a broad categorization and could capture most non-retail types of business operating in a shopping mall. The bylaws do not suggest that a single strata lot may be used for an unlimited number of unrelated general office businesses, and I find that they prohibit changes resulting in multiple uses. I find that accounting services and mailbox rentals are two different uses under the bylaws.

21. If multiple uses are prohibited, how has the owner operated two different businesses from its single strata lot for many years? I find the owner's strata lot was "grandfathered," in that two uses were permitted as part of the original transfer of the strata lot from the developer to the owner. A July 6, 1999 fax from the developer to the strata stated that sales of unoccupied strata lots still in the developer's possession were not governed by the bylaws' change of use guidelines. Therefore, the developer proposed selling the strata lot to the owner for the uses of an accounting office and mailbox services, which it felt were both "general office" uses. The strata manager responded by saying the council did not object to the developer's opinion, and confirming that the strata lot's permitted use was "general office use of accounting services and mail box services."

22. Under bylaw 42.1, written strata council approval is needed to change the strata lot's use to something other than that granted in the original strata lot purchase. Bylaw 45.1 says all previously permitted strata lot uses are forfeited once the owner opens a new, permitted business on the strata lot. As a result, I find the original permitted "use" of the strata lot is for accounting services and mail box services, which are two separate uses. I also find that the owner forfeits this original, multiple use upon opening a new type of business under a new use permitted by council. In other words, while the owner's present use for accounting services and mail box services is allowed, this does not mean it has any right to multiple uses if it attempts to change the strata lot use.

23. Turning to the prohibition on multiple uses, bylaw 44.2(c) says that an owner must not apply for more than one use for a strata lot. The owner sent emails to the strata

manager in May 2019, saying that it would like to discontinue its mailbox business and change it to an online auto trading business, while also continuing to operate the accounting firm. The owner said it considered the new use to fall under "general office use," so it believed there was no mixed-use issue. The owner said it would "like to apply now to the strata council for a change of business (mailbox business only) and the approval of signs." The owner argues it did not apply for a change in use, but I disagree. The owner explicitly applied for a change of business, which I find is the same as a change of use. The owner did this in addition to applying for a change in signage. I find the emails were not solely a notice to the strata under bylaw 7.1(b) that the tenants of the strata lot had changed.

24. In a follow-up email, the strata council also considered the applicant's emails to be an application for a change in use. On July 5, 2019, it denied this application under bylaw 44.2(c), as being a request for more than one use.

25. I find the owner's application for a change of use to accounting services and an online auto trading business is an application for two separate uses. Changing to two separate uses is prohibited by the strata bylaws, even if both businesses fall under a more general category of "general office use". As a result, I find the strata council's decision to not permit these dual uses was consistent with the strata's bylaws and was correct.

26. There is also the question of whether the strata council's decision was significantly unfair to the owner. CRTA section 123(2) gives the tribunal authority to issue orders to remedy significantly unfair decisions or actions or a strata corporation (see *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164 at paragraph 119).

27. The courts and the tribunal have equated "significantly unfair" with oppressive or unfairly prejudicial conduct. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128, the British Columbia Court of Appeal interpreted a significantly unfair action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or is unjust or inequitable.

28. In *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, the British Columbia Court of Appeal considered the language of SPA section 164, which is similar to the language of CRTA section 123(2). The test of significant unfairness in *Dollan* was restated in *Watson* at paragraph 28:

> The test under s. 164 of the Strata Property Act also involves objective assessment. [*Dollan*] requires several questions to be answered in that regard:
>
> 1. What is or was the expectation of the affected owner or tenant?
>
> 2. Was that expectation on the part of the owner or tenant objectively reasonable?
>
> 3. If so, was that expectation violated by an action that was significantly unfair?

29. Applying this test to the current situation, I note that the owner expected to be able to change his strata lot to a new, dual use because it appeared other strata lots were also dual use. The owner listed several different examples of alleged dual use.

30. On the evidence before me, it appears that until the owner applied for changes in use of his strata lot in mid-2019, the strata had not been perfectly diligent in investigating and enforcing its change of use bylaws. Therefore, I find that the owner's expectation, that it would also be allowed a dual use, was objectively reasonable.

31. However, the strata provided evidence showing that around the time of the owner's change of use applications, it changed its former practice and investigated the alleged dual uses of the other strata lots identified by the owner. I address these alleged dual uses and the corresponding investigations in the following paragraphs.

32. The owner says another strata lot had been used for two uses. According to July 2019 emails submitted by the strata, the tenant of that strata lot confirmed that it was no longer operating one of the businesses, and it removed the signs for that defunct business within days.

33. The owner says another strata lot had been subdivided into two separate spaces without strata approval, and two businesses were operating out of it. The strata council investigated. According to September 2019 emails from the strata manager, in 2012 a former owner of that strata lot built a demising wall separating it into two spaces, and the work passed city inspections. There is no evidence that the strata ever approved a subdivision of this strata lot, but the strata manager found the present owner had only ever used the strata lot for a single business. According to the minutes of a November 26, 2019 strata council meeting, the deletion of the second, unapproved space was discussed.

34. The November 26, 2019 minutes also stated that the strata council concluded another strata lot had only been used for a single business at any one time. However, the minutes indicated the strata lot's owner was fined for failing to seek the strata council's approval of a change in use, as required by bylaw 43.1.

35. The owner also argues that a multi-strata lot bank features a package delivery locker. The owner felt this was analogous to the mailbox rentals it provided in addition to its accounting services. The strata council investigated and received emails from the bank stating that the locker was branded with its identification, although photos in evidence reveal delivery company branding was also present. The November 26, 2019 strata council meeting minutes stated that the delivery lockers were discussed, but there is no evidence that the strata council decided they were a mixed usage prohibited under bylaw 44.3. The strata says the lockers are an extension of the bank's business and are not a mixed usage. I find this to be consistent with the strata council's sole discretion to determine what is "mixed usage," under bylaw 44.3

36. The owner also argued that a tenant had used another strata lot for more than one use. According to business licence information provided by the owner, it appears two businesses may have operated out of this strata lot in 2011. However, the owner acknowledges this strata lot now has a new tenant who is operating a single business. The strata says the new business is a single use and is not in breach of

any bylaws. The evidence does not show this new business breached any bylaws regarding changes in use.

37. I find the strata council's enforcement was lax prior to the owner's change of use applications, but the strata increased its change of use enforcement efforts at the time of the applications and afterward. I find the strata applied this increased level of enforcement consistently across the strata lots with alleged dual uses, and applied the same criteria as it did to the owner's proposed uses. As a result, I find the strata council's change of use decision was not significantly unfair, and was consistent with its other change of use enforcement actions against other strata lot owners around the same time and afterward.

38. Having found the strata council's decision not to permit new dual uses of the strata lot was consistent with the strata's bylaws, and was not significantly unfair, I dismiss this claim.

Was the strata council's decision not to permit use of the strata lot for a packaged office business inconsistent with the strata bylaws?

39. A few days after the strata denied the owner's application to change the use of its strata lot to both accounting services and an online auto trading business, the owner applied for a new change of use. This time, the owner sought to operate a "packaged office," which it says is a single use of the strata lot. On July 17, 2019, the strata council denied this application, and says that a packaged office is a term for operating two separate businesses out of the same strata lot.

40. It is not clear to what degree, if any, the owner described the features of the proposed "packaged office" use to the strata council. In its arguments, the owner says that a packaged office provides furnished office space and office facilities to customers. The owner says this could include, for example, a business centre or workplace centre with executive suites and shared office workplaces, meeting facilities and services, word processing, secretarial support, teleconferencing, internet connectivity, and office equipment and supplies.

41. From the owner's descriptions, it is not clear whether the packaged office would accommodate long-term customers who run their businesses primarily from the packaged office, or customers who simply rent a desk on an hourly or daily basis. In my view, long-term customers operating their businesses out of the packaged office could result in the strata lot effectively having more than one business use. Short-term desk or office space rentals would be less likely to result in multiple uses of the strata lot.

42. Further, the owner does not say what it intends to do with the existing accounting firm business that has been operating out of the strata lot for decades. It also did not indicate how it would accommodate the online auto trading business with whom it signed a rental agreement for part of the strata lot. If those two businesses permanently operated out of the proposed packaged office, this would, in effect, be the same two uses that the strata council has already declined to approve.

43. The evidence before me is not sufficient to demonstrate what use or uses would result from the proposed packaged office business, and whether the use or uses would be permitted under the strata's bylaws. Therefore, I find the owner has not met its burden of proving that the strata council's decision not to permit use of the strata lot for a packaged office business was inconsistent with the strata bylaws. Further, I find the strata council's decision was not significantly unfair, because it is not objectively reasonable of the owner to expect approval of a change of use where it has not provided adequate information about the proposed new use.

44. As a result, I dismiss this claim. However, the owner is free to re-apply to the strata council for a change of use of the strata lot, including for a "packaged office" with additional supporting information. If the owner disagrees with a future strata council change of use decision, then following a hearing before the strata council, the owner may again apply to the tribunal for dispute resolution.

Does the strata owe the owner $2,700.00 for loss of rental income from June 2019 to November 2019?

45. Above, I decided the strata council's change of use decisions were consistent with the strata bylaws, and were not significantly unfair. Therefore, I find that the strata is not responsible for any loss of strata lot rental income resulting from those decisions. I dismiss this claim.

TRIBUNAL FEES AND EXPENSES

46. 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 to deviate from the general rule. The owner was unsuccessful, but the strata did not pay tribunal fees or claim dispute-related expenses. Therefore, I make no order for tribunal fees or dispute-related expenses.

47. The strata corporation must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner.

ORDER

48. I dismiss the applicant's claims and this dispute.

Chad McCarthy, Tribunal Member