Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Hedberg v. The Owners, Strata Plan 511*, 2021 BCCRT 340

B E T W E E N :

JOEL HEDBERG

APPLICANT

A N D :

The Owners, Strata Plan 511

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kate Campbell, Vice Chair

INTRODUCTION

1. This dispute is about governance and building maintenance in a strata corporation.

2. The applicant, Joel Hedberg (owner), co-owns a strata lot in the respondent strata corporation, The Owners, Strata Plan 511 (strata). In his dispute application, The owner sets out 4 claims against the strata:

   a. A special levy collected in 2020 was not properly approved, and the voting process was flawed.

      Requested remedies: a declaration that the vote recount at the February 24, 2020 annual general meeting (AGM) was invalid, an order to correct the AGM minutes, and an order requiring a scrutineer for future votes.

   b. On April 6, 2020, the strata posted a notice with information that was contrary to the strata's bylaws.

      Requested remedy: an order to post a corrected notice.

   c. On April 28, 2020, the strata circulated a letter stating that owners experiencing financial hardship could apply for an exemption to the strata's rental restriction bylaw.

      Requested remedy: an order that the strata acknowledge that a hardship exemption is not a reasonable or feasible way to pay for the special levy.

   d. The purpose of the 2020 special levy was to pay for building envelope repairs, including work on the exterior balconies, guardrails, swing doors, sliding glass doors, windows, and exterior stucco. The owner says there is water ingress into the strata building's basement parkade, due to unaddressed problems with the foundation and patios at the front of the building. He says it would create unnecessary work and expense, and is not in the best interests of the owners, to complete the exterior balcony and glass repairs before fixing the foundation and patios. He says this is because the new glass and aluminum balcony enclosures would have to be removed in order to complete the leak repairs and then re-installed.

Requested remedy: an order that the strata acknowledge that the frontside building foundation and patios must be repaired before new glass balcony enclosures are installed.

3. The strata says the owner's claims should be dismissed, for reasons I discuss below.

4. The owner is self-represented in this dispute. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow legal principles. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

6. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconference, 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 CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT 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 CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

9. CRT documents incorrectly show the name of the respondent as The Owners, Strata Plan, VIS 511. Based on section 2 of the SPA, the correct legal name of the strata is The Owners, Strata Plan 511. Given the parties operated on the basis that the correct

name of the strata was used in their documents and submissions, I have exercised my discretion under section 61 to direct the use of the strata's correct legal name in these proceedings. Accordingly, I have amended the strata's name above.

10. In his submissions, the owner asserts that the strata council members acted in conflict of interest. CRTA section 122(1)(a) says the CRT does not have jurisdiction to resolve claims about council members' conflict of interest, and CRTA section 10(1) says the CRT must refuse to resolve a claim over which it does not have jurisdiction. I therefore refuse to resolve this claim.

11. To the extent the owner's submissions contain new claims not included in the Dispute Notice, such as about financial reimbursements paid to council members, or damages for significant unfairness, I refuse to resolve those claims. I find it would be unfair to the strata for me to decide these late-raised claims, which were not clearly set out until the CRT's facilitation stage had ended.

12. Both parties objected to late evidence or submissions provided by the other party. I note that the CRT's mandate includes flexibility. I find there is no prejudice to either party in considering the late evidence and submissions, as the parties had the opportunity to review the material and respond where appropriate to do so. I therefore accept the late evidence and submissions, and have considered it.

ISSUE

13. The issues in this dispute are:

    a. Did the owner fail to request a strata council hearing before filing this CRT dispute, and if so, should his claims be dismissed?

    b. Was the 2020 special levy vote valid, and if not, what remedies are appropriate?

    c. Is the owner entitled to a remedy related to the strata's April 6, 2020 notice?

    d. Is the owner entitled to a remedy related to the strata's April 28, 2020 letter?

e. Must the frontside building foundation and patios be repaired before new glass balcony enclosures are installed?

BACKGROUND FACTS

14. I have read all the evidence and submissions provided but refer only to that which I find relevant to provide context for my decision. As the applicant in this civil dispute, the owner must prove his claims on a balance of probabilities.

15. The strata was created in 1977, under the former *Strata Titles Act.* It continues to exist under the current *Strata Property Act* (SPA). The strata consists of 61 residential strata lots, in a 4-storey building with a common property basement.

16. In May 2015, the strata repealed and replaced many of its previous bylaws and filed consolidated bylaws in the Land Title Office (LTO). I find the bylaws filed in May 2015 are applicable to this dispute. The strata filed 2 subsequent bylaw amendments in the LTO, which I find are not relevant to this dispute.

REASONS AND ANALYSIS

Strata Council Hearing

17. SPA section 189.1(2)(a) says an owner may not file a CRT dispute application unless they have requested a strata council hearing. Section 189.1(2)(b) says the CRT can waive that requirement on request.

18. The strata says the CRT should dismiss this dispute because the owner did not request a hearing before filing his dispute application.

19. CRT records show the dispute application was filed on May 11, 2020. In a May 5, 2020 email to the owner, strata property manager KG wrote that she had received the owner's request for a hearing that day. I therefore find the owner had requested a hearing when he filed this CRT dispute.

20. The strata argues that the owner did not participate reasonably in the hearing, once it occurred. It says he reiterated his allegations and then hung up without permitting any questions. Even if that is true, nothing in the SPA specifies how an owner must participate in a council hearing. The plain wording of SPA section 189.1(2) only requires that an owner or tenant request a hearing. I find that the owner met that requirement.

Was the 2020 special levy vote valid?

21. The parties agree that at the February 24, 2020 AGM, the strata owners voted on a ¾ vote resolution to approve a comprehensive envelope renewal project (CERP), funded through a special levy of $2,780,000.

22. The owner says the voting process used for the resolution was unfair and contrary to the SPA in several ways, including the lack of secret ballot, acceptance of an improper proxy provided by text message, and an improper second vote after the first vote failed to pass.

23. As remedy, the owner requests an order that the vote is invalid, an order that the AGM minutes be corrected, and an order requiring a scrutineer for future votes.

24. The strata says it followed the SPA and bylaws, and that the vote is valid.

25. Declaring the vote or resolution invalid would be a declaratory order the CRT does not have jurisdiction to make: see *Fisher v. The Owners, Strata Plan VR 1420*, 2019 BCCRT 1379. However, under CRTA section 123(1), the CRT does have jurisdiction to order a strata to do or stop doing something, which could include ordering the strata to stop acting on the February 2020 resolution.

26. The SPA does not address secret ballots, except in the SPA's Standard Bylaws. Since the strata has filled different bylaws in the LTO, the Standard Bylaws do not apply. In this case, strata bylaw 29(2) says that unless an eligible voter requests a "precise count", a vote is decided on a show of voting cards. Bylaw 29(3) says that if a precise count is requested, the chair must decide whether it will be by show of voting cards, roll call, secret ballot, or some other method.

27. In this case, the owner says the strata should have held the vote by secret ballot when an owner requested it, as it would then have an accurate written record of the votes. However, I find bylaw 29(3) permitted the meeting chair to decide to hold the vote by voting cards, so I find the vote is not invalid on this basis.

28. The parties agree that the strata accepted 1 vote sent in by text message after the AGM has started. The strata says this vote was legal, and should be counted.

29. SPA section 56 permits that eligible voters may vote at general meetings by proxy. A proxy is a person appointed to stand in the place of a person otherwise able to vote at strata general meetings. SPA section 56 says a person who is entitled to vote may do so by proxy. Section 56(2)(a) says a document appointing a proxy must be in writing, and must be signed by the person appointing the proxy.

30. Since there is no evidence before me that the text message was signed, I find it was not a valid proxy under SPA section 56(2)(a). In making this finding, I am guided by the binding reasoning of the BC Supreme Court (BCSC) in *Macdonald v. The Owners, EPS 522*, 2019 BCSC 876. In paragraph 102 of *Macdonald,* the BCSC held that a proxy signed using a script-type font, rather than handwriting or digitally, was not a properly signed proxy for the purpose of SPA section 56(2).

31. The strata suggests the text voter participated in the AGM by electronic means, as permitted by bylaw 29(6). However, bylaw 29(6) requires that the method of attending a general meeting by electronic means must permit all persons in the meeting to communicate with each other during the meeting. I find the evidence does not support the conclusion that all persons at the AGM could communicate with the text voter during the meeting. Therefore, I find the text voter did not attend the AGM.

32. Related to that, the strata admits the text vote was received after the AGM had started, when the first vote on the special levy resolution was being counted. Bylaw 29(1) requires that voting cards be issued to eligible voters. There is no evidence suggesting that a voting card was issued in relation to the text voter. Bylaw 30(1) sets out a mandatory order of business for general meetings, and says the strata must first certify proxies and issues voting cards, then determine if there is quorum, and

then go through various other agenda items before voting on new business, such as resolutions. This means a strata cannot permit anyone without a voting card to vote.

33. For these reasons, I find the text vote was not valid, and should not have been counted.

34. The strata says even without the text vote, on the second count it received the necessary ¾ majority to approve the special levy resolution. Specifically, the strata says it held a first vote on the resolution, and "the result of the vote was 1 percent short of passing and there was a missing vote". The strata says some participants felt the first vote count was unreliable, due to the large number of people in the room and the fact that some owners lowered their hands after voting while others left them up.

35. The strata says it "re-counted" the votes. I find this was a second vote, as the strata submits that at least one voter who abstained from the first vote then cast a vote during the second vote. Also, the witness statements in evidence confirm that at least some time passed and discussion occurred between the 2 votes.

36. In *The Owners, Strata Plan NW 971 v. Daniels*, 2010 BCCA 584, the BC Court of Appeal (BCCA) considered the validity of a special levy resolution. In that case, the resolution failed to pass on the first vote, and the meeting chair permitted a motion to reconsider the unsuccessful vote. The resolution then passed after a second round of voting. The BCCA found that this was accepted under the SPA.

37. Similarly, in *Loveys v. The Owners, Strata Plan NW204*, 2008 BCSC 1924, the BCSC also considered a resolution approving a special levy, which failed to pass on first vote. After a recess, the owners voted again on the same resolution, which then passed. The court found the second vote was valid, and said in paragraph 38 that it is not necessary to give separate notice when the resolution is brought forward for reconsideration at the same properly convened meeting.

38. Based on these court decisions, which are binding on me, I find the second vote was permissible. I also find the results of the voting, excluding the invalid text vote, are that the special levy resolution was approved by the necessary ¾ vote.

39. Evidence about the second vote count was provided by both the strata, and by JH, who is the owner's wife and former strata council secretary. Both accounts confirm that there were 58 votes, plus the text vote, which as explained above I find was invalid and should not have been counted.

40. The evidence shows that with the text vote subtracted, the outcome of the second vote on the special levy resolution was 43 votes in favour, 14 opposed, and 1 abstention.

41. SPA section 1(1) says that "3/4 vote" means a vote in favour of a resolution by at least 3/4 of the votes cast by eligible voters who are present in person or by proxy at the time the vote is taken and who have not abstained from voting (my emphasis added). That means the abstention in this case is subtracted from the total, so there were 57 eligible votes. Of those 57 votes, 43 were in favour of the resolution, which equals 75.4%. Thus, I find the special levy resolution received the necessary ¾ vote in support, and passed.

42. To be clear, the fact that SPA section 1(1) requires abstentions to be subtracted from the total number of voters means the ¾ vote passed. If the abstention had been counted, for a total of 58 votes, the resolution would not have received ¾ of votes in support. But that calculation is contrary to SPA section 1(1), so it is incorrect.

43. For these reasons, I find the February 2020 special resolution levy was approved by the strata ownership. I dismiss the owner's claim for a declaratory order and amended AGM minutes.

44. I also dismiss the owner's claim for an order that the strata must use a scrutineer for future votes. The above discussion about the impermissible text vote shows there were some problems with how the strata managed the voting at the February 2020 AGM. However, I find there is nothing in the SPA or bylaws that requires the strata to use a scrutineer.

April 6, 2020 Notice

45. On April 6, 2020, the strata posted a notice in various common property areas in the strata, including the elevator, on stairwell doors, and next to the mailboxes. The notice was signed by the property manager, and said someone had distributed a note to owners indicating that they should submit their request for a special general meeting (SGM) to the property manager. The notice further stated (emphasis in original):

> Holding a Special General Meeting (SGM) would conflict with the government's recommendation to limit meeting size and maintain physical distancing, and therefore calling an SGM is **NOT** an option.
>
> Please note that sending an email to [property management firm] will **NOT be considered appropriate correspondence for calling a Special General Meeting.**

46. The owner says this notice contains false information, and the strata should be ordered to post a corrected version.

47. I agree that the notice does contain a misstatement, as the strata's bylaws permitted it to hold an SGM by electronic means. The notice appears to be attempt to dissuade owners not to request an SGM, which is contrary to the entitlement to request such a meeting set out in SPA section 43. However, I find the owner's claim about the notice is moot.

48. In *Binnersley v. BCSPCA*, 2016 BCCA 259. In *Binnersley*, the BCCA restated the principles of mootness as outlined by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R 342, as follows:

> ... if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot...

49. At paragraph 23 of *Binnersley*, again citing *Borowski*, the court found that determining mootness involves a 2-step analysis. First, whether the live issue has disappeared and any issues are theoretical or academic. Second, if there is no live issue, should the court or tribunal exercise its discretion to hear the case anyway.

50. Following *Binnersley* and *Borowski,* which are binding precedents, I find that any inaccuracies in the April 6, 2020 notice are moot. The notice was posted in the very early days of the COVID-19 pandemic, when strata corporations, businesses, and private citizens were struggling with how to conduct their affairs in a manner consistent with physical distancing. In response to this, by mid-April 2020, the government had issued Ministerial Order M114, under the *Emergency Program Act*, which provided specific permission and guidance about electronic meetings and voting methods for strata corporations. Other legislation came into force later which also addressed COVID-related challenges in holding strata meetings.

51. In *Borowski,* the court said it may be appropriate decide moot issues if the decision will have some practical effect on the rights of the parties. I find that is not the case here. The new notice sought by the owner would have no practical effect, as the work on the CERP has already commenced, and there is currently legislation in force governing how meetings may be held during the pandemic.

52. I find these facts support the conclusion that the owner's claim about the April 6, 2020 notice is moot. Even if I found it were not moot, I find that posting a new notice at this time would not be an effective remedy, as explained above. I therefore dismiss this claim.

April 28, 2020 Letter

53. On April 28, 2020, the strata sent a letter to owners, signed by the property manager. The letter discussed alleged "misinformation" circulating in the strata about the special levy resolution and related matters. Among other things, the letter discussed other strata corporations that were undergoing major repairs, despite the ongoing pandemic. The letter said the council had heard of few layoffs among owners in the strata. It concluded by stating that if an owner was experiencing financial difficulties

and wished to apply to temporarily rent out their strata lot under a hardship exemption from the strata's rental restriction bylaw, certain listed documents would be required to confirm eligibility.

54. The owner objects to this information about the hardship exemption. He says it would have been nearly impossible to rent out a strata lot at that time during the pandemic, and that a temporary hardship exemption was not a reasonable or feasible financial solution to paying the large special levy.

55. I dismiss this claim for 2 reasons. First, the strata's information about requesting a hardship exemption to permit a strata lot rental is accurate. Requesting a hardship exemption is an option that is always available under SPA section 144. The owner believes the strata should not have suggested it in connection to the special levy, but there is no legal reason why the strata should not have raised it.

56. Second, I find I do not have the authority to grant the requested remedy. The owner seeks an order that the strata acknowledge that a hardship exemption is not a reasonable or feasible financial solution to the special levy. I cannot order a party to change its opinion, particularly about something it was entitled to suggest. Under SPA section 144, a hardship exemption to a rental bylaw is available at the discretion of the strata council, and is largely dependent on the circumstances of the individual application.

57. I therefore dismiss the owner's claim about the April 28, 2020 letter.

Must the frontside building foundation and patios be repaired before new glass balcony enclosures are installed?

58. The owner requests an order that the strata acknowledge that the patios and foundation on the entire front of the strata building needs to be repaired before installing any glass balcony enclosures as part of the CERP, due to logistical and cost considerations. Specifically, he says the strata should prioritize these repairs over other work, and that it would be overly expensive and inefficient to remove and reinstall the new glass balcony enclosures later as part of the foundation and patio work.

59. Documents in evidence confirm there are some problems with the patios and foundation at the front of the strata building, resulting in leaks into the parkade, and moisture and mould problems in at least 1 strata lot on the ground floor.

60. However, I find the strata's engineering firm, Method, specifically considered how to deal with these problems in a report dated June 15, 2020. Method had previously created the scope of work and other documents related to the CERP.

61. Method's June 15, 2020 report said the primary problem was a lack of waterproofing beneath the patios. Method's report said that leakage into the parkade had continued for many years, and was a nuisance, but with the exception of some areas that had been addressed, the areas of leakage were relatively minor and there was no evidence of damage to the concrete podium slab.

62. Method said that to install a waterproof membrane, it would be necessary to remove the frontside patios, but since there was no evidence of water damage to the podium and no reports of active leakage into any of the 6 frontside ground floor suites, the strata had time to plan for podium membrane renewal on the east elevation.

> Method's June 15, 2020 report said the membrane installation could cost between $350,000 and $450,000, which was too much to be covered by the February 2020 special levy. Method said the membrane replacement could be delayed for up to 5 years, should the strata need to take time to plan and raise funds. Method said it was possible to do this work separately from the CERP, cost savings from combining the 2 projects would be "negligible", and that removing and reinstalling the glass balcony enclosures would cost between $5,000 to $10,000.

63. As it was written by a professional engineer, I accept Method's June 15, 2020 report as expert evidence under CRT Rule 8.3. I place significant weight on it, as I find there is no contrary expert opinion before me. I note that the owner has not provided evidence establishing that he is an expert in construction or building technology. Essentially, the owner suggests the mould and moisture problems in the strata are

more significant than described in Method's June 15, 2020 report. However, as noted, there is no expert opinion before me confirming that fact.

64. A strata corporation is not held to a standard of perfection in its maintenance and repair obligations. The strata has a duty to make only those repairs that are reasonable in the circumstances: *Wright v. The Owners, Strata Plan #205, 1996 CanLII 2460* (S.C.), affirmed (1998), 43 B.C.L.R. (3d) 1, 1998 CanLII 5823 (C.A.). When deciding whether and how to repair common property, the strata has discretion to approve "good, better or best" solutions to any given problem. The court (or tribunal) will not interfere with a strata's decision to choose a "good," less expensive, and less permanent solution, although "better" and "best" solutions may have been available: *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784 at paragraphs 28 and 29.

65. In the circumstances, and based on Method's June 15, 2020 report, I find it was reasonable for the strata to defer the membrane replacement work, and proceed with the CERP. I dismiss the owner's claim.

CRT FEES AND EXPENSES

66. Under CRTA section 49 and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule.

67. The strata is the successful party. It paid no CRT fees and claims no dispute-related expenses. I therefore do not award them to any party.

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

ORDER

69. I dismiss the owner's claims, and this dispute.

Kate Campbell, Vice Chair