Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Sarophim v. The Owners, Strata Plan EPS4597*, 2021 BCCRT 1091

B E T W E E N :

SAMIR SAROPHIM and BRONWYN NELSON

APPLICANTS

A N D :

The Owners, Strata Plan EPS4597 and KRISTIAN AUSTAD

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Kristin Gardner

INTRODUCTION

1. The applicants, Samir Sarophim and Bronwyn Nelson, own a strata lot (SL21) in the respondent strata corporation, The Owners, Strata Plan EPS4597 (strata). The other respondent, Kristian Austad, co-owns strata lot 22 (SL22). SL21 and SL22 are 3-level townhouses and together they form a duplex building. Mr. Austad is also the strata council president.

2. This dispute is mainly about a common property (CP) fence that is behind SL21 and SL22. A portion of the fence is angled because it was built around a tree. However, the tree died and was removed, so the applicants say the fence should be straightened. The applicants allege that the strata made several errors surrounding its decision not to approve straightening the fence, including putting the request to a vote at the strata's August 17, 2020 annual general meeting (AGM).

3. The applicants seek the following orders:

    a. The strata approve straightening the angled portion of the fence.

    b. The strata's 2020 AGM be declared unlawful because it did not comply with the *Strata Property Act* (SPA) or *Ministerial Order 114* (M114), and that all resolutions (including one about straightening the fence), approvals, and the strata council members elected be declared null and void.

    c. The strata be prevented from relying on a legal opinion in making a decision about straightening the fence, because the applicants say the opinion was based on incomplete information.

    d. The strata produce documentation of any discussions about leaving the fence angled.

4. The applicants also say the strata improperly approved alterations to CP without the required ¾ vote approval. They seek orders that Mr. Austad must not place a shed where it will obstruct the applicants' view and that the owners of SL20 relocate trees placed on the east side of the yard around SL20.

5. The strata denies that the alterations the owners of SL20 and SL22 made were significant changes, so it says no votes were required. The strata also says it properly put the applicants' request to straighten the fence to a vote, but the resolution failed to get the required ¾ approval. The strata says there was nothing wrong with the legal advice it received and it has provided the applicants with all requested documents about the fence.

6. The respondents do not specifically deny that the 2020 AGM failed to comply with the SPA or M114, but they say the applicants did not object to the AGM's format at the time, and they only raise the issue now because the fence vote did not go their way. The strata also says the applicants' requested order will serve no useful purpose because most of the other items voted on will be re-addressed at the 2021 AGM.

7. The applicants and Mr. Austad are each self-represented. The strata is represented by a strata council member

JURISDICTION AND PROCEDURE

8. 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). CRTA section 2 says the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

9. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice and fairness.

10. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

11. Under CRTA section 123, 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.

12. I note that the applicants claim the strata failed to follow the SPA requirements for document production because it took 5 months for the strata to provide a copy of the legal opinion it obtained about the fence. The applicants request an order that the strata council follow the SPA when responding to information requests. As outlined in prior CRT decisions, a strata corporation is always required to follow the SPA. Ordering the strata to do what it is already legally obligated to do would serve no practical purpose, and it is likely unenforceable. So, I decline to make that order.

13. I also note that the applicants added Mr. Austad as a respondent during the facilitation phase of this dispute. However, I find the applicants have not made any specific claims against Mr. Austad or sought any orders against him. I find all the applicants' claims are against the strata. Therefore, I dismiss the applicants' claims as against Mr. Austad.

ISSUES

14. The remaining issues in this dispute are:

a. Whether straightening the fence is a significant change under SPA section 71 that requires a ¾ vote.

b. Whether the strata treated the applicants in a significantly unfair manner by failing to approve the fence straightening without a ¾ vote.

c. Whether the strata acted contrary to the SPA or its bylaws in approving alterations to CP behind SL20 and SL22.

d. Whether the strata's 2020 AGM process contravened the SPA or M114 and, if so, what is the appropriate remedy.

e. Whether the strata improperly relied on a legal opinion about straightening the fence.

f. Whether the strata failed to produce requested documents as required under section 36 of the SPA.

BACKGROUND

15. I have read all the submissions and evidence provided but refer only to what I find is necessary to provide context for my decision. In a civil proceeding such as this one, the applicants must prove their claims on a balance of probabilities.

16. The strata plan filed in the Land Title Office (LTO) shows that the strata was created in 2018 under the *Strata Property Act* (SPA). It is comprised of 22 townhouse-style strata lots in 4 buildings. SL21 and SL22 are the only 2 strata lots in Building 2. There is a common property (CP) yard area behind Building 2, and beyond the yard area is a golf course, which is not part of the strata.

17. The strata's bylaws are the Standard Bylaws set out as an appendix in the SPA, subject to an Owner Developers' Notice of Different Bylaws filed in the LTO on September 28, 2018. Among the modifications to the Standard Bylaws, the notice added bylaw 6(3) about landscaping.

18. I find the bylaws relevant to this dispute include:

    a. 3(1)(c) An owner must not use a strata lot, the CP or common assets in a way that unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot.

    b. 6(1) An owner must obtain the written approval of the strata corporation before making an alteration to CP or common assets.

    c. 6(3) An owner will not add to, prune, or make any alterations to the landscaping in the CP planting areas identified as such on the strata plans.

The fence

19. The strata's owner developer, ZD, placed fences behind each strata lot to create enclosed yard areas. It is undisputed that the fences and yard areas are CP. Section 66 of the SPA says CP is owned by all the strata lots owners as tenants in common, in a share proportionate to each owner's unit entitlement. For clarity, the yard areas

have not been designated as limited common property (LCP), which is common property designated for the exclusive use of the owners of one or more strata lots.

20. It is also undisputed that a portion of the fence separating the yards behind SL21 and SL22 is not straight. It proceeds directly north, straight out from the building, but approximately 12.5 feet from the back of the yard, the fence is angled about 45 degrees toward the west. It is undisputed that it was angled to go around a large tree.

21. Mr. Austad purchased SL22 from ZD in June 2019, and he took possession in late September 2019. He says the tree behind SL22 was dead by the time he moved in. The strata council approved the dead tree's removal in November 2019 and the tree was removed in December 2019.

22. The applicants purchased SL21 from ZD in November 2019 and took possession in January 2020. The evidence suggests that SL21 was the final strata lot sold in the complex. The applicants say ZD told them that the dead tree behind Building 2 was going to be removed, after which ZD intended to straighten the fence behind SL21 and SL22. This is supported by several emails between the applicants and ZD from January to March 2020. The emails also show that ZD planned to have a worker straighten the fence in mid-March, but the applicants say due to the COVID-19 pandemic, that work was cancelled.

23. The evidence shows that Mr. Sarophim emailed all strata council members, including Mr. Austad, on March 28, 2020 confirming that the fence between SL21 and SL22 needed to be "re-aligned" as ZD had promised them, since the dead tree had been removed. There is no evidence before me that anyone on the strata council responded to Mr. Sarophim's email.

24. On April 11, 2020, Mr. Austad submitted a proposal to the strata council for changes to the CP yard area behind SL22. The proposed changes included planting hedges along the existing angled fence line, among other changes discussed further below. The April 17, 2020 strata council meeting minutes show that 3 council members discussed Mr. Austad's proposal in his absence and largely approved the proposed changes.

25. The evidence shows that ZD again arranged to straighten the angled fence on about May 14, 2020. However, in a May 13, 2020 email to the strata's property manager, ZD noted that Mr. Austad had already planted hedges along the existing fence line, so the fence could not be moved. ZD left the matter to the property manager to determine how to proceed.

26. The applicants attended a June 5, 2020 hearing with the strata council to discuss the fence. The strata council sent the applicants a June 11, 2020 letter that stated it agreed the fence should be straightened to conform with all other fences in the strata but removing the angle from the existing fence would be unfair to Mr. Austad because it would reduce the size of the yard behind SL22.

27. The strata council ultimately decided that straightening the existing fence was a significant change that required a ¾ vote at an AGM. At the strata's 2020 AGM in August, the strata put forward Resolution "D" to straighten the fence, but the resolution did not achieve the required ¾ vote approval.

EVIDENCE AND ANALYSIS

Is straightening the fence a significant change?

28. Section 71 of the SPA says 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 ¾ vote at an annual or special general meeting, or there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage. The British Columbia Supreme Court (BCSC) has held that changes to CP made by individual owners may trigger section 71 of the SPA (see *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333).

29. The applicants argue that straightening the angled portion of the fence behind their strata lot is not a change at all, but a correction that ZD always intended to make if the tree died. The applicants say that the strata should have approved their request to straighten the fence, and it did not require a ¾ vote.

30. In contrast, the strata says ZD's authority to make changes to the landscaping or CP ended once a strata council was established. It is undisputed that a strata council was elected at a May 2019 AGM. The strata says the council had the exclusive authority to determine whether to approve CP changes, including whether the proposed change was "significant" under SPA section 71.

31. Under SPA section 5(1), an owner developer exercises the powers and duties of a council until a council is elected at the first AGM. I find that once the strata council was elected, ZD no longer had the power to make decisions that were within a strata council's authority under the SPA, including whether to approve CP alterations.

32. While the evidence shows ZD intended to straighten the fence before the applicants moved into SL21, I find moving the fence is a CP alteration that requires the strata's written approval under bylaw 6(1).

33. So, the question is whether straightening the fence is a significant change, that requires a ¾ vote under SPA section 71. As noted, the strata says that it is.

34. The SPA does not define "significant change". The BCSC in *Foley* set out the criteria for determining what is a significant change, summarized as follows:

    a. Is the change visible to other residents or the general public?

    b. Does the change affect the use, enjoyment, or an existing benefit of a unit, or a number of units?

    c. Is there a direct interference or disruption from the changed use?

    d. Does the change impact the marketability or value of the unit?

    e. How many units are in the strata and what is the strata's general use?

    f. How has the strata governed itself in the past and what it has allowed?

35. Contrary to the strata's submissions, I find the angled fence is essentially only visible to the occupants of SL21 and SL22, and it does not visually impact other owners or the general public.

36. The strata submits that moving the fence is a significant change partly because it would affect SL22's existing benefit of a certain sized yard and it would disrupt the layout and use of the yard SL22 uses. However, as noted, the yards behind each strata lot are not designated as LCP for the exclusive use of each respective strata lot. So, I find Mr. Austad does not have any more "right" to the use or enjoyment of the CP yard space previously occupied by the tree, than any other owner in the strata in proportion to their respective unit entitlement.

37. It is undisputed that the fence was only placed at an angle because the large tree was located at the back of the yard behind SL21 and SL22. Had the tree not been there, I find the fence would have been straight, like every other fence in the strata complex. Essentially, the tree initially acted as a natural fence for that portion of the yards behind SL21 and SL22.

38. The strata also submits that moving the fence would require permanent removal of a tree. However, I find the evidence does not support that position. While a new tree was planted in place of the removed tree, I find the photographs in evidence show the tree would not likely interfere with the fence if it was straightened. Further, I find that moving the fence will only interfere with the current landscaping in the enclosed yard behind SL22 because Mr. Austad changed the landscaping along the existing fence line, even though he was aware the applicants wanted to move the fence. More about Mr. Austad's landscaping below.

39. The only evidence before me about the fence's impact on marketability comes from the applicants' realtor, MC, who stated the angled fence could impact the resale value of SL21 in a negative way because it "looks out of place" and does not conform with the other fences. I find this statement is insufficient to conclude that straightening the fence would impact the marketability or value of either SL21 or SL22.

40. The applicants argue that the strata set a precedent by approving other changes to CP without requiring an owners' vote. The evidence before me shows that the strata has consistently approved requests to alter the landscaping in the CP yards behind strata lots without requiring a ¾ vote. While there is no evidence before me that the

strata previously considered or approved a similar alteration that involved moving a fence line, I agree with the applicants that the strata has generally approved requests to alter CP yards without requiring a ¾ vote.

41. On balance, I find that moving the fence to where the tree had previously acted as a natural barrier is not a significant change to CP. This means that SPA section 71 does not apply, and I find the applicants' request to straighten the fence did not require a ¾ vote.

Has the strata treated the applicants in a significantly unfair manner?

42. While not specifically argued in these terms, I find the applicants' position is that the strata treated them significantly unfairly by declining to approve the fence straightening, and by classifying their request to straighten the fence as a significant change, which required a ¾ vote approval of the owners.

43. Section 123(2) of the CRTA gives the CRT the power to make an order directed at the strata, if the order is necessary to prevent or remedy a significantly unfair action, decision, or exercise of voting rights.

44. Significantly unfair conduct must be more than mere prejudice or trifling unfairness (see *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44). Significantly unfair means conduct that is oppressive or unfairly prejudicial. "Oppressive" is conduct that is burdensome, harsh, wrongful, lacking fair dealing or done in bad faith, while "prejudicial" means conduct that is unjust and unequitable (see *Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578, affirmed in 2003 BCCA 126).

45. The courts and the CRT have consistently applied the following test from *Dollan* in considering claims of significant unfairness:

    a. What was the applicants' expectation?

    b. Was the expectation objectively reasonable?

    c. Did the strata violate that expectation with a significantly unfair action or decision?

46. In *King Day Holdings Ltd. v. The Owners, Strat Plan LMS3851*, 2020 BCCA 342, the BC Court of Appeal confirmed that an owner's reasonable expectations continue to be relevant to determining whether the strata's actions were significantly unfair.

47. The applicants say they expected the strata to approve their request to straighten the angled fence without a vote because ZD told them the fence would be straightened and it was always ZD's intention to straighten the fence once the dead tree was removed. They say Mr. Austad and the strata council were aware of this intention. The applicants also say that every other fence on the strata's property is straight, and the angled fence should be straightened to conform with the rest of the strata.

48. While I agree with the strata that ZD did not have the authority to promise the applicants it would straighten the fence, I find the applicants reasonably expected the strata would approve the fence straightening so it would look consistent with every other fence in the strata.

49. I also find the evidence shows the applicants advised the strata and Mr. Austad about their discussions with ZD to straighten the fence by March 28, 2020. There is no evidence before me that the strata or Mr. Austad indicated they opposed straightening the fence at that time. It was only after ZD confirmed that Mr. Austad's new landscaping interfered with its ability to straighten the fence that the strata indicated there was any issue with the plan. However, Mr. Austad submitted his proposed landscaping changes and the strata approved them *after* the applicants advised them of ZD's intention to straighten the fence.

50. Section 3 of the SPA says the strata is responsible for managing and maintaining CP for the benefit of all owners. While the strata says it was concerned that approving the applicants' request to straighten the fence would be unfair to the owners of SL22, as noted, SL22 has no more claim to the CP yard area than any other owner. I find whether the yard area behind SL22 was reduced by straightening the fence, or whether it would interfere with Mr. Austad's landscaping changes, were not relevant considerations for the strata in determining whether to approve straightening the fence or whether it constituted a significant change requiring a ¾ vote.

51. Under the circumstances, I find the strata's decisions to approve Mr. Austad's landscaping alterations when it was aware the applicants expected the fence to be straightened, and then requiring the applicants' fence request to be put to a ¾ vote, violated the applicants' objectively reasonable expectation that the fence would be straightened. I find the strata's decisions were significantly unfair to the applicants.

52. I find the appropriate remedy is to order the strata to approve the applicants' request to straighten the fence.

Did the strata approve CP alterations in breach of the SPA or bylaws?

53. The applicants also claim the strata improperly approved owners' requests to plant cedar trees, relocate trees, and install storage sheds on CP without classifying them as significant changes or requiring a ¾ vote at a general meeting. The applicants say that some of these changes occurred on CP around strata lots 6 and 14, but they only request remedies for alterations to the CP around strata lot 20 (SL20) and SL22. Further, I find I have insufficient evidence before me about the alleged changes around strata lots 6 and 14 to conclude whether they are significant changes, so I decline to make any specific findings about those alleged changes.

54. I turn then to the alleged alterations to CP trees around SL20. The evidence shows that the strata approved the relocation of several maple and dogwood trees along the strata's west and north property lines, within the enclosed CP yard area used by SL20. The strata plan shows SL20 is in Building 4, which is west of Building 2, with a CP greenspace between the enclosed yards used by SL21 and SL20. The applicants argue that the relocated trees impede their view of the golf course, which impacts the use and enjoyment of their strata lot.

55. It is undisputed that the strata's property had drainage issues, which impacted the viability of many trees and shrubs. The strata says relocating the trees was immediately necessary or they would have died. It also says the trees were moved to a location nearby to their original location, and it disputes that the trees' relocation materially obstructs the applicants' view.

56. I find from the photographs in evidence that while the relocated trees are visible from the applicants' strata lot, it is not clear that their new position obstructs the applicants' view of the golf course any more than they did in their original position. I find the applicants' view of the golf course is primarily obstructed by trees located on the golf course's property, not the strata's CP. Further, I am not satisfied that the relocated trees will significantly impact the applicants' use and enjoyment of their strata lot.

57. I also find the relocated trees are not highly visible to other strata lots or the general public, nor will they likely impact the use or enjoyment of any other units, as they are not large or mature trees. Further, I find the relocated trees are similar to several other trees already planted in that area. On balance, I find the trees' relocation does not constitute a significant change to the appearance of CP that required a ¾ vote at a general meeting under section 71 of the SPA. I find the owners of SL20 received the strata's written permission to relocate the trees, as required by bylaw 6(1). So, I dismiss the applicants' claims related to the relocated trees near SL20.

58. It is undisputed that the strata also approved the installation of a shed in the enclosed yard used by SL20. However, there are no photographs of the shed or its location in evidence, and the applicants have not requested any remedies specifically relating to SL20's shed. So, I decline to make any orders about it.

59. I turn then to Mr. Austad's alterations to the yard behind SL22. As noted, the strata approved Mr. Austad's proposed changes in April 2020, other than installing a hot tub. The approved changes included planting cedar hedges along the east and west fence lines (including the angled fence), replacing sod with artificial turf, installing pavers and a raised herb garden, replacing the tree that had been removed, and installing a storage shed at the back of the yard area next to the replaced tree. Mr. Austad has completed all the approved changes, except the shed installation.

60. While the applicants' submissions suggest that all of Mr. Austad's alterations constitute significant changes to CP that should have been approved by a ¾ vote, they only seek a remedy about the where the storage shed is placed. Because the strata restricted its submissions to whether the shed constitutes a significant change,

I will not address Mr. Austad's other approved changes to CP and will restrict my analysis to the shed.

61. It is undisputed that Mr. Austad proposed placing a shed at the back of the enclosed yard behind SL22, adjacent to where the dead tree was removed. I find from the drawings Mr. Austad submitted to the strata council, the shed would encroach on the area created by the angled portion of the fence. In other words, if the fence was straightened, the shed would be in the way of the fence.

62. The applicants argue that storage sheds generally change the look of the strata property in a negative way, and they are unnecessary because each strata lot has an attached garage that can be used for storage. Further, the applicants say the planned location of Mr. Austad's shed would impede their view of the golf course and would negatively affect the use and enjoyment of their strata lot.

63. The strata argues that the shed Mr. Austad planned to install is a free-standing and collapsible structure, so it does not constitute an "alteration" of CP that requires the strata's approval and, therefore, SPA section 71 does not apply. I disagree. I find that determining whether a proposed change constitutes an "alteration" for the purpose of bylaw 6(1) requires a different analysis than determining whether it is a "significant change" to CP for the purpose of SPA section 71. I find the test from *Foley* set out above applies here to determine whether the shed constitutes a significant change requiring a ¾ vote approval.

64. The strata does not dispute that the proposed placement of the shed at the back of the enclosed yard would be visible to the applicants and I infer the strata accepts the shed could negatively impact the applicants' use and enjoyment of their strata lot. As such, the strata submits it would consider requiring Mr. Austad to place the shed adjacent to the building, which would be less visible to the applicants.

65. The applicants rely on *Berezan v. The Owners, Strata Plan NW 9*, 2019 BCCRT 438, in which a tribunal member found a shed built on CP constituted a significant change under SPA section 71. I find there are some differences in *Berezan* from the circumstances here. For instance, the strata in *Berezan* had a bylaw that prohibited

using CP for personal storage, which is not the case here. Further, there were no other sheds on CP in *Berezan*, whereas here, the undisputed evidence is that at least one other strata lot has a shed in an enclosed CP yard area.

66. However, the tribunal member in *Berezen* found that an important factor in determining whether the shed was a significant change, was that the owner had essentially converted a portion of CP to his own private use. This reasoning was also applied in *Foley* to determine that a deck extension onto CP was a significant change.

67. I acknowledge that the enclosed CP yard areas behind each strata lot are already essentially privately used. However, again, they are not designated as LCP on the strata plan. This means that despite the fence enclosures, all owners are entitled to the benefit of using and enjoying all the CP yard areas, and owners cannot convert even a portion of them to their own exclusive use without the appropriate approval.

68. I find that placing a shed in the CP yard area behind SL22 is a significant change because it converts part of the CP yard area into LCP, for Mr. Austad's exclusive use. In order to have the shed designated as LCP, it must be passed in a resolution by a ¾ vote at an AGM or SGM, in accordance with section 74 of the SPA. SPA section 74(2) requires that the resolution be filed in the LTO with a sketch plan that satisfies the registrar, defines the areas of LCP, and specifies each strata lot whose owners have exclusive use of the LCP.

69. Therefore, I order the strata to put Mr. Austad's request for a shed in a resolution for a ¾ vote at a general meeting. For clarity, the resolution must state it is about designating LCP for SL22's exclusive use and include the sketch plan to be filed at the LTO, according to SPA section 74. I also note that the shed's location will have to be considered in light of my order that the strata must approve straightening the fence.

Did the strata's 2020 AGM contravene the SPA or M114?

70. Section 54 of the SPA sets out a person's right to vote at an AGM or special general meeting (SGM). Generally, all owners, and in some cases tenants and other, can vote. Eligible voters may vote in person, or by proxy.

71. Bylaw 17(1) says the strata council may choose to hold council meetings electronically, so long as all participants can communicate with each other.

72. Further, on April 15, 2020, the government issued M114 under the *Emergency Program Act*, in response to the COVID-19 pandemic. Section 2(2) of M114 says a strata may hold a strata meeting by telephone, or by any other electronic method, "if the method permits all persons participating in the meeting to communicate with each other during the meeting". M114 became a provision of the *COVID-19 Related Measures Act* (CRMA) on CRMA's enactment on July 8, 2020. Under section 3(5)(a) and Schedule 1 of the CRMA, the electronic attendance at strata property meetings provision remained in effect until 90 days after the state of emergency ended on June 30, 2021.

73. The applicants say that the strata's 2020 AGM was conducted contrary to the SPA and M114 because the meeting was not held electronically where all participants could interact with each other, and voting was conducted using restricted proxy only. "Restricted proxy" means that eligible voters were required to use a form appointing specific people (not whomever the voter wanted) to vote on their behalf.

74. The evidence shows that the strata circulated a notice stating the 2020 AGM would be conducted in 2 stages. First, there would be a "virtual townhall pre-AGM information meeting" (townhall) on July 29, 2020, with the AGM to be completed by restricted proxy on August 5, 2020. The notice said owners were to attend the townhall to ask questions, speak to resolutions, and nominate strata council members, and its stated purpose was to provide a forum to make informed decisions about executing the enclosed restricted proxy form.

75. The notice stated that the August 2020 AGM would be conducted with no personal attendance, other than the 2 council members designated to receive proxies. It also stated that proxies should not be submitted until after the townhall so that the name of all owners wishing to stand for council had been determined, and all proxy forms had to be received by email by August 4, 2020 at 12:00 p.m.

76. I note that the restricted proxy form initially distributed said voters could appoint council members LC or Mr. Austad as their "restricted proxy" for the AGM. The evidence shows that the applicants sent the strata a July 31, 2020 letter objecting to Mr. Austad being appointed to receive proxies due to a conflict of interest, given one of the resolutions affected him. I find the strata remedied the potential conflict of interest by postponing the AGM and distributing revised proxy forms. On August 6, 2020, the strata circulated a notice that the AGM was rescheduled for August 17, 2020 and enclosed a new restricted proxy form. The form said voters could now appoint council members LC or CC as their "restricted proxy".

77. It is undisputed that the August 17, 2020 AGM did not allow owners to attend in person or for electronic "in person" attendance. Several prior CRT decisions have explained that a strata cannot prevent a person from attending a general meeting held under the SPA, and cannot require restricted proxy voting: see for example *Curll v. The Owners, Strata Plan NW2926*, 2021 BCCRT 504; *Raitt v. The Owners, Strata Plan LMS 1087*, 2021 BCCRT 683; and *Pahlke v. The Owners, Strata Plan LMS 342*, 2021 BCCRT 905. While prior CRT decisions are not binding on me, I find the reasoning in these decisions is persuasive, and I apply it here.

78. I find that the strata's attempt to conduct the AGM in 2 phases was insufficient to comply with the in-person attendance and proxy voting requirements in the SPA and M114. A similar AGM process was considered in *Hodgson v. The Owners, Strata Plan LMS 908*, 2021 BCCRT 463. While not binding on me, I agree with the tribunal member's reasoning in *Hodgson* that the townhall pre-AGM meeting does not replace discussions and potential amendments of resolutions, which are intended to occur at the same time, and by the same owners and proxies who vote on the resolutions and council nominations at the AGM.

79. I find that the strata's 2020 AGM process effectively prevented owners and proxies from discussing and proposing any resolution amendments as contemplated by SPA section 50(2). It also did not allow owners and proxies to call for a secret ballot vote, as provided for in bylaw 27(7).

80. Overall, I find the strata's 2020 AGM process contravened the SPA, M114, and the strata's bylaws, so I find the August 17, 2020 AGM was not a valid AGM.

81. The documents in evidence confirm that the votes held at the 2020 AGM included electing strata council members, plus votes on the following matters:

- Proposed budget and fee schedule
- Resolution "A" to waive depreciation report
- Resolution "B" to fund depreciation report via the contingency reserve fund
- Resolution "C" on a smoking bylaw amendment
- Resolution "D" on the CP fence alteration behind SL21 and SL22

82. The applicants ask that the strata not act on or rely on the votes held at that meeting. I find that approach would be impractical for the votes on the budget, the depreciation report, and council members' election because the strata's 2021 AGM has likely already taken place, where new council members would have been elected and votes taken on a 2021 budget and depreciation report. So, I find those issues are likely moot, and I decline to make any orders about the 2020 AGM vote results on the proposed budget or Resolutions "A" and "B".

83. I also find Resolution "D" (CP fence alteration) is now moot, given my finding that the applicants' request to straighten the fence does not constitute a significant change, and my order that the strata approve the applicants' request to straighten the fence. So, I find it is unnecessary to order a new vote on Resolution "D".

84. This leaves Resolution "C" (smoking bylaw amendment). Given I have found the AGM was invalid, I order the strata to hold an SGM within 60 days for the purpose of allowing the owners to vote, either in person or by unrestricted proxy, on Resolution "C" from the 2020 AGM. The SGM must comply with the strata's bylaws and the SPA, including SPA section 56.

85. I note that the smoking bylaw amendment passed at the 2020 AGM, but there is no evidence before me about whether the strata has filed the bylaw amendment in the LTO. If the strata has filed the bylaw 3(7) amendment in the LTO, I order the strata not to enforce it unless, and until, the bylaw is approved by a ¾ vote at the upcoming SGM and subsequently filed in the LTO.

Did the strata improperly rely on a legal opinion?

86. It is undisputed that the strata obtained a legal opinion about the fence in May 2020. The applicants made extensive submissions about the strata's delay in providing them with a copy of the legal opinion upon request, in breach of SPA section 36. However, it is undisputed that the strata ultimately provided the applicants with the legal opinion in November 2020. The applicants have not requested any remedy for the production delay, and I order none.

87. The applicants argue that the strata should not be able to rely on the legal opinion because it was based upon incorrect and incomplete information. In contrast, the strata says it properly sought legal advice on the fence issue, and it is not for the applicants or the CRT to direct what advice the strata may rely on.

88. I find the strata sought a general legal opinion about whether it or the owner developer was responsible for the fence position, and how to best resolve the issue. The opinion received was similarly general. It confirmed the yard areas are CP, that the fence location was for the strata to decide, subject to section 71 of the SPA, and that ZD did not have the authority to commit the strata to anything dealing with CP.

89. While the lawyer may not have had all the relevant documentation before them, I find the strata may provide as much or as little information as it deems necessary, and it is not obligated to follow any legal advice it receives. I find there is no basis here to order the strata not to rely on the legal opinion it received. I dismiss this claim.

Did the strata fail to produce documents as required by the SPA?

90. The applicants say the strata failed to produce documents about the decision process around removing the dead tree. Specifically, the applicants request that the strata

produce documentation and meeting minutes reflecting its discussions to remove the tree, plant a new one, and leave the fence angled after the dead tree was removed.

91. The strata says that it provided the applicants with all requested documents. The strata says it did not vote on whether to remove the tree at a council meeting, so it is not contained in any meeting minutes. Rather, it says the tree removal was approved by email on October 24, 2019, and it provided the applicants with those emails. The strata acknowledges that it should have notified owners of the tree removal decision at the November 2019 council meeting, and it says not doing so was an oversight.

92. The strata also says it did not discuss or contemplate the fence location when it voted on removing the tree. While the applicants say it is logical that the strata would have discussed whether to straighten the fence when the tree was removed, I find there is no evidence before me that any such discussion took place.

93. On the evidence before me, I find the applicants have not proven the strata failed to provide them with a copy of any document the strata is required to retain under SPA section 35(2). I dismiss the applicants' claim for document production.

CRT FEES AND EXPENSES

94. Under section 49 of the CRTA, 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 find the applicants were largely successful on the main issues, so I order the strata to reimburse the applicants' $225 in paid CRT fees. The applicants did not claim any dispute-related expenses.

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

ORDERS

96. I order the strata to approve the applicants' request to straighten the angled fence behind SL21 and SL22.

97. Within 60 days of the date of this decision, I order the strata to hold an SGM in accordance with the SPA and the strata's bylaws for the purpose of allowing the owners to vote, in person, electronically, or by unrestricted proxy, on the 2020 AGM Resolution "C".

98. I order the strata not to enforce bylaw 3(7) until it is approved by a ¾ vote at the upcoming SGM and is filed in the LTO.

99. Should Mr. Austad maintain his request to place a shed in the CP yard behind SL22, I order that his request be put in a resolution for a ¾ vote at a general meeting. The resolution must state it is about designating CP as LCP for SL22's exclusive use and include the sketch plan to be filed at the LTO, under SPA section 74(2).

100. Within 7 days of the date of this decision, I order the strata to reimburse the applicants $225 for their CRT filing fees.

101. The applicants are entitled to post-judgement interest under the *Court Order Interest Act*.

102. I dismiss the applicants' remaining claims.

103. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under $35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

Kristin Gardner, Tribunal Member