



# Civil Resolution Tribunal

Date Issued: October 14, 2021

File: ST-2020-009891

Type: Strata

Civil Resolution Tribunal

Indexed as: *Lopinto v. The Owners, Strata Plan 402*, 2021 BCCRT 1092

**B E T W E E N :**

CATHLYN LOPINTO

**APPLICANT**

**A N D :**

The Owners, Strata Plan 402

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Sherelle Goodwin

## INTRODUCTION

1. This dispute is about control over limited common property (LCP) in a strata corporation.
2. The applicant, Cathlyn Lopinto, owns Strata Lot 14 (SL 14) in the respondent strata corporation, The Owners, Strata Plan 402 (strata). She says the strata incorrectly

refused her request to install a gate across the limited common property (LCP) strip of land between SL 14 and the road (LCP driveway), by installing a gate. She asks that the strata be ordered to approve her gate installation request and inform all other owners, by registered mail, that they are not permitted to use the LCP driveway.

3. The strata says it reasonably denied Ms. Lopinto's request because the gate would prevent other owners from accessing a common property (CP) parking lot.
4. Ms. Lopinto represents herself. A strata council member represents the strata.
5. As explained below, I find the strata must approve Ms. Lopinto's request to install a gate across the LCP driveway.

## **JURISDICTION AND PROCEDURE**

6. 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 sets out the CRT's mandate 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.
7. 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.
8. 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.

9. 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.

## **ISSUES**

10. The issue in this dispute is whether the strata must approve Ms. Lopinto's request to install a gate across the LCP driveway and, if so, whether the strata should also inform the owners, by registered mail, that they do not have permission to use the LCP driveway.

## **EVIDENCE AND ANALYSIS**

11. In a civil dispute like this one the applicant, Ms. Lopinto, must prove her claims on a balance of probabilities (meaning "more likely than not"). I have reviewed the parties' submissions and weighed the evidence submitted but only refer to that necessary to explain and give context to my decision.
12. The strata was created in 1976 and consists of 14 strata lots, each of which is connected to a common property cul-de-sac style road. The plan shows that each strata lot is a house with a carport, surrounded by an LCP yard for that strata lot's use. The LCP designated for SL 14's use also includes a strip of land from the yard to the main city road, approximately 3 meters wide, that SL 14 uses as a driveway. No other strata lot has LCP access to the city road. Rather, the strata's CP road accesses the city road, further to the east of SL 14's LCP driveway.
13. The strata plan shows a large CP area directly to the west of the LCP driveway and south of the LCP yards for strata lots 14, 13, 12, 11 and 10. The parties agree that CP area is used by the owners as a parking lot. Photos by both parties show a paved driveway bib, then a gravel driveway leading from the main road north toward SL 14 and branching west to the CP parking lot. A July 19, 2019 survey shows that the east half of the gravel driveway entrance is located on half of the LCP driveway for SL 14 while the west half of the gravel driveway entrance is located on CP.

14. The strata filed an amended set of bylaws in the Land Title Office on March 24, 2009, which I find apply to this dispute. Bylaw 6 says that an owner must obtain the strata's written approval of any alteration to common property, including limited common property. Bylaw 3 says that an owner may not use a strata lot or common property in a way that causes a nuisance or hazard to another person or unreasonably interferes with the rights of other persons to use and enjoy common property.
15. The parties agree that Ms. Lopinto asked the strata for approval to install a gate to restrict the flow of traffic on the LCP driveway for SL 14, although neither party provided a copy of Ms. Lopinto's request. In a March 3, 2020 letter, the strata refused Ms. Lopinto's request, finding the proposed gate would inhibit other owners' access to the CP parking area, contrary to bylaw 3.
16. It is undisputed that the strata granted Ms. Lopinto a hearing to discuss the denied request. Although neither party provided the strata council's meeting minutes about the hearing, the strata again denied Ms. Lopinto's request to install a gate across the LCP driveway to SL 14 in its December 24, 2020 letter. The strata found a gate would allow an individual owner to restrict all owners' access to the CP parking lot. The strata also said they were concerned about safety and liability issues that might arise from installing a gate near a high-volume street.
17. Ms. Lopinto says the strata's response refuses to recognize her right to restrict other owners' use of the LCP driveway. I agree. For the reasons set out below I find the strata's refusal to allow the gate is significantly unfair to Ms. Lopinto.
18. 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.
19. 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).

20. In considering an owner’s reasonable expectations the courts have applied the following test from *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44:

- 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?

21. In *King Day Holdings Ltd. v. The Owners, Strata 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.

22. I find Ms. Lopinto’s expectation that she have exclusive use of the LCP driveway leading to SL 14 is objectively reasonable. This is because section 1(1) of the SPA defines LCP as common property designated for the exclusive use of the owners of 1 or more strata lots. Such a designation confers on the owner a substantial degree of control. Once designated as LCP, the other owners in the strata no longer have the right to use and enjoy that space (see *Frank v. The Owners, Strata Plan LMS 355*, 2016 BCSC 1206).

23. It is undisputed that other owners use the LCP driveway to SL 14 as part of the gravel driveway to enter the CP parking lot. Based on the parties’ photos, I agree with the strata that, if Ms. Lopinto installs a gate across the SL 14 LCP driveway, the remaining ungated portion of the gravel driveway will likely not be wide enough for other owners to drive through to the CP parking lot. There is currently no other access to the CP parking lot. The strata says the proposed gate would restrict other owners’ access to the CP parking lot. I infer the strata relies on bylaw 3, which prohibits an owner from using common property in a manner which unreasonably interferes with other owners’ use of common property. I accept that the bylaw applies to LCP. However, I find Ms. Lopinto is not unreasonably interfering with the other owners’ use of the CP parking

lot by exercising her statutory right to exclude other owners from using the LCP driveway.

24. Although the strata argues that 2 of the strata lots have no carports or available parking, it has not provided any supporting evidence or explained why those strata lots cannot park on the LCP designated for their strata lots. I find the strata's position is inconsistent with the strata plan that shows each strata lot has a carport. In the absence of any contrary evidence or explanation from the strata, I find it likely that other owners can access their strata lots from the strata's private road and can park somewhere on their designated LCP. Even if some owners have no available parking space on their own LCP, as the strata claims, I find the strata's interference with Ms. Lopinto's exclusive use of the LCP driveway to SL 14 unreasonable in the circumstances, because I find the strata can develop an alternate access to the CP parking lot.
25. The CP parking lot's southern boundary is along the public roadway. I accept the strata's assertion that it would cost the strata money to remove trees and widen the existing gravel driveway or construct another driveway to access the CP parking lot without using the LCP driveway. However, the expense does not allow the strata to restrict Ms. Lopinto's exclusive use of the LCP driveway, because that would be contrary to the SPA.
26. Finally, the strata says it is concerned about liability for an accident potentially caused by a car turning into the LCP driveway and hitting the proposed gate. I find it likely the strata could address potential liability with lighting and warning signs. I find it is not reasonable for the strata to deny Ms. Lopinto's gate request on this basis.
27. On balance, I find the strata violated Ms. Lopinto's objectively reasonable expectation to have exclusive use of the SL 14 LCP driveway by refusing to approve Ms. Lopinto's request to install a gate on the LCP driveway. I find the strata's decision was significantly unfair because it denied Ms. Lopinto her statutory right of exclusive use. I find the strata must approve Ms. Lopinto's request to install the gate only on LCP designated for the exclusive use of SL 14.

28. For completeness, I considered whether the gate installation was a significant change to the use or appearance of the LCP driveway such that a  $\frac{3}{4}$  vote of the owners at a general meeting would be required under s. 71 of the SPA. Based on my analysis of the factors set out in *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333, I find the gate would likely not be a significant change. I find the gate would be visible only to a handful of owners whose LCP backs onto the CP parking lot, or those using the CP parking lot. Although the gate would affect other owners' use of the LCP driveway, those owners are not entitled to use the LCP portion of the gravel driveway in any event. I also consider that the strata bylaws require all owners to be responsible for their own LCP, so find any installed gate would not cause any further maintenance or expense for the strata. On balance, given the particular interest conferred by the LCP designation, I find the gate installation is not a significant change to the property and so does not require approval by  $\frac{3}{4}$  vote of the owners at a general meeting.
29. Overall, I find the strata must approve Ms. Lopinto's request to install a gate on the LCP driveway.
30. I do not find it necessary for the strata to inform all owners, by registered mail, that they do not have permission to use the LCP driveway. As this is a published decision, I find all owners will have access to it, although it is open to the strata to include the results of this decision in its strata council meeting minutes or a direct communication to the owners.

## **CRT FEES and EXPENSES**

31. 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 see no reason in this case not to follow that general rule. I find the strata must reimburse Ms. Lopinto \$225 for CRT fees. I make no order about dispute-related expenses because none were claimed.
32. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. Lopinto.

## ORDERS

33. Within 14 days of the date of this decision I order the strata to:

- a. approve, in writing, Ms. Lopinto's request to install a gate on the LCP driveway leading to SL 14.
- b. Reimburse Ms. Lopinto \$225 in CRT fees.

34. Ms. Lopinto is also entitled to post judgment interest under the *Court Order Interest Act*.

35. 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.

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Sherelle Goodwin, Tribunal Member