Civil Resolution Tribunal

Date Issued: March 11, 2022

File: ST-2021–001946

Type: Strata

Civil Resolution Tribunal

Indexed as: *Dolinsky v. The Owners, Strata Plan NES 3191*, 2022 BCCRT 275

B E T W E E N :

JOAN DOLINSKY and JEFFREY DOLINSKY

**APPLICANTS**

A N D :

The Owners, Strata Plan NES 3191

**RESPONDENT**

A N D :

JOAN DOLINSKY and JEFFREY DOLINSKY

**RESPONDENTS BY COUNTERCLAIM**

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**REASONS FOR DECISION**

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Tribunal Member: Sherelle Goodwin

## INTRODUCTION

1. This dispute is about secondary suite rentals and bylaws in a bare land strata corporation which is part of a ski resort. This is 1 of 2 linked disputes about the same issue but involving different parties. I have written a separate decision for the linked dispute (ST-2021-003395).

2. The applicants and respondents by counterclaim, Joan Dolinsky and Jeffrey Dolinsky, own strata lot 5 (SL 5) in the respondent strata corporation, The Owners, Strata Plan NES 3191. In 2016 the applicants built their house with a secondary suite, which they say is authorized by a restrictive covenant registered on SL 5's title. In 2021 the strata passed bylaw 38, which essentially prohibits secondary suites on the strata lots.

3. The applicants say bylaw 38 contravenes the *Strata Property Act* (SPA) and is significantly unfair to them. The applicants ask that the strata be ordered to rescind bylaw 38, exempt the applicants from the bylaw generally, or at least exempt the applicants from the bylaw until the applicants sell their strata lot.

4. The strata says bylaw 38 was validly passed and denies any significant unfairness to the applicants. It says the strata lots' use is restricted to single family homes under the restrictive covenants, the ski resort's master plan and the owner developer's real estate disclosure statement. The strata says the applicants' secondary suite contravenes those agreements and the strata's bylaws.

5. In its counterclaim the strata asks that the applicants be ordered not to use SL 5 for anything other than a single family home, to comply with the restrictive covenant and strata bylaws and to change their residence into a single family home.

6. The strata is represented by a council member. The applicants are represented by Ms. Dolinsky.

7. As explained below, I find the applicants' secondary suite is permitted. I also find bylaw 38(d) contravenes SPA section 121 and is therefore unenforceable. I order the strata to not take steps to enforce the remainder of bylaw 38 against the applicants, because I find it is significantly unfair to them. I dismiss the strata's counterclaim.

## 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.

## ISSUES

12. The issues in this dispute are:

    a. Is the applicants' secondary suite permitted?

    b. Does bylaw 38 contravene the SPA such that it is unenforceable?

    c. If not, are the applicants entitled to an exemption from bylaw 38?

d. Did the strata act significantly unfairly toward the applicants in passing bylaw 38 and, if so, what is the appropriate remedy?

e. Does the applicants' secondary suite contravene the applicable restrictive covenants or the strata's bylaws and, if so, what is the appropriate remedy?

## EVIDENCE AND ANALYSIS

13. In a civil dispute like this one the applicants must prove their claims on a balance of probabilities (meaning "more likely than not"). The strata has the same burden to prove its counterclaim. 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.

### *Background*

14. The strata was created on March 8, 2007 with the deposit of the strata plan in the Land Title Office (LTO). The bare land strata consists of 19 residential strata lots and is part of the Kicking Horse Mountain Resort. In January 2016 the applicants purchased SL 5 from Kicking Horse Management Ltd. (KHM), which is the general and operating partner of the strata's owner developer Kicking Horse Mountain Limited Partnership (developer). Kicking Horse Mountain Limited Partnership is also the developer of Kicking Horse Mountain Resort. None of this is disputed.

15. It is undisputed, and the evidence shows, the applicants built a house on SL 5 which includes a secondary suite above their attached garage. The applicants acknowledge they have been renting the suite since approximately January 2017.

16. On March 27, 2019 the strata filed an amended set of bylaws with the LTO. It filed bylaw 38 in the LTO on April 6, 2021. I find those bylaws apply here and will address them in more detail below.

### *Is the applicants' secondary suite permitted?*

17. As noted, the strata says all strata lots are restricted to single-family home use only, under restrictive covenants filed at the LTO, the ski resort's Master Plan, and the owner developer's Real Estate Disclosure Statement. The applicants say their secondary suite is authorized by a restrictive covenant filed against SL 5.

18. On May 17, 2006, KHM filed a restrictive covenant in favour of the Province of BC under section 219 of the *Land Title Act* (LTA). The 2006 covenant was filed against 3 parcels of land, 1 of which later became the strata lands. KHM agreed that the lands would be developed as a "detached dwelling development, substantially in accordance with any requirements set out in the Ski Area Master Plan". The covenant clearly says that it runs with the land and is binding on future owners. It is undisputed that the covenant is registered against all 19 strata lots created in the strata, including SL 5.

19. The strata provided excerpts from an April 30, 1999 Ski Area Master Plan for Golden Peaks Resort, which I find was the resort's former name. It also provided excerpts from the March 31, 2009 for Kicking Horse Mountain Resort Master Plan which, I infer is the updated "Ski Area Master Plan" referred to in the 2006 covenant. Both plans outline the development of hotels, condotels, townhouses and single-family chalet areas. None of the master plan excerpts in evidence define "single-family chalet" or specify that the strata lands specifically are to be developed as single-family chalets.

20. The 2006 covenant has been amended from time to time to specify development of townhomes or single-family chalets. However, I find those amendments specifically refer to 1 or the other of the 2 land parcels that are not the strata lands. So, I find those amendments that specify the type of buildings allowed do not apply to strata lands, including SL 5. Contrary to the strata's argument, I find the ski resort master plans and therefore the 2006 restrictive covenant do not limit SL5 or the strata lots in this strata to single-family homes.

21. On March 8, 2007, KHM filed a section 2019 restrictive covenant in favour of Kicking Horse Mountain Development Corporation (KHMDC), which is undisputedly the developer's developmental authority for the resort. The 2007 covenant adopted a set of standard charge terms KHMDC filed in the LTO in 2002, which set out a development scheme for the resort. The 2002 standard charge terms referred to another instrument designating KHMDC as an authority to receive a covenant, under LTA section 219(3)(c).

22. The 2002 standard terms, as amended by the 2007 covenant, define "single family home" as a residential building containing not more than one dwelling unit. A "dwelling unit" means 2 or more rooms used for residential accommodation, containing cooking, sleeping and sanitary facilities. A "secondary suite" is defined as a second, subsidiary dwelling unit within or attached to another dwelling unit on the same legal parcel. I agree with the strata that, under the standard charge terms, a single-family home, by definition, cannot include a secondary suite.

23. The 2007 covenant says "principal use" means single family residences. Clause 2.1 of the 2002 standard charge terms prohibits any use of the strata lot, other than the principal use or any use permitted in a general instrument or specifically contemplated in the covenant. Clause 2.2 establishes rental restrictions and clause 2.3 allows home-based businesses incidental and subordinate to residential use. Clause 2.4(4) specifically prohibits the owner from developing, occupying or using any secondary suite.

24. I find the 2007 restrictive covenant and 2002 standard charge terms together restrict strata lot use to single family homes only and do not permit secondary suites. The 2007 covenant was filed against all strata lot lands, including SL 5. It specifically says it is binding on all future owners and so I find the 2007 restrictive covenant is binding on the applicants. However, that is not the end of the matter.

25. Prior to completing the sale of SL 5 to the applicants, KHM and KHMDC filed a modification of the 2007 covenant against SL 5 only, on January 14, 2016. The 2016 modification deleted section 2.4(4) of the 2002 standard charge terms, thereby

removing the restrictive covenant's prohibition against secondary suites. The 2016 modification also says the parties agreed to execute any further documents or perform any actions reasonably required to give "full force and effect" to the modification agreement. In the event of any conflict between the covenant and the modification agreement, the modification agreement would prevail.

26. The strata says that, despite the 2016 modification, the applicants are still required to only use SL 5 for single family residence, as that is the principal use set out in the 2007 restrictive covenant. I disagree.

27. First, if that were the case, it would mean the 2016 modification had no purpose, which I find cannot be the case. I find the clear intention of the modification was to allow the future owners of SL 5 to develop, occupy, and use a secondary suite on their strata lot. This is supported by emails between the applicants and the developer in 2015 and 2016 negotiating a removal of the secondary suite prohibition. I also find such use is the only reason to delete clause 2.4(4) of the 2002 terms.

28. Second, the 2016 modification specifies that the modification prevails in the case of any conflict with the 2007 covenant. So, I find the removal of the secondary suite prohibition in 2016 prevails over the definition of single-family residence set out in the 2007 covenant. This is also consistent with section 233(3) of the LTA, which says that a later modified term of a standard charge term will prevail where there is any inconsistency.

29. Third, clause 2.1 of the 2002 standard charge terms allow for strata lot use other than as a single family residence, if the use is permitted in a general instrument. A "general instrument" is defined as a filed instrument referring to the 2002 standard charge terms, which I find the 2016 modification is. I find the 2016 modification permits the use of SL 5 for a residence including a secondary suite. So, I find that use is a permitted use under a general instrument, as allowed in clause 2.1(2) of the 2002 standard charge terms.

30. Overall, I find the 2016 modification allows the applicants to use SL 5 for a residence containing a secondary suite, and not just for a single family residence.

31. Contrary to the strata's argument, I find the developer, KHMDC, or the applicants had no obligation to seek the strata's consent, or even advise the strata before filing the 2016 modification against SL 5. This is because the strata is not a party to that covenant. The restrictive covenant is a contract between KHMDC and the owner, so it is not enforceable by a third party (see *Suomalainen v. Jernigan et al*., 2004 BCSC 465 at paragraph 17).

32. Contrary to the strata's argument, I find the developer did not breach any fiduciary duty to the strata in agreeing to the 2016 modification. Under SPA section 6, a developer has a fiduciary duty to act in the strata's best interest while acting as the strata council. The developer only acts as strata council up to the strata's first annual general meeting (AGM), where it elects its first strata council. The 2005 Real Estate Disclosure Statement in evidence required the strata to hold its first AGM within 9 months of the first strata lot sale. I find the first AGM likely occurred well before January 2016 and so I find the developer was not acting on behalf of the strata, but on its own behalf, when it modified the restrictive covenant in 2016. So, I find the developer did not have a fiduciary duty to act in the strata's best interest in selling SL 5 as it was no longer acting as the strata council.

### *Is Bylaw 38 contrary to the SPA and thus unenforceable?*

33. At the strata's March 6, 2021 AGM, the strata passed a 3 page "Secondary Suites & Rental Accommodations" bylaw (bylaw 38). As noted, it was filed in the LTO on April 6, 2021.

34. Subsection (a) says the bylaw's purpose is to adopt the secondary suite prohibitions and rental restrictions set out in the section 219 restrictive covenant on title. Subsection (b) adopted definitions from the 2002 standard charge terms and the 2007 restrictive covenant.

35. Subsection (c) replicates clause 2.4(4) of the standard charge terms, prohibiting an owner from developing, occupying, or using a secondary suite on their strata lot. Subsection (d) replicates clause 2.2 and allows short-term rentals (less than 29 days) of an entire single family home, or tenancies of all or part of a single family home for

a fixed term of not less than 3 months or for an indefinite month-to-month term. It specifically prohibits all other rentals.

36. Subsection (e) sets out remedies for bylaw breaches including requiring the owner to stop contravening the bylaw, to carry out any work required to rectify the bylaw breach or to remove any Improvement which includes a secondary suite.

37. Section 121 of the SPA says a bylaw is not enforceable to the extent it contravenes the SPA or any other enactment or law.

38. SPA section 141(2) allows a strata to prohibit strata lot rentals, or to restrict rentals by limiting the number or percentage of strata lots for rent or limiting the rental period. SPA section 141(1) specifically prohibits a strata from restricting strata lot rentals in any other way. In the non-binding but persuasive CRT decision *The Owners, Strata Plan VR812 v. Yu*, 2017 BCCRT 82, vice-chair found a rental bylaw that prohibited rentals of "less than all" of a strata lot was, on its face, contrary to SPA section 141(2) because it imposed a limitation not permitted by that section. I find bylaw 38(d) similarly attempts to impose unauthorized rental restrictions by restricting the type of homes that can be rented to single-family homes only, defined as containing only 1 dwelling unit. So, I find subsection (d) of bylaw 38 contravenes SPA section 141(1) and is therefore unenforceable under SPA section 121.

39. I do not make the same finding about bylaw 38(c), because I find it is not a rental bylaw. Subsection (c) does not refer to rentals or tenancies, but rather development, use and occupation. I find these terms include building, altering and using the suite according to the 2002 standard charge term definitions. I also find it includes occupancy under a licence or agreement other than a residential tenancy agreement, such as is the case with short-term accommodation. As noted in *Semmler v. The Owners, Strata Plan NES3039*, 2018 BCSC 2064, Part 8 of the SPA, which includes section141, does not apply to short-term licence agreements to occupy. So, I find section 141 of the SPA does not apply to bylaws restricting use and occupancy, only bylaws restricting rentals.

40. I find bylaw 38(c) is what is known as a “use bylaw”. SPA section 119(2) authorizes a strata to pass bylaws about strata lot use.

41. The applicants say bylaw 38 is unenforceable because it contravenes the 2016 modified restrictive covenant allowing secondary suites on SL 5. As the restrictive covenant is not a law or enactment, SPA section 121 does not apply to it. So, I find nothing in the SPA would render bylaw 38 unenforceable for contravening the 2016 modified restrictive covenant registered against SL 5.

42. In summary, I find subsection (d) of bylaw 38 is unenforceable because it restricts rentals in a way that contravenes section 141 of the SPA.

43. For clarity, I find the strata’s bylaws currently allow all forms of rentals and short-term accommodation. However, as noted above, clause 2.2 of the 2007 restrictive covenant governs rentals on each strata lot. The covenant allows either short term accommodation or long term rentals of a full residence, but allows only fixed terms of more than 3 months or month-to-month tenancies of part of a house, such as SL 5’s secondary suite.

### *Are the applicants entitled to an exemption from bylaw 38 under the SPA?*

44. Section 143 of the SPA sets out exemptions for rental restriction bylaws. These apply to strata lots that are rented at the time the bylaw passes, or those that were designated as rental strata lots by the developer, both of which I find apply here based on the LTO documents in evidence. However, those exemptions only apply to the rental part of bylaw 38, which is subsection (d). As I found bylaw 38 (d) is unenforceable, I need not consider whether any of the SPA section 143 rental restriction bylaw exemptions apply.

### *Is bylaw 38 significantly unfair to the applicants?*

45. CRTA section 123(2) gives the CRT the power to make an order directed at the strata to remedy a significantly unfair action or decision. This provision mirrors section 164(1) of the SPA, which gives the same or a similar power to the court.

46. In *Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578, affirmed 2003 BCCA 126, the court said a significantly unfair action is one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust, or inequitable. In *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342 the court confirmed that an owner's reasonable expectation is a relevant factor to consider when assessing significant unfairness.

47. In *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, the court applied a "reasonable expectations" test when considering whether a discretionary action of council was significantly unfair. The test asks: What was the applicants' expectation? Was that expectation objectively reasonable? Did the strata violate that expectation with a significantly unfair action or decision?

48. Contrary to the strata's argument, I find the applicants' expectation that they could build, use and rent out a secondary suite in SL 5 was objectively reasonable. As noted above, I find the 2016 modification permits SL 5 to be used for a residence including a secondary suite. It is undisputed KHMDC approved the applicants' building plans, which included the suite. So, I find it was reasonable for the applicants to rely on the modified restrictive covenant, and the developer's assurances, that they could include a secondary suite on their SL 5 residence.

49. It is undisputed that the strata had no rental restriction bylaws, or secondary suite bylaws prior to passing bylaw 38. I disagree with the strata that the applicants should have known their secondary suite contravened strata bylaw 3(e), which says a strata cannot be used in a way contrary to the intended purpose set out in the strata plan. As noted, I find it reasonable for the applicants to have believed the suite was authorized and so I also find it reasonable for them to believe their use of SL 5 was not contrary to the intended purpose.

50. Contrary to the strata's argument, I do not find the applicants should have expected that SL 5 was restricted to single-family residence use only based on the 2015 Real Estate Disclosure Statement. This is because a registered charge against title prevails over assurances made in the Real Estate Disclosure Statement when it

comes to bare land strata use (see *Winchester Resorts Inc. v. Strata Plan KAS2188 (Owners)*, 2002 BCSC 1165).

51. In *Winchest*er, the court considered the strata's use bylaws, which prohibited use of a strata lot contrary to its intended purpose, or for a commercial purpose. The applicant owner was developing a fishing resort on its strata lots, approved by the province, but the statutory declaration on the strata plan said the strata was intended for residential use. The court concluded the strata lot permitted uses were determined by the building scheme, rather than the statutory declaration. It found that the fishing resort, although a commercial use, was permitted under the building scheme. The court found the strata's bylaws prohibiting that use were significantly unfair to the applicant owner under SPA section 164.

52. In this case, I find the permitted uses of SL 5 are determined by the section 219 covenant registered against title, as it is similar to the statutory building scheme considered by the court in *Winchester*. I find the 2016 covenant modification expressly allows SL 5 to develop, use or occupy a secondary suite. So, following the court's reasoning in *Winchester*, I find the strata's bylaw prohibiting using strata lots for secondary suites is significantly unfair to the applicants.

53. I also find bylaw 38 is inequitable to the applicants, because they are undisputedly the only owners with a modification on title allowing a secondary suite.

54. I further find it significantly unfair that the strata proposed and passed bylaw 38 in early 2021, well after the applicants developed their secondary suite and approximately 4 years after they started renting it out. Contrary to the strata's argument, I find the strata was aware of the suite from either January 2017 or shortly thereafter because Mr. Dolinsky is a member of the strata council. Further, text messages in evidence show the applicants discussing suite guests with another strata council member in December 2017. Until this counterclaim, the strata has taken no steps to address the applicants' alleged breach of bylaw 3(e). Rather, the strata knowingly allowed the applicants to continue using the secondary suite.

55. Finally, I find bylaw 38 is oppressive to the applicants because it prohibits them from even having the secondary suite. If the applicants were required to comply with the bylaw they would have to alter or renovate their previously approved building.

56. The strata argues it was not significantly unfair because, at the March 2021 AGM, it passed a resolution exempting SL 5 from only subsection (c) of bylaw 38, which prohibited the development, use and occupation of a secondary suite. I acknowledge that such an exemption would permit the applicants to keep, but not rent out, their secondary suite. However, that resolution was undisputedly rescinded by the owners at a July 5, 2021 special general meeting. So, I find the short-lived partial exemption does not render the strata's actions fair to the applicants.

57. On balance, I find bylaw 38 is significantly unfair to the applicants and is thus unenforceable against them. I order the strata to not enforce bylaw 38 against the applicants.

### *The Strata's Counterclaim*

58. As explained above, I find the applicants' secondary suite is a permitted use of SL 5 and that bylaw 38 should not be enforced against the applicants. So, I decline to order the applicants to bring their development into compliance with the strata's bylaws, as requested by the strata.

59. I also decline to order the applicants to comply with the 2007 restrictive covenant because I find the applicants' secondary suite does not contravene the restrictive covenant as modified in 2016. In any event, I find the strata has no authority to enforce the restrictive covenant, as noted above.

60. In its counterclaim dispute notice, the strata asked for an order that the applicants produce their communications with the developer about the sale of SL 5 and the developer's review and approval of the SL 5 development. The applicants say they have provided the strata everything they have, and the strata has not provided any evidence or submissions to the contrary.

61. The strata did not confirm or renew its request for document production in its submissions or otherwise explain its entitlement to such communications. So, I decline to order the applicants to produce the requested communications to the strata.

## CRT FEES AND EXPENSES

62. 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. As the applicants were successful in their claim, I order the strata to reimburse them $225 in CRT fees. I find the strata is not entitled to any fee reimbursement as it was unsuccessful in its counterclaim. No party claimed any dispute-related expenses.

63. The strata must comply with section 189.4 of the SPA, which includes not charging any part of its costs for this dispute to the applicants.

## DECISION AND ORDERS

64. I order the strata to not enforce bylaw 38 against the applicants.

65. Within 14 days of this decision, I order the strata to reimburse the applicants $225 in CRT fees.

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

67. I dismiss the strata's counterclaim.

68. 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.

Sherelle Goodwin, Tribunal Member