



# Civil Resolution Tribunal

Date Issued: April 22, 2022

File: ST-2021-005433

Type: Strata

Civil Resolution Tribunal

Indexed as: *Kent v. The Owners, Strata Plan LMS4555*, 2022 BCCRT 470

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

LAURA KENT, ANALI DADGOSTAR, and ALEXANDER KAVANAGH

**APPLICANTS**

**A N D :**

The Owners, Strata Plan LMS4555

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

David Jiang

## **INTRODUCTION**

1. This dispute is about landscaping of common property. The applicant, Mrs. Laura Kent, is 1 of 2 joint owners of strata lot 366 in the respondent strata corporation, The Owners, Strata Plan LMS4555 (strata). The other applicants, Dr. Anali Dadgostar, and Dr. Alexander Kavanagh, jointly own strata lot 358 in the strata.

2. The applicants say the strata's landscaping alterations are significant changes in the use or appearance of common property that required a  $\frac{3}{4}$  vote under section 71 of the *Strata Property Act* (SPA). They also say the changes are significantly unfair. In their dispute application, the applicants requested orders for the strata to immediately stop removing trees and bushes and replace the already-removed plants with like-for-like substitutes. In submissions the applicants suggested different remedies that I discuss below.
3. The strata denies breaching SPA section 71 or acting in a significantly unfair manner. It says the landscaping work is necessary maintenance that it appropriately advised owners of in advance. The strata also says it stopped work pending the outcome of this dispute.
4. Mrs. Kent represents the applicants. A strata council member represents the strata.
5. For the reasons that follow, I find the applicants have proven that the alterations are significant changes under SPA section 71. I make the orders set out below.

## **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 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.
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 issues in this dispute are as follows:
  - a. Are the June 2021 landscaping alterations of the common property a significant change under SPA section 71 that require a  $\frac{3}{4}$  vote?
  - b. Did the strata treat the applicants in a significantly unfair manner?
  - c. Are any remedies appropriate?

## **BACKGROUND, EVIDENCE AND ANALYSIS**

11. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities. This means more likely than not. I have read all the parties' submissions, including cited case law, but refer only to the evidence and arguments that I find relevant to provide context for my decision.
12. I begin with the undisputed background. The strata's buildings consist of a mix of townhouse and apartment-style housing. The strata plan shows the applicants' strata lots are townhouses that face south. Their strata lots each have a patio designated as limited common property for the strata lot's use. Each patio is outdoors, near ground level, and fenced. The fences can be easily seen through.
13. Parts of each patio are surrounded by concrete planters. The strata plan shows the planters are designated as common property. There are also ground-level garden

beds that are located at the foot of the planters that I find are also common property. The planters and garden beds provide some separation between the strata lots and a nearby public sidewalk. The alterations in this dispute consist of changes in the plants in the planters and garden beds next to strata lots on the south side of the strata, and not elsewhere. I will discuss the plants in those planters and garden beds below.

14. I turn to the chronology. At the March 29, 2021 annual general meeting (AGM), the owners in the strata approved a budget that included \$23,000 for landscaping improvements. The owners passed no specific resolutions about the landscaping and the strata later decided on specific changes I outline below. So, I find the alterations at issue were not approved at the AGM.
15. On April 21, 2021, the strata held a townhall-style meeting about the proposed alterations. Mrs. Kent and 2 other strata lot owners attended. The strata noted the following in its PowerPoint presentation for the meeting. It had formed a landscaping committee in May 2019. The committee had developed a 3-year plan starting in 2019. The year 3 activities were the chief topic of the presentation.
16. As stated in the slides, the strata planned to change the planter and garden bed plants along the south side of the strata's building. It said the planter plants were overgrown, unsightly, and were encroaching on sidewalks and other common property. The strata also said the plants presented a safety concern, though it did not elaborate. It planned to use several plants that would mature within 1 to 2 years reaching 4 to 5 feet in height. The slides included photographs of the existing planters and mock-ups with the new plants at maturity. The strata also wrote that the ground-level garden beds were being affected by dog waste and it described plans to install boulders and new grass to prevent this.
17. Of note, the slides did not include pictures of what the plants would look like when first planted.

18. No owners objected to these plans. In early June 2021, the strata sent a notice that the year 3 work would begin on June 14, 2021. The strata hired landscapers and they started work on the planned date by removing plants in the planters and garden beds.
19. In emails dated June 15 to 23, 2021, the landscapers advised the strata that they had to stop work early because certain owners were interfering. They said the owners denied the landscapers access to common property, yelled at their staff, and photographed them without permission. I will refer to the work done as the June 2021 alterations in my decision and order.
20. The landscapers noted that owners of units 1039, 1051, 1053, 1063, and 1065 objected to the work. Those owners said the replacement plants were too small. Dr. Dadgostar and Dr. Kavanagh's strata lot is also known as unit 1053 and Mrs. Kent's strata lot is also known as unit 1065.
21. The strata council held an online meeting on June 28, 2021 with the townhouse owners. The owners said the new plants were too small and negatively affected their privacy and security. An owner also raised the allegation that the strata had breached SPA section 71. The strata replied that the plants would mature in 1 to 2 years to a size of 4 to 5 feet tall. Ultimately, the owners and the strata did not reach a consensus. The applicants applied for dispute resolution with the CRT on July 10, 2021.

***Issue #1. Are the June 2021 landscaping alterations of the common property a significant change under SPA section 71 that require a ¾ vote?***

22. Section 71 of the SPA says that a strata corporation must not make a significant change in the use or appearance of common property unless the change is approved by a resolution passed by a 3/4 vote at an AGM or special general meeting (SGM), or there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage. See *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333.

23. In *Foley*, the court summarized the criteria for a significant change at paragraph 19 as follows:
- a. A change would be more significant based on its visibility to residents and towards the general public.
  - b. Whether the change to common property affects the use or enjoyment of a unit or a number of units or an existing benefit of a unit or units.
  - c. Is there a direct interference or disruption as a result of the changed use?
  - d. Does the change impact on the marketability or value of the unit?
  - e. The number of units in the building may be significant along with the general use, such as whether it is commercial, residential, or mixed.
  - f. Consideration should be given as to how the strata corporation has governed itself in the past and what it has allowed. For example, has it permitted similar changes in the past? Has it operated on a consensus basis, or has it followed the rules regarding meetings, minutes and notices as provided in the SPA?
24. Court decisions suggest that the more permanent the change, the more significant it is. See for example, *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126 and *Sidhu v. The Owners, Strata Plan VR1886*, 2008 BCSC 92.
25. I have also considered several non-binding CRT decisions. In *Bourque v. The Owners, Strata Plan VIS 6730*, 2020 BCCRT 701, the CRT held that the strata's decision to replace small ornamental plants with cedar trees was a significant change. The CRT placed weight on its finding that the change negatively affected the owner's enjoyment of his strata lot. In *Richardson v. Simmons*, 2020 BCCRT 241, the CRT held that in considering whether the removal of trees from common property is a significant change, relevant factors include whether the removal impacts residents' privacy or views. I agree with the reasoning in these decisions and find that privacy and an owner's enjoyment are relevant considerations.

26. I will first consider how the *Foley* factors apply to this dispute. I find that the landscaping changes are highly visible to both residents and the general public. The south-facing townhouses, including the applicants', have doorways facing an adjoining sidewalk and road, and a marina with many boats across the road further south. Given the strata's location, I find it likely that the sidewalk and road are frequently used by pedestrians and cars. It follows that the landscaping changes would be frequently seen by both residents and the general public.
27. I also find the changes to common property negatively affect the use or enjoyment of a number of strata lots and their residents' privacy. There are many "before" and "after" photos in evidence taken by various townhouse owners and the strata. They generally show the same things. Previously, the planter plants reached or exceeded the height of the fences surrounding the townhouse patios. I find that they generally obscured the patios from the throughfare. There were also large arbutus trees in the planters.
28. In contrast, the new planter plants are shorter, smaller, and less dense. Some reach less than half the height of the patio fences. The arbutus trees were also replaced with smaller trees. In some photos, which I infer were taken in the summer, the new plants have yellowed leaves, and the trees are wilted. The plants and trees are also of a different species and so differ in appearance.
29. I find that the alterations of June 2021 dramatically changed the landscaping appearance. Photos taken from both inside and outside patios show that there is increased visibility to and from the nearby sidewalk. So, I find the owners' privacy was reduced. My conclusion is consistent with the letters provided by the owners of units 1037, 1051, 1055, 1059, and 1063. In general, the owners expressed dismay over the changes and said they lost privacy. Two owners noted that in addition to the patio, their living room and kitchen were also more visible to the public. I also place weight on the fact that the owners most affected by the landscaping changes generally said that they opposed them, at times vigorously. As noted above, I find the owners' enjoyment is a relevant consideration.

30. I also find the landscaping changes directly interfere or disrupt the townhouse owners because they directly impact their privacy, as discussed above.
31. I find the number of affected strata lots is significant. As stated earlier, the landscaping impacts each townhouse unit facing the south side. I also find the changes are unlike any past alterations. I note that the 3-year landscaping project, mentioned earlier, concentrated on other areas in years 1 and 2.
32. I also find the landscaping changes have a high degree of permanence. I find the plants would be difficult to move. This is because they are in immovable planters and garden beds as opposed to movable pots. The strata's submissions also indicate that the plants are meant to stay for several years.
33. In terms of factors that support the strata, I find it unproven that the change impacts the marketability or value of the units. In particular, I find the evidence does not quantify any alleged loss in value. I find that expert evidence, such as an appraisal, would be required to prove this. That said, I find that overall, the *Foley* factors suggest the landscaping changes are a significant change under SPA section 71.
34. The strata says the plants in the south side planters were overgrown, unmanageable, and intrusive. It says the landscaping changes were necessary. While I acknowledge these submissions, I find that they address the issue of whether the changes are desirable, which is separate from the issue of whether they are significant. See, for example, *Lane et al v. The Owners, Strata Plan 212*, 2019 BCCRT 249 at paragraph 42.
35. I also acknowledge the strata's evidence that the plants will grow over time. For example, the hired landscaper wrote in a September 1, 2021 email to the strata that it chose plants that would provide the same privacy or more at maturity. The strata also provided a November 1, 2021 letter from BM, the president of a gardening company. BM wrote that 1 of the selected plants would reach the top of the fence in 2 growing seasons. However, I find 2 growing season is a significant period of time for the owners. So, I find the change is still significant under SPA section 71.



36. Finally, the strata submits that the pre-existing landscaping was a safety hazard. It provided police reports of calls for service from January 2011 to September 2021. However, I find these records lack context or any explanation for what is causing the crimes in the strata. Further, the applicants say the new landscaping makes them more vulnerable to crime. I find the evidence insufficient to prove whether the strata or the applicants are correct.
37. For all those reasons, I find the June 2021 alterations to the planters and garden beds are significant changes in the appearance of common property under SPA section 71. I also find there were not reasonable grounds to believe the landscaping changes were immediately necessary to ensure safety or prevent significant loss or damage. As such, the changes require approval by a  $\frac{3}{4}$  vote at an AGM or SGM. No such vote has been held.
38. The applicants suggested that I order the strata to hold meetings and have owners vote on a mutually agreed-upon resolution at an AGM or SGM to comply with SPA section 71. The applicants also suggested that if the owners and strata cannot come to a resolution, I should order the strata remove and replace the planter and garden bed plants.
39. While I acknowledge the opposition expressed in the letters in evidence, I find that owners could still vote to approve the changes at issue. So, I order the strata to, within 120 days of the date of this decision, hold an SGM or AGM to vote on a resolution under SPA section 71 to approve the June 2021 alterations to the common property planters and garden beds.
40. I order that if the resolution is not approved by a  $\frac{3}{4}$  vote at the general meeting, then within 120 days of the general meeting, the strata must remove the alterations, including the plants and rocks planted in the planters and garden beds in June 2021, and replant similar plants to restore the planters and garden beds to their state before the June 2021 alterations.

***Issue #2. Did the strata treat the applicants in a significantly unfair manner?***

41. The applicants say the strata treated them in a significantly unfair manner by failing to comply with SPA section 71. However, they did not request any different remedies for significant unfairness, and I find that in any event, the strata must comply with SPA section 71. Given these circumstances, I find it unnecessary to determine whether the strata treated the applicants in a significantly unfair manner.

**CRT FEES AND EXPENSES**

42. 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 therefore order the strata to reimburse the applicants for CRT fees of \$225. The parties did not claim any specific dispute-related expenses.

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

**ORDERS**

44. I order the strata to, within 90 days of the date of this decision, hold an SGM or AGM to vote on a resolution under SPA section 71 to approve the June 2021 alterations to the common property planters and garden beds.

45. I order that if the resolution is not approved by a  $\frac{3}{4}$  vote at the general meeting, then within 120 days of the general meeting, the strata must remove the alterations, including the plants and rocks planted in the planters and garden beds in June 2021, and replant similar plants to restore the planters and garden beds to their state before the June 2021 alterations.

46. I order that within 30 days of the date of this order, the strata pay the applicants \$225 in CRT fees.

47. The applicants are entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.
48. 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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David Jiang, Tribunal Member