



# Civil Resolution Tribunal

Date Issued: March 20, 2023

File: ST-2022-003640

Type: Strata

Civil Resolution Tribunal

Indexed as: *Stewart v. The Owners, Strata Plan NW 1370*, 2023 BCCRT 229

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

KERRI STEWART

**APPLICANT**

**A N D :**

The Owners, Strata Plan NW 1370

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Leah Volkers

## **INTRODUCTION**

1. This dispute is about a common property deck replacement.
2. The applicant, Kerri Stewart, co-owns a strata lot (SL116) in the respondent strata corporation, The Owners, Strata Plan NW 1370 (strata).

3. It is undisputed that the strata removed an existing common property deck that was located immediately adjacent to SL116 and used exclusively by SL116's occupants, including the applicant. The strata undisputedly only replaced half of the deck with a smaller patio, and installed a raised garden where the other half of the original deck was located. The applicant says she wants the entire deck to be usable like it was before, and asks for an order that the strata complete the deck by "putting in the same pavers as the other half". The applicant says the smaller patio and raised garden is a significant change to common property. Although the applicant lists \$2,000 as the amount of her requested remedy, I find she is not claiming any reimbursement or compensation. I find she only asks for an order that the strata replace the original common property with a deck or patio of the same size.
4. The strata says it replaced the failing common property deck with a smaller patio and raised garden to accommodate a Sequoia tree's root system. The strata says it was reasonable to do so based on advice from an arborist and its contractor. The strata denies that the smaller patio and raised garden is a significant change to common property.
5. The applicant is self-represented. The strata is represented by a strata council member.

## **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.

### ***Hearing request***

10. In her application for dispute resolution, the applicant alleged that the strata failed to schedule a hearing within 4 weeks of her request, and did not provide a response after the hearing, as required by *Strata Property Act* (SPA) section 34.1. In submissions, the applicant asks for an order that the strata not contravene the SPA, and specifically section 34.1. However, she did not request this remedy in her application for dispute resolution, so I find it is not properly before me. Therefore, I have not addressed this issue in this dispute.
11. The applicant also makes various allegations about the strata's failure to communicate with her during the common property repairs. However, she requested no remedy for this alleged issue, so I find it unnecessary to address it in any detail in this dispute and I make no findings about it.

## **ISSUES**

12. The issues in this dispute are:
  - a. Has the strata reasonably repaired and maintained the common property area beside SL116?

- b. Was the strata's common property repair a significant change?
- c. What remedies are appropriate, if any?

## **EVIDENCE AND ANALYSIS**

- 13. In a civil proceeding such as this one, the applicant must prove her claims on a balance of probabilities (meaning more likely than not). I have reviewed all the parties' submissions and evidence, but I only refer to what I find relevant to provide context for my decision.
- 14. The strata filed consolidated bylaws in the Land Title Office in 2018. The strata filed further bylaw amendments in 2021, but none are relevant to this dispute.

### ***Has the strata reasonably repaired and maintained the common property deck beside SL116?***

- 15. The strata is responsible for repairing and maintaining common property under the SPA and the strata's bylaws. Under SPA section 72, the strata must repair and maintain common property. It is well established that the standard the strata is held to in the exercise of this duty is reasonableness. The obligation to repair and maintain can include replacement, where that is the only reasonable option. See *The Owners of Strata Plan NWS 254 v. Hall*, 2016 BCSC 2363. The strata must make repair and maintenance decisions that reasonably balance competing interests between owners. See *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784.
- 16. What is reasonable in the circumstances depends on the likelihood of the need to repair, the cost of further investigation, and the gravity of the harm sought to be avoided or mitigated by investigating and remedying any discovered problems. See *Guenther v. Owners, Strata Plan KAS431*, 2011 BCSC 119 at paragraph 40.
- 17. When faced with a range of possible solutions to solve a problem, the fact that a strata chooses a good, less expensive solution instead of a better, more expensive solution does not render its approach unreasonable. See *Weir* at paragraph 28. Further, a strata corporation does not have a duty to repair or maintain common

property in accordance with the requirements of a specific owner. See *Swan v. The Owners, Strata Plan LMS 410*, 2018 BCCRT 241 at paragraph 51.

18. It is undisputed that the strata removed a wooden common property deck located beside SL116 because it was rotten and required replacement. The strata only replaced half of the deck with patio pavers, and installed a raised garden where the other half of the deck was originally located. The applicant says the strata should have replaced the entire deck. So, the question is whether the strata's decision to replace the deck with a smaller patio and raised garden was reasonable.
19. For its part, the strata says it installed a smaller patio and raised garden to accommodate a Sequoia tree's root system, because the city would not allow the strata to remove the tree. The strata says based on advice from an arborist and its contractor, it ruled out any rigid decking because the raised area would require the installation of multiple footings that would shift as the tree roots grew. The evidence shows the strata's contractor said the best option was to replace the original deck with a smaller patio and raised garden.
20. The applicant does not dispute that the strata followed the advice of its contractor in deciding to replace the deck with a smaller patio and raised garden. The courts have found that a strata corporation is entitled to rely on and be guided by the advice of professionals. See *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 at paragraph 56. Therefore, if the installation is not a significant change as the applicant alleges, I find the strata's approach to replacing the common property deck would not be unreasonable. With that, I turn to the question of whether the strata's common property repair was a significant change.

***Was the strata's common property repair a significant change?***

21. The applicant says the strata replacing the deck with a smaller patio and raised garden is a significant change to common property, and says there was no vote to approve this change.

22. SPA section 71 says that the strata cannot make a significant change to the use or appearance of common property unless the change is approved by a resolution passed by  $\frac{3}{4}$  of the owners or the change is immediately necessary to ensure safety or prevent significant loss or damage. There is no suggestion that the removed deck needed to be immediately replaced to prevent loss or damage.
23. The strata argues that it would be procedurally unfair to address this issue because the applicant did not include this allegation in her “original claim”. I do not accept this submission. First, I find the applicant’s allegation is merely argument to support her claim that the original deck should have been replaced with a deck of the same size, and is not a new claim. Second, although the strata says that if this allegation had been raised in the Dispute Notice, it would have obtained other evidence to support its submissions on this issue, the strata did not explain why it was unable to provide this evidence at the time it provided its submissions. I find the strata had the opportunity to respond to the significant change argument in its submissions, and did so. Given all the above, I find it is not procedurally unfair to address whether the strata’s common property repair was a significant change to common property that required a  $\frac{3}{4}$  vote.
24. So, I turn then to consider whether the patio and raised garden installation was a significant change in the use or appearance of common property. In *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333, the BC Supreme Court set out a non-exhaustive list of factors to consider when deciding whether a change is significant:
- a. Is the change visible to other residents or the general public?
  - b. Does the change affect the use or enjoyment of a unit or existing benefit of another unit?
  - c. Is there a direct interference or disruption because of the changed use?
  - d. Does the change impact the marketability or value of a strata lot?
  - 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 has it allowed?

25. The applicant says the change from a deck to a smaller patio and raised garden is a significant change. The applicant says the deck's visual appearance and use were both altered, and says the raised garden area is unusable. The applicant says she cannot use and enjoy her "backyard" the way she used to, and says it went from being a useful patio to eat and gather on, to an area where dirt is tracked in and cannot be kept clean. She also says the change greatly depreciated the property value and negatively affects its marketability. The applicant says the outdoor space was a significant factor when she bought SL116. The applicant also says the deck beside SL116 is the only deck in the strata has been partially replaced with a raised garden.
26. The strata says the installation of a patio and raised garden is not a significant change of use. It says the applicant is still using the raised garden area.
27. I find photographs in evidence show the original common property deck likely covered an entirely fenced in area located beside SL116. Although not designated as limited common property, I find the deck was likely used exclusively by SL116's occupants, including the applicant, since no one else had access to it. Photographs of the original deck show two deck areas with patio furniture and planters.
28. Other photographs show that the new raised garden is an un-landscaped dirt area that takes up a large area that used to be covered by a deck. Although not precisely half, based on the photographs, I find the raised garden takes up about half the space of the original deck. The applicant undisputedly covered the raised garden area with some sort of carpet in order to store patio furniture and other items on it. While I find the photographs show the applicant is still making some use of the raised garden area, I find the photographs also show that the applicant is not able to use the raised garden in the same manner she used the original deck.
29. Given that fencing surrounds the raised garden and patio, I find it is visible to SL116's occupants, but not to other residents or the general public, and only affects SL116. Based on the photographs described above, I find the original deck provided SL116 with the benefit of a large fenced-in usable space. I find the change to a raised garden affected this benefit. I also find the raised garden directly interfered with the

applicant's use of that area. Although the applicant did not provide documentary evidence to support her allegation that the raised garden affects the marketability of SL116, I find from the photographs that the reduction of usable space in the fenced-in area immediately beside SL116 would likely affect its marketability.

30. Applying the *Foley* criteria, I find that replacing the deck with a smaller patio and a raised garden is a significant change to the use and appearance of common property. Therefore, I find a  $\frac{3}{4}$  vote to approve the change was required under SPA section 71, which the strata undisputedly did not do. I find the strata's decision to install the smaller patio and raised garden contravenes SPA section 71.

### ***What remedies are appropriate?***

31. The applicant asks for an order that the strata complete the deck by placing pavers over the raised garden area.
32. For its part, the strata says if I find the patio and raised garden installation is a significant change to common property, the appropriate remedy is to order the strata to call a general meeting to hold a  $\frac{3}{4}$  vote to approve the change, and only order the strata to change the installation if the resolution fails. I agree with the strata that this is the appropriate remedy in this dispute.
33. In *Lum v. Strata Plan VR519 (Owners of)*, 2001 BCSC 493 at paragraph 12, the court said it should only interfere with or override a strata's democratic governance when absolutely necessary. Here, I find that ordering the strata to change the patio and garden installation without first providing the strata with the opportunity to approve the significant change would clearly be an unnecessary interference in the strata's democratic governance.
34. I therefore order the strata to hold a general meeting to vote on a resolution under SPA section 71 to approve the replacement of the common property deck beside SL116 with a smaller patio and raised garden. If the resolution is not approved by a  $\frac{3}{4}$  vote at the general meeting, then the strata must replace the raised garden with a



comparable deck or patio of the same size and function as the original common property deck, at the strata's expense.

### ***CRT fees and expenses***

35. Under CRTA section 49, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I find the applicant was substantially successful in this dispute. I therefore order the strata to reimburse the applicant \$225 for paid CRT fees.
36. The applicant claims \$16.53 for "strata documents" as a dispute-related expense. However, the applicant did not provide any documentary evidence that shows she paid \$16.53 or any other amount for strata documents. So, I find this claimed dispute-related expense unproven, and I dismiss it.
37. The applicant also initially claimed \$546 for an arborist report as a dispute-related expense. However, in submissions, the applicant withdrew her \$546 arborist report claim because she did not need to obtain an arborist report and relied on the strata's arborist. Therefore, I have not considered this claimed expense and I make no award for it. The strata did not claim any dispute-related expenses, and I award none.
38. The strata must comply with SPA section 189.4, which includes not charging dispute-related expenses against the applicant.

### **ORDERS**

39. Within 90 days of the date of this order, I order the strata to hold a general meeting to vote on a resolution under SPA section 71 to approve the replacement of the common property deck beside SL116 with a smaller patio and raised garden. 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 replace the raised garden with a comparable deck or patio of the same size and function as the original common property deck, at the strata's expense.

40. Within 30 days of the date of this order, I order the strata to pay the applicant \$225 in CRT fees.
41. The applicant is also entitled to post judgment interest, as applicable.
42. Under CRTA section 57, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under CRTA section 58, 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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Leah Volkens, Tribunal Member