IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Macdonald v. The Owners, EPS 522,* 2019 BCSC 876

Date: 20190603
Docket: 18-0340
Registry: Victoria

Between:

David Macdonald

Petitioner

And:

The Owners, EPS 522

Respondent

Before: The Honourable Madam Justice Young

Reasons for Judgment

The Petitioner in Person:	D. Macdonald
Counsel for the Respondent:	J.J. Kinghorn
Place and Date of Hearing:	Victoria, B.C. January 9-10, 2019 and March 11-13, 2019
Place and Date of Judgment:	Victoria, B.C. June 3, 2019

Table of Contents

I. INTRODUCTION

[1] The petitioner challenges various actions of EPS 522 Strata Council (the "Council") on the basis that they have not complied with the *Strata Property Act*, S.B.C 1998, c.43 *(SPA)*. He seeks court declarations and related orders to correct the impugned conduct.

[2] The petitioner says the issues that he raises fall into three categories:

i. Actions that are significantly unfair under s. 164 of the *SPA*;

ii. Actions that contravene the *SPA* which can be remedied according to s. 165 of the *SPA*; and

iii. Conduct that fails to meet the standard of care expected of the Council.

[3] Specifically, the petitioner challenges the validity of bylaw amendments made in 2013 on the basis that the voting process did not comply with s. 128 of the *SPA.*

[4] The petitioner challenges the May 29, 2018 resolution to build a fence on top of a pony wall in front of the building.

[5] Finally, the petitioner raises numerous complaints about the general governance of the Council. These include allegations that the Council has miscounted quorum and votes, certified blank and irregular proxies, and created selective mailing lists. The petitioner also challenges the eligibility of certain council members to sit on the Council.

[6] The petitioner submits that the Council's behaviour warrants an appointment of an administrator pursuant to s. 174 of the *SPA*.

[7] The respondent acknowledges that bylaw amendments were made without a separate 3/4 vote between residential owners and non-residential owners as required by s. 128 of the *SPA.* As a result of the petitioner's repeated attempts to bring this to the Council's attention, the Council eventually addressed the issue in an

Special General Meeting ("SGM") on January 15, 2019 by holding a re-vote on the existing bylaws in accordance with s. 128 of the *SPA*.

[8] There was no re-vote on the fencing bylaw because the Council was aware of this legal proceeding.

[9] The respondent generally denies the complaints about governance. It submits that the Council does its best to comply with the *SPA* when counting votes, certifying proxies, and calculating quorum.

II. LEGAL BASIS

[10] The court has jurisdiction to review the activities of strata corporations under ss. 164 and 165 of the *SPA*, which state:

> 164. (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
>
> (a) action or threatened action by, or decision of, the Strata Corporation, including the council, in relation to the owner or tenant, or
>
> (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
>
> (2) For the purposes of subsection (1), the court may
>
> (a) direct or prohibit an act of the Strata Corporation, the council, or the person who holds 50% or more of the votes,
>
> (b) vary a transaction or resolution, and
>
> (c) regulate the conduct of the Strata Corporation's future affairs.
>
> 165. On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:
>
> (a) order the Strata Corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;
>
> (b) order the Strata Corporation to stop contravening this Act, the regulations, the bylaws or the rules;
>
> (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

[11] The standard of care for council members is set out in s. 31 of the *SPA*:

> 31. In exercising the powers and performing the duties of the strata corporation, each council member must
>
> (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
>
> (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

[12] Section 174 authorizes the court to appoint an administrator under certain circumstances:

> 174. (1) The strata corporation, or an owner, tenant, mortgagee or other person having an interest in a strata lot, may apply to the Supreme Court for the appointment of an administrator to exercise the powers and perform the duties of the strata corporation.
>
> (2) The court may appoint an administrator if, in the court's opinion, the appointment of an administrator is in the best interests of the strata corporation.
>
> (3) The court may
>
> (a) appoint the administrator for an indefinite or set period,
>
> (b) set the administrator's remuneration,
>
> (c) order that the administrator exercise or perform some or all of the powers and duties of the strata corporation, and
>
> (d) relieve the strata corporation of some or all of its powers and duties.
>
> (4) The remuneration and expenses of the administrator must be paid by the strata corporation.
>
> (5) The administrator may delegate a power.
>
> (6) On application of the administrator or a person referred to in subsection (1), the court may remove or replace the administrator or vary an order under this section.
>
> (7) Unless the court otherwise orders, if, under this Act, a strata corporation must, before exercising a power or performing a duty, obtain approval by a resolution passed by a majority vote, 3/4 vote, 80% vote or unanimous vote, an administrator appointed under this section must not exercise that power or perform that duty unless that approval has been obtained.

[13] Generally speaking, courts are cautious to not interfere with the democratic process of strata corporations unless there is just cause to do so. Justice Skolrood's

comments in *Campbell v. Strata Plan NW1018*, 2014 BCSC 2058 at para. 59 are instructive in this regard:

> [59] While the *Act* does authorize the court to issue orders concerning the actions of a strata corporation, the court will not lightly do so. One of the central elements of the *Act* is a governance structure under which the owners in a strata development elect a council of their peers to act in their collective best interests. There will rarely if ever be unanimity between the council and all owners concerning every action or decision taken by the council, but that is true in every democratic organization and the mere presence of disagreement does not justify judicial intervention (*Wier v. Strata Plan NW 17,* 2010 BCSC 784 at paras. 26 - 32).

III. GENERAL FACTS

[14] EPS 522 is a 14-story condominium in the 800 block of Johnson Street in Victoria, B.C. Occupation of the building began in November 2011.

[15] There are 115 strata lots. BC Housing owns strata lots 8 through 19 through a corporation, Provincial Rental Housing Corporation Inc. It provides low-income rentals. Beacon Community Association ("Beacon") manages those rentals. An employee of Beacon represents BC Housing at annual general meetings ("AGM"). BC Housing has 12 votes at AGM's. There are three commercial strata lots on the main floor of the building referred to as "live/work units" or "the townhomes."

[16] The petitioner and his wife own two condos in the building. They moved into the building in 2011.

[17] The Strata Corporation's bylaws originally provided for the Strata Corporation to be operated in sections with one section being residential and the other section being commercial.

[18] In an AGM held on March 27, 2013, the owners voted to amend the bylaws of the Strata Corporation. As a result of this resolution, the two sections were removed. At the same meeting, a series of other bylaw amendments were also voted on. The respondent agrees that this resolution did not comply with the voting procedure required by s. 128 of the *SPA*. The respondent sought to remedy the defect in 2019 by holding a re-vote.

[19] I will address the concerns raised in the petition, starting with the s. 128 error and the fencing bylaw as these are the primary issues. I will then address the governance irregularities of which the petitioner complains.

IV. SECTION 128 MIXED-USE STRATA LOT VOTING

[20] Section 128(1)(c) of the *SPA* requires that bylaw amendments in a mixed strata composed of both residential and non-residential strata lots be approved by separate 3/4 votes of both residential owners and non-residential owners. Failure to follow this procedure invalidates amended bylaws. Fines associated with invalid bylaws are also invalid: *Omnicare Pharmacy Ltd. v. The Owners, Strata Plan LMS 2854*, 2017 BCSC 256 at para. 123 (*Omnicare)*.

[21] The petitioner submits that since the very first bylaw amendment was done improperly, any subsequent amendments are invalid. Thus, the Strata Corporation must begin anew with the original 2011 bylaws. He submits that the January 15, 2019 re-vote did not remedy the prior defect because the corporation unlawfully and surreptitiously deleted and added new bylaws without advising owners of what they had done.

[22] These are two separate issues. The first issue is correcting the voting procedure to comply with s. 128. The second issue is whether or not the membership had sufficient notice of bylaw amendments to become properly informed prior to the re-vote on January 15, 2019.

[23] I note that the petitioner raised the issue of compliance with s. 128 numerous times and was ignored by the Council. Finally, the petitioner sent the corporation the *Omnicare* decision and at last they listened to him.

Ruling

[24] I find the re-vote at the January 15, 2019 SGM adequately resolved the voting defect in 2013 and that the owners had sufficient notice of the bylaws to be amended.

[25] The notice of the January 15, 2019 SGM was sent on December 20, 2018 identifying it as a single question meeting to re-present and approve the existing bylaws in accordance with s. 128 of the *SPA*. The bylaws were spelled out in the notice giving all members three weeks to consider them. I note that only four owners attended the meeting.

[26] In subsequent material, the petitioner raises further irregularities with the bylaw amendments. These issues are not properly before me but should be reviewed by the Council. The petitioner submits that amendments to bylaws 5.1 and 39.1 were considered but no motion was made and no vote was taken. He notes that the Council sought to add bylaws 16, 18 and 19.2 rather than deleting the previous version first and replacing them. I agree that this would result in two different versions of those bylaws being in place simultaneously.

V. FENCING RESOLUTION

[27] The three commercial townhomes are at street level facing Johnson Street. The petitioner described the features at the front of the building in his first affidavit. He deposed that in front of each of the businesses, there is a large L-shaped planter, each landscaped with a large tree and ornamental grasses. In front of those planters is a low, wide pony wall that is slightly taller than bench height. The wall breaks in three places for gates and entranceways to the three businesses. There is a privacy fence that runs along the back of the pony wall, interrupted with a gate for each townhome.

[28] The strata plan identifies the planters, pony wall, and landscaping as common property.

[29] In a 2014 council meeting, Rachelle Keeley, who is the owner of Premier Executive Suites (“PES”) operating out of one of the townhomes, asked if it was possible to put spikes or glass on the pony wall to stop people from sitting there.

[30] On June 16, 2016, she wrote to the property manager complaining about garbage and cigarette butts in the front planters. She suggested that the grilling

could be moved to the outside of the stonework on the street side to prevent people from sitting on the stone work, which might reduce litter. She asked the property manager to contact the contractor who installed the fencing around the townhouses to see if it would be possible to move the fencing to the outside of the stone work.

[31] There have been three attempts to pass a fencing resolution since Ms. Keeley raised the issue.

[32] For the most part, the respondent does not contradict the evidence submitted by the petitioner regarding the conduct of these meetings.

A. Three Attempts to Pass a Fencing Resolution

2017 AGM

[33] At the 2017 AGM, a resolution was proposed to remove the existing fencing and install similar fencing close to the southeast corner sidewalk on top of the front edge of the privacy wall to prevent people from sitting on these ledges. The proposed resolution stated:

> **The owners, strata plan EPS 522** hereby resolve by a 3/4 vote to remove and upgrade the privacy fence in front of the Townhomes and to pay for the cost of this upgrade by means of [a] Special Assessment in the amount of [$10,000]. Permanent withdrawal from the Contingency Reserve Fund such amount not to exceed $9,000.

[34] The petitioner, on a Point of Order, objected to the resolution on the grounds that the wording made no sense, that there was no such thing in the *SPA* as a "special assessment," the amounts were wrong, and the dimensions in the mock-up drawing were wrong. He submitted that to re-word the resolution at the meeting would contravene s. 50(2) of the *SPA.* That section provides that amendments to the wording of a proposed resolution must not substantially change the resolution and must be approved by a 3/4 vote before the vote on the resolution itself.

[35] Meeting Chair Yee's conduct during this meeting will be addressed later under the heading of "Unfair Acts."

[36] The petitioner's Point of Order was ignored and the following amended resolution was drafted:

> **THE OWNERS, STRATA PLAN EPS 522** hereby resolve by a 3/4 vote to remove and upgrade the privacy fencing in front of the Townhomes and to pay for the cost of this upgrade by means of a Special Levy in the amount of $10,000.

[37] The petitioner attempted to make further submissions about how to draft a special levy resolution but was not permitted to speak.

[38] The amended resolution was put forward for a vote but did not pass.

2018 AGM

[39] The second attempt to pass a fencing resolution was made at the 2018 AGM. At that AGM, the petitioner argued that moving the fencing would enhance property rights to the commercial townhome owners by providing the equivalent of a balcony. He argued that while all strata owners would be required to pay for the fence and its maintenance, the benefits of the fence would accrue to the commercial owners only. These concerns were ignored.

[40] As noted, one of the objectives of the proposed fencing resolution is to prevent people, including residents of a neighbouring transition house, from sitting on the pony wall and loitering in the area. The petitioner asked if there was any proof that residents from the transition house were sitting on the pony wall or proof that the problem had gotten worse in the past year as stated in the resolution. Chair Noordhof admitted that the Council had no proof.

[41] The petitioner requested that the members wait to proceed with voting on the fencing resolution because the matter was being litigated.

[42] The proposed resolution was amended to add the words, "Council do your own due diligence and ensure and confirm or ensure or reassure that there is no unrecognized legal implication with this action." The amendment was passed. The resolution appeared to pass with 29 votes in favour and 7 votes against.

[43] However, the petitioner subsequently noted that two of the proxies had no owner signatures and were therefore invalid. That meant that the resolution had failed.

May 29, 2018 SGM

[44] The April 10, 2018 Council meeting minutes report that the Council received the following legal opinion after the 2018 AGM:

> While noting that the area is currently behind the privacy fence consisting of common area planters (CP) and areas designated as limited common property (LCP) it is being recommended that an additional 3/4 vote resolution be re-presented to the owners authorizing the change of these areas to Limited Common Property for the exclusive use of the Townhome owners.

[45] Council agreed that the current resolution as approved, not be acted on, and that a lawyer be requested to provide a formal resolution per terms, noted above, that can be re-presented to owners for consideration.

[46] On April 20, 2018, the Council sent a notice to the strata owners, which attached a proposed resolution to *inter alia* convert the patios, planters, and pony walls to limited common property and to install a fence on the street side of these areas.

[47] The resolution passed at the May 29, 2018 SGM.

[48] The May 29, 2018 SGM was scheduled for 5:00 p.m. The time was unusual. Most general or special meetings were held at 6:00 p.m. to allow people to get home from work. The petitioner raised a concern with the Property Manager about holding the meeting in the roof garden because of noise issues.

[49] On May 25, 2018, the property manager advised the petitioner by email that the Council agreed with his concern and decided to change the meeting place. No official notice of location change was sent to owners but signs announcing the venue change were posted in the building. Sixty percent of the owners do not live in the building and would not have received notice of the change of location.

[50] The petitioner arrived at the new location at 5:02 p.m., which was two minutes after registration was slated to begin. Eleven owners were already present and seated. Each had already completed their sign-in and had received their voting card. The petitioner concluded that clearly some owners had been notified that registration would begin earlier than 5:00 p.m.

[51] There are no minutes of the May 29, 2018 meeting in the material before me. I do not know whether or not minutes were prepared. I note that s. 35(1)(a) of the *SPA* requires that minutes be taken at every AGM and SGM. There are minutes of the Strata Council meeting held on June 21, 2018, which briefly mention the May 29, 2018 SGM business.

[52] The petitioner does not dispute the corporation's right to build a fence provided there is a genuine need and the owners are fairly and properly informed. However, he raises the following concerns regarding the validity of the fencing resolution passed on May 29, 2018:

1. The resolution was already twice defeated and thus, the petitioner says there was no legal basis to reintroduce it for a third time;

2. The resolution attached to the April 20, 2018 notice made reference to incorrect sections of the *SPA*;

3. The April 20, 2018 notice improperly solicited the outcome that the Council supported;

4. Ms. Keeley, who initiated the fencing proposal, should not have been permitted to vote on the resolution due to a conflict of interest;

5. The costs and benefits of the resolution will not be equally distributed among owners; and

6. The resolution to convert the patios, planters, and pony walls to limited common property should be done under s. 257 of the *SPA,* which requires amending the strata plan.

[53] I note that at the May 29, 2018 SGM, the petitioner again raised the issue of s. 128 of the *SPA,* which requires separate residential and commercial votes. There was no re-vote on this resolution at the January 15, 2019 SGM because this petition on the issue was underway.

[54] Finally, the petitioner further submitted that he was treated in a severe and oppressive manner at the May 29, 2018 SGM. He says the chair declined to answer any of his objections and ignored most of his arguments. I will deal with that submission under “Unfair Acts” below.

[55] I will now consider each of the above concerns in turn.

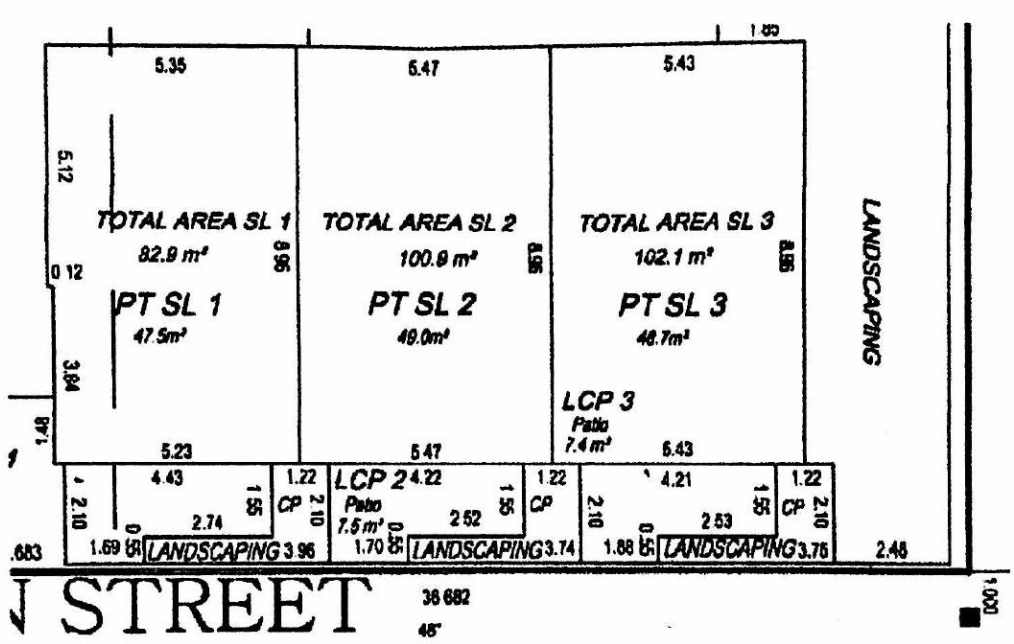
i. Reintroducing a Failed Resolution

[56] The petitioner submits that there is no legal basis for reintroducing a twice defeated resolution for a third time. I know of no rules preventing this from happening. He refers to Robert’s Rules of Order. However, I find that the *SPA* governs these proceedings and does not prevent the reintroduction of a previously failed resolution.

ii. Incorrect References to the SPA

[57] The proposed resolution attached to the April 20, 2018 notice read as follows:

> WHEREAS
>
> A. The Strata Corporation is located at 834 Johnson St. and consists of 115 residential strata lots with 3 live work commercial units facing onto Johnson Street.
>
> B. The three live work units each have a small fenced in patio that faces onto Johnson Street. The fenced in patios are a mix of LCP patio space & CP planters as shown in the excerpt from Strata Plan EPS 522 below.



C. Strata Plan EPS 522 does not show the 3' high pony wall that defines the LCP patios and forms part of the LCP patio of Strata Lot 1. The pony wall has been very popular with street people to hang out on, more so since the 844 city housing project opened up next door.

D. There is a small privacy fence on the inside of the pony wall facing the street.

E. The Strata Corporation wishes to replace the existing fence with a new fence located on top of the pony wall to discourage loitering and presented their plan to do so at the last AGM;

F. One owner objected, claiming loss of common property, and upon legal review it was confirmed that a resolution re change of CP to LCP should have also accompanied this "change in appearance" proposal.

G. The Strata Council believes it is in the best interest of the Strata Corporation to:

   a. install a new fence enclosing a portion of the common property on the southwest corner of Strata Plan EPS 522;

   b. designate the patios, planters and pony wall as the Limited Common property ("LCP") of the adjoining strata lots;

   c. remove the existing fences and install new fences at the top of the pony walls; and

   d. adopt a bylaw make [*sic*] the owners of strata lots 1, 2, and 3 responsible for the annual repair, maintenance and upkeep of the patios, walls and landscaped areas.

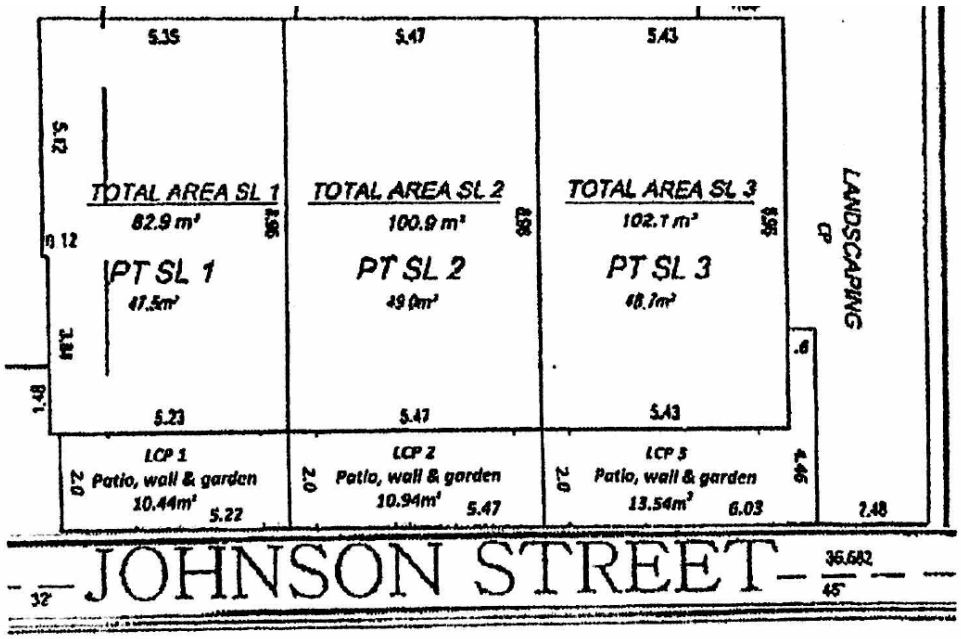
H. Pursuant to s. 74 of the Strata Property Act, S.B.C. 1998, c. 43 (the "Act"), a strata corporation may designate common property as limited common

property for the exclusive use of the owners of one or more strata lots, if the resolution is passed by a 3/4 vote of owners at the annual or special general meeting.

I. In order to retain the surveyor to draft and file the reference and explanatory plan, the Strata Corporation requires a 3/4 vote of the owners pursuant to section 96 of the Strata Property Act.

BE IT RESOLVED by a 3/4 vote of THE OWNERS, STRATA PLAN EPS 522 (the "Strata Corporation"), that pursuant to:

1) **Section 76** of the *Strata Property Act*, that the Strata Corporation designate the patios, landscaping planters, and pony walls adjacent to strata lots 1, 2, and 3 as the Limited Common Property of those strata lots as shown in the sketch plan below:

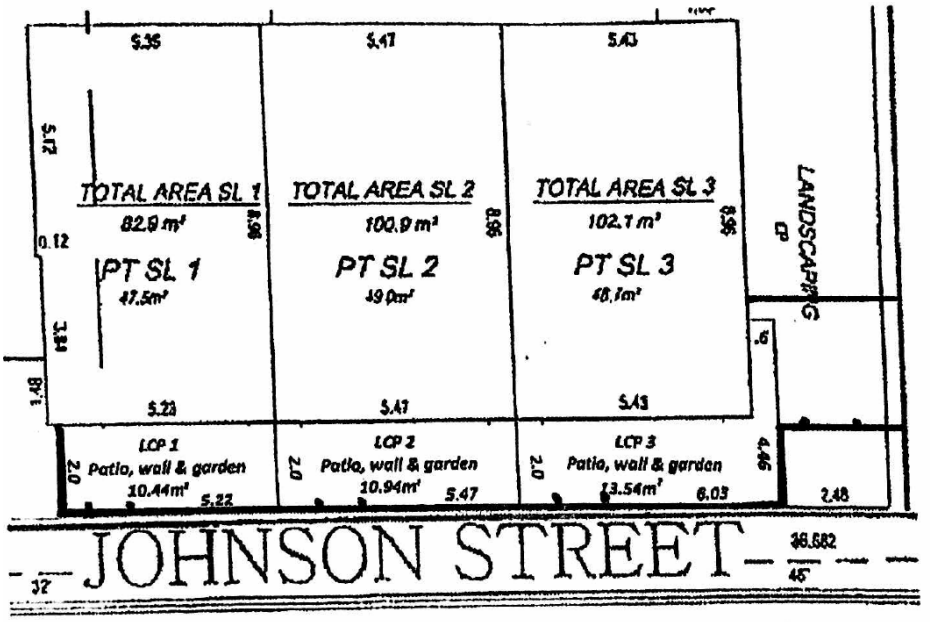


2) **Section 27** of the *Strata Property Act*, that the Strata Council be authorized and directed to:

   a) Prepare a sketch plan showing the dimensions in arears [*sic*] of the limited common property, and to file that sketch plan at the Land Title Office along with this resolution;

   b) In the event that the Land Title Office does not accept the Council's sketch plan, to retain a surveyor to prepare an explanatory or reference plan showing the designations of the LCP patios referred to above, make amendments to the reference, sketch or explanatory plan, in its discretion, provided that such changes meet the intention of this Resolution, finalize the reference, sketch or explanatory plan and otherwise ensure that it is in registerable form for Land Title Office purposes, and to file the reference, sketch, or explanatory plan with the land title office; and

c) remove the existing fencing from the landscaping planters in front of strata lots 1, 2, and 3 and installing a new similar fence in the location shown on the sketch plan below:



3) **Section 96** of the *Strata Property Act,* that the Strata Corporation be authorized to expend up to $14,000.00 from the Contingency Reserve Fund to:

   a) pay for the removal and replacement of the existing fence as shown in the sketch plan above; and

   b) and if required to retain the surveyor to draft the reference, sketch, or explanatory plan and pay the associated filing costs.

4) **Section 72** of the *Strata Property Act,* that the owners approve any change in appearance or use of the common property arising out of the installation of the fence and the enclosure of Area A in the southwest corner of the Strata Plan arising as a result of fencing in that corner as shown in the excerpt from Strata Plan EPS 622, shown above.

5) **Section 128** of *Strata Property Act,* that the Strata Corporation adopt the following bylaw making the owners of Strata Lots 1, 2, and 3 responsible for the annual upkeep of their patios, landscaping planters, and pony walls:

52. Repair, Maintenance and Upkeep of the Patios of Strata Lots 1, 2, and 3

(1) Despite any provision in the Strata Corporation's bylaws to the contrary:

   (a) The owners of strata lots 1, 2, and 3 will be:

      (i) responsible for the maintenance of the plants and landscaping within the landscaping planters that form part of their limited common property;

(ii) responsible to clear and keep clean and free of obstruction, any drainage located on their patios;

(iii) the cleaning of the patios, landscaping planters, and pony walls that form part of their limited common property, including the removal of any garbage or debris left thereon;

The Strata Corporation will be responsible for the less than yearly repair, maintenance and replacement of the patios, the surface of the patios, the pony walls, and the landscaping planters and related irrigation system.

[58] At the meeting, the petitioner raised a number of concerns regarding the drafting of this proposed resolution.

[59] Part 1 of the resolution purports to resolve to designate the area as limited common property pursuant to s. 76 of the *SPA.* The petitioner points out that s. 76 applies when a strata corporation wishes to grant an owner or tenant permission to exclusively use common property for a limited period of time, not exceeding one year. A resolution to designate the area as limited common property for an indefinite period of time cannot be made pursuant to s. 76. The reference should have been to s. 74, which provides that common property may be converted to limited common property by way of a 3/4 vote. Such a resolution must be filed with the Land Title Office with a sketch plan that satisfies the registrar, defines the area of the limited common property, and specifies each strata lot whose owners are entitled to the exclusive use of the limited common property.

[60] At the meeting, the Council modified the fencing resolution to correct this error by changing s. 76 to s. 74.

[61] Part four of the resolution refers to s. 72 of the *SPA*, which concerns the repair of common property and not changes to the appearance or use of common property. The resolution should have referred to s. 71, which deals with the change in use of common property. This error was not corrected.

iii. Notice Not Neutral

[62] The petitioner says the notice of the May 29, 2018 SGM is not neutral. He says it solicits the result that the Council supports. The notice does not introduce any

contrary view on whether the change would benefit the whole building and it does not support a debate of the issue.

[63] Pursuant to s. 45(3) of the *SPA*, the notice of an AGM or SGM must include a description of the matters that will be voted on at the meeting, including the proposed wording of any resolution requiring a 3/4 vote.

[64] In *Azura Management (Kelowna) Corp. v. Owners of the Strata plan KAS2428*, 2009 BCSC 506 at para. 48 (rev'd 2010 BCCA 474 on other grounds), Justice Burnyeat suggested that notices should be restricted to factual matters and remain neutral to the outcome of the resolution.

[65] The notice of the May 29, 2018 SGM provided the wording of the proposed resolution. The proposed resolution identifies only one side of the debate as to whether a change in fencing would benefit the owners. No potential contrary view is articulated. I agree with the petitioner's submission that the notice only provides owners with the view of the council members.

iv. Conflict of Interest

[66] The petitioner submits that Ms. Keeley, who initiated the fencing proposal, is in a conflict of interest and should not be permitted to vote on the resolution. Ms. Keeley is the president and managing partner of PES, which is a business operated out of Strata Lot 1. The petitioner submits that Ms. Keeley's business would benefit from the resolution because it would convert common property to limited common property and create a private courtyard, thus enhancing the value of her business property.

[67] The respondent argues that Ms. Keeley was not in a conflict of interest by voting on the fencing resolution at general meetings because any owner can vote at a general meeting. I note that Ms. Keeley is not an owner but by the time of the May 29, 2018 SGM, she had secured a proxy from the owner of lot 1.

[68] I agree with the respondent's position that the conflict of interest provisions in ss. 32 and 33 of the *SPA* relate to council members voting at council meetings. They do not apply to owners voting at general meetings.

[69] I will deal with the petitioner's other concerns regarding Ms. Keeley's prior position as a council member under the heading, "Governance Issues."

v. Benefits and Costs of the Fence

[70] The petitioner questions why owners would pay up to $14,000 for the movement of this fence if it only benefits lots 1, 2, and 3. It would remove common property rights to the planters, grass, and landscaping, and provide limited common property rights only to three commercial owners. The three businesses would see enhanced property rights and property values. However, because the strata plan will not be changed, the increased value will not be reflected in the property assessment of those lots. On the other hand, the value of the other owners' lots will continue to be assessed as if that area was still designated as common property.

[71] This is an issue that should be voted on by the owners. It could be that the membership of owners believe they will all benefit from the movement of the fence, decreased litter in the front of the property, and decreased loitering. Without meeting minutes, I cannot be certain whether these issues were heard or debated at the meeting. I have only heard excerpts of audiotapes of the meeting.

vi. Section 257 Versus Section 74

[72] As noted above, the petitioner is concerned that without a change to the strata plan, the assessment of owners' property values will not reflect the conversion of common property to limited common property. For this reason, the petitioner submits that the resolution should be done under s. 257 of the *SPA* because, unlike s. 74, it would require a change to the strata plan. Section 257 states:

> **Amending strata plan to designate limited common property**
>
> **257** To amend a strata plan to designate limited common property, or to amend a strata plan to remove a designation of limited common property

made by the owner developer at the time the strata plan was deposited or by amendment of the strata plan, the strata plan must be amended as follows:

(a) a resolution approving the amendment must be passed by a unanimous vote at an annual or special general meeting;

(b) an application to amend the strata plan must be made to the registrar accompanied by

(i) a reference or explanatory plan, whichever the registrar requires, that

(A) shows the amendment, and

(B) is in a form required under the *Land Title Act* for a reference or explanatory plan, and

(ii) a Certificate of Strata Corporation in the prescribed form stating that the resolution referred to in paragraph (a) has been passed and that the reference or explanatory plan conforms to the resolution.

[73] Section 73 of the *SPA* clearly states that common property can be converted to limited common property by a 3/4 vote under s. 74 of the *SPA* or by an amendment to the strata plan under s. 257 of the *SPA*. The Strata Corporation may validly proceed under either method.

[74] The main difference between the two methods is the way in which the resulting designation of limited common property may be undone in the future.

[75] A designation of limited common property under s. 74 could be removed in the future by way of a 3/4 vote pursuant to s. 75 of the *SPA.* By contrast, an amendment to the strata plan under s. 257 would require a subsequent amendment to the strata plan in order to be undone. In this way, s. 257 may provide a more secure designation.

[76] There is nothing in the *SPA* that prevents the Strata Corporation from proceeding by way of a 3/4 resolution under s. 74. If the resolution passes, the only common property that would be converted to limited common property is the patios, pony walls, and planters. The Strata Corporation should not be compelled to amend the strata plan to effect this fairly minor change.

B. Ruling on the Fencing Resolution

[77] There are numerous irregularities in the resolution voted on in the May 29, 2018 SGM. I have concern over the unpublicized change of location for the meeting. The notice contained two errors with respect to the *SPA* section numbers (although one of those errors was corrected at the meeting). Separate votes were not taken for the commercial and non-commercial owners as far as I know. I find that the resolution is invalid.

[78] I exercise my jurisdiction under s. 165 of the *SPA* to direct the Strata Council to reconvene an SGM on proper notice with reference to correct *SPA* sections in the notice. The resolution is brought pursuant to s. 74, not s. 76 of the *SPA*. The resolution also falls under s. 71 and not s. 72 of the *SPA*. The proposed change is to the use of common property, not the repair of property.

[79] The notice should reflect the question raised by the petitioner and endorsed by this Court as to whether it is appropriate for all owners to be responsible for paying for the reconstruction of this fence if it is determined that the reconstruction of the fence will only benefit the owners of the commercial townhomes. This should be a democratic decision made by fully informed owners.

[80] There should be no change to the meeting time or location without proper notice to all owners.

[81] All proxies will be certified and must be signed in advance by owners with the name of the person who is to receive the proxy written in prior to the signature. Voting cards will be handed out and the vote should be scrutinized.

[82] Section 128 must be complied with so that there are separate votes for commercial and residential owners.

[83] Proper minutes of this meeting should be prepared promptly and that they be accessible on request pursuant to *SPA*, s. 36.

[84] I will now deal with the petitioner's complaints about general governance issues.

VI. GOVERNANCE ISSUES

A. Eligibility of Strata Council Members

[85] Pursuant to s. 28 of the *SPA*, council members must be owners, individuals representing corporate owners, or tenants who have been assigned a landlord's right to stand for council.

i. Ms. Keeley

[86] The petitioner says that Ms. Keeley served on the Council for a number of years when she was not qualified to do so.

[87] Ms. Keeley was incorrectly listed on the owners list from 2012 to 2016. In February 2018, the petitioner ascertained that Ms. Keeley had never been an owner in the Strata Corporation and was not appointed as a corporate representative nor did she have landlord rights assigned to her.

[88] Once the petitioner brought this irregularity to Council's attention, Ms. Keeley was provided a proxy form by Guy Breckinridge, the owner of strata lot 1. Ms. Keeley resigned from council in 2018.

ii. Beacon Employees

[89] The petitioner also questions the eligibility of certain Beacon employees to sit on the Council.

[90] Yvonne Noordhof deposed that BC Housing is the registered owner of strata lots 8 through 19. She provided a copy of the certificates of title, which show that the Provincial Rental Housing Corporation Inc. is the registered owner of those lots. I infer that this is BC Housing's corporate entity and nothing arises from the different names. As noted, the BC Housing rentals are managed by Beacon.

[91] The petitioner questions whether a senior rental housing provider's employee can hold proxies for BC Housing. He provided an excerpt of a document called, "The Senior Rental Housing Operator Agreement Schedule A" which purports to outline the relationship between the housing provider, Beacon, and BC Housing. Section 10 of Schedule A indicates that a provider's employee can be appointed to council "as set out in the EPS 522 bylaws." The petitioner submits that neither the original nor the most recent bylaw make any mention of BC Housing. The operating agreement makes no mention of proxies.

[92] David Macdonald (not the petitioner) who is now retired, was an employee of Beacon and held the proxy for BC Housing from 2013 to 2017 when he was replaced by Tim O'Brien. The petitioner submits that there were some irregularities in how Mr. O'Brien was voting. It was believed that he was voting under a standing proxy when in fact none existed. That proxy was produced after the fact but appears to be backdated to April 12, 2017.

[93] Beacon and BC Housing were not served with notice of this petition and I heard no submissions from them or from Mr. O'Brien.

[94] The respondent accepts that Beacon is the corporate representative of BC Housing for strata lots 8 to 19 and accepts its ability to appoint one of its employees to sit on Council.

Ruling on Council Member Eligibility

[95] Since Ms. Keeley has resigned from Council, I find that no further steps are required to deal with this issue.

[96] Section 56(3) of the *SPA* sets out that, subject to the regulations, any person can be a proxy. I see nothing in the *SPA* or the *Strata Property Regulation*, B.C. Reg. 43/2000, that would prevent a Beacon employee from holding a proxy for BC Housing. It appears that Mr. O'Brien's representation on Council may not have been properly documented prior to the petitioner raising this issue. Now that a proxy form

has been completed, and without further submissions from Beacon or BC Housing, I find this issue is now resolved.

B. Improper Proxy Solicitation

[97] The petitioner requested that Council desist from solicitation of proxy votes or conversely, that Council allow interested owners to add an information package with the notice so that members are informed of the issues and can decide whether to attend the meeting or whether to give proxies.

[98] Council took the position that they do not engage in solicitation of proxies.

[99] I have found above that the notice of the May 29, 2018 SGM was not neutral and improperly solicited a particular outcome.

[100] In the future, notices should remain as neutral as possible. If an issue is controversial, the notice should preferably outline the nature of the debate from both sides. This could be done in a few paragraphs and should not involve the addition of detailed information packages. Information packages can be provided at the meetings. The purpose of the notice is to alert owners to the nature of the debate and the date and time of the meeting.

C. Proxy Form Irregularities

[101] As noted above, there were two unsigned proxies certified at the 2018 AGM.

[102] The petitioner asks the Court to consider the validity of further examples of proxies, which he says are irregular.

1. One proxy for the May 29, 2018 SGM is not signed by hand or digitally. Rather, it is signed using a script type font. In my view, this is not a properly signed proxy.

2. Another proxy had a name that was covered up using liquid paper and replaced with a new appointee’s name. I cannot determine if the change was made before or after the owner signed the proxy.

3. The proxy of the owner of TH2 appointed Ms. Keeley. Ms. Keeley's name was then crossed out and replaced with Ms. Noordhof's name. It appears from the handwriting that Ms. Noordhof initialled the change. The change should have been initialled by the owner of TH2, not the appointee.

4. Finally, proxy forms certifying a class of people such as "council member" were accepted.

[103] I agree with the petitioner that many of these proxies should not have been certified.

[104] Proxies must be in writing and signed by the person appointing the proxy: *SPA*, s. 56(2)(a). Blank proxies are invalid.

[105] A proxy form must identify an individual as a proxy holder. A proxy which says "any council member" is irregular and should not be certified.

[106] A proxy form with no named appointee is an invalid proxy. The name of the council member should be written in or typed before the proxy is signed. If a proxy is completed and then the appointee's name is crossed out and replaced with a different appointee's name, the proxy may or may not be invalid. What is important is that the appointee's name was written or rewritten on the form before it was signed by the owner. Changes must be initialled by the owner in order for the proxy to be valid.

D. Property Management Contract Renewal

[107] The petitioner submits that the owners voted at the 2013 AGM to amend the existing property management contract to be of one year's duration rather than the unspecified and therefore indefinite period of the existing contract. However, the contract was never amended.

[108] The petitioner questioned Council about the issue in 2017. The property manager answered that, “this is the contract originally signed by the developer and subsequently ratified by the owners.”

[109] The property manager, Gateway Property Management (“Gateway”), was not interested in signing a one year contract, which would need to be renewed annually. However, Gateway agreed that it would accept a unanimous vote of Council as sufficient to terminate the contract in the future. This would be in addition to the Strata’s right under s. 39(1)(a) of the *SPA* to cancel the contract within two months’ notice if first approved by a 3/4 vote of owners.

[110] I am satisfied that this issue has been resolved. The petitioner is concerned that it would be less convenient for the Council to have to obtain a unanimous vote to end the property management contract. He does not consider the fact that a party to the contract would not agree to the amendment and that the Strata Council is not concerned about the termination of the management contract.

E. Fines Related to Invalid Bylaws

[111] The petitioner submits that if any fines have been issued by the Strata Council related to invalid bylaws, then the fines themselves are invalid and should be reimbursed. There is no evidence before me that this has actually occurred. As such, it is more of a hypothetical argument, which I need not address further.

F. Towing of Visitors’ Vehicles

[112] In 2012, the Strata Corporation erected signage in the visitors’ parking area. The signage required the visitor to display a suite number and phone number on the vehicle’s dashboard. The Strata Corporation began towing vehicles that were not in compliance with the signs.

[113] The petitioner says that his friend’s vehicle was towed while the friend was visiting the petitioner. The friend did not post a name or number on their dashboard. I have no evidence from the person who had their vehicle towed nor do I know the specific circumstances of that event.

[114] The petitioner challenges the practice of requiring disclosure of a name and phone number as an unlawful infringement of privacy.

[115] A parking pass system has now been implemented by the Council, which does not require displaying the name and phone number of a resident.

[116] The new parking pass system appears superior to the previous rules. I am not prepared to order reimbursement of past towing fees charged under the old rules to an unnamed person who has not sought reimbursement.

G. Move-In Fees

[117] In late 2016 and early 2017, the petitioner inquired as to whether PES was collecting move-in fees for its two rental condos in accordance with the bylaws. In May 2016, after the petitioner started a Civil Resolution Tribunal ("CRT") dispute that included the move-in fees, the Council took action. The Council claimed there had been an administrative error and that Gateway and PES reached an agreement to share payment of $800 in unpaid move-in fees for 2016 and 2017. Fees for 2014 and 2015 were not addressed.

[118] The petitioner also alleges that PES engaged in short-term rentals of less than one month.

[119] Ms. Keeley deposed that PES has never contravened the rental bylaws set out by the developer or the City of Victoria and that PES has never been a vacation rental company.

[120] Ms. Keeley also addresses the missing move-in fees in her affidavit. She deposed that upon check-in, a Form K is signed by the guest and faxed to Gateway. Gateway then responds to the receipt of the Form K by issuing an invoice for the move-in. An oversight occurred when a Gateway employee advised PES that PES did not need to send Form K for check-ins to the 834 building. Rather, the Gateway employee said PES should keep the Form K in a reservation file, should Gateway need to see it. Because of this error, the Form K was not collected and the

move-in-fee was not charged for a period of time. Ms. Keeley deposed that both Gateway and PES paid all missed move-in fees so that the Strata Corporation would not be short on this income.

[121] I accept Ms. Keeley's explanation and find that this issue has been resolved for 2016 and 2017. The Counsel has yet to address the 2014 and 2015 move-in-fees and whether further reimbursement is warranted. This inquiry should be made.

[122] I also accept Ms. Keeley's evidence that PES has not engaged in impermissibly short-term rentals.

H. Vote Counting

[123] The petitioner raises concerns about the transparency of the voting process. He submits that one or more scrutineers should be selected to monitor voting on resolutions. The petitioner complains that owners and council members are not provided with voting cards. Owners cannot tell how many votes support a resolution because a raised hand could represent several votes in the form of proxies. Owners have never been explicitly informed that the corporate representative of BC Housing holds 12 proxy votes.

[124] In an SGM held on February 2018, Council was asked if they would ensure that one or more volunteer scrutineers participate in all vote and ballot tallying. Council responded that at the 2017 AGM, an impartial owner volunteered to count the ballots for the first ever election for Strata Council. Council said this would continue moving forward. The petitioner is asking that a scrutineer be present for all votes, whether it be for electing council members or for other resolutions.

[125] The petitioner also asks that all ballots, tally sheets, and copies of proxy forms be securely saved for a period of two years and made available to owners to support any legal action if required.

[126] The respondent denies that there has been any questionable vote counting practices. It says that voting cards are handed out and that elections are scrutinized.

[127] The respondent submits that it is not entitled to keep proxies as they are the property of the holder. The Council did offer to have Gateway hold onto ballots and tally summaries.

[128] I cannot resolve the conflict in the evidence as to whether or not voting cards are handed out or AGM and SGM votes are scrutinized. Section 35 of the *SPA* sets out the records which must be retained by the Strata Corporation. Section 4.1 of the Regulations states the period for which those records must be retained. Proxy forms, tally sheets and ballots are not included in s. 35. In order for me to make a direction under s. 165 of the *SPA* I must find that there has been a breach of the *SPA* or the Regulations.

[129] I deny the petitioner's request that proxy forms, tally sheets and ballots be saved for two years. This is not a requirement under the *SPA*. In light of the past certification of blank and irregular proxies, I find that this matter can be addressed with the appointment of a scrutineer at every meeting to count votes. This may already be occurring. If it is not, then it should be.

I. Quorum

[130] The petitioner also submits that there have been quorum miscounts. He says the quorum count should be based on 33.3% of the total vote count for the strata, that is, 117.3.

[131] The respondent says that quorum for AGMs and SGMs is determined in accordance with s. 48 of the *SPA.*

[132] A quorum must be calculated as one-third of the total qualified votes. The total number needs to be verified.

VII. UNFAIR ACTS

[133] Section 164 of the *SPA* provides for court intervention to prevent or remedy unfair acts by the Strata Corporation against an owner or tenant.

[134] Justice Adair set out the meaning of “significantly unfair” in *Omincare* at para. 147:

> 147. The term "significantly unfair" in s. 164 encompasses conduct that is oppressive or unfairly prejudicial. "Oppressive conduct" has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial" conduct has been interpreted to mean conduct that is unjust and inequitable. See *Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578 (B.C. S.C.) ("*Reid*"), at paras. 11-13; aff'd 2003 BCCA 126 (B.C.C.A.) ("*Reid Appeal*").

[135] In *Dolan v. The Owners, Strata Plan BCS 1589,* 2012 BCCA 44, leave to appeal ref’d [2012] S.C.C.A. No. 141, Garson J.A. adapted a test set out in *Golden Pheasant Holding Corp. v. Synergy Corporate Management Ltd.*, 2011 BCSC 173, to the context of s. 164 of the *SPA.* Justice Garson articulated the test as follows:

> a) Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?
>
> b) Does the evidence establish that the reasonable expectation of the petitioner was violated by action that was significantly unfair?

[136] The petitioner says that the Strata Council has treated him significantly unfairly in many respects.

[137] When I review the communication between the petitioner and certain council members, I have to agree. That is not to say that all council members have treated the petitioner unfairly but certainly some have.

[138] An owner addressing Council on an issue concerning the Strata Corporation has a reasonable expectation that he or she will be heard, treated with respect, and that his or her concern will be considered by the Council.

A. Chair Yee

[139] The clearest example of unfairly prejudicial conduct toward the petitioner occurred during the 2017 AGM when council member Yee was chairing the meeting.

[140] When the petitioner raised a valid point at the meeting, Chair Yee turned his head 90 degrees and began a conversation with the property manager while the

petitioner was talking. Seeing this, the petitioner stopped speaking and Chair Yee turned his head back and said “go ahead David, I’m listening.” As soon as the petitioner resumed speaking, Chair Yee turned to the property manager again and began a conversation with him. Finally, Chair Yee turned back to the petitioner and said “so David, let’s cut the jaw” and told the petitioner to stop talking. I listened to an audio recording of this exchange. I find this conduct to be significantly unfair to an owner who was raising valid concerns at an AGM.

[141] At the 2017 AGM, the petitioner also spoke during the discussion of the fence resolution after another owner spoke for five minutes. Within one minute, the petitioner was interrupted by the Chair. The petitioner filed an audio recording of that conversation as an exhibit attached to his seventh affidavit. Another owner stopped the exchange, stating that it was getting too personal.

[142] This is an excerpt of that conversation:

> Chair Yee: I’m just going to stop you there for a second David. In this situation, your credibility is a little bit veiled, you once accused me of not caring because I didn’t live in the building and your sole reason for saying that is because you never saw me in the building just because our schedules happen to be different and I got so fed up of him repeatedly accusing me of not living in the building that I invited him into my home where he met my girlfriend and as he stood there in my living room …
>
> Petitioner: This is not connected.
>
> Chair Yee: He told me he appreciated my efforts in staging, and he called me a liar to my face …
>
> Other owner: I think we should get on with the meeting, this is getting too personal.
>
> Chair Yee: So I appreciate your comments but I think we’re going to move on here.

[143] I find the treatment of the petitioner by Mr. Yee in the 2017 AGM to be rude, dismissive, and hostile. It violates the petitioner’s reasonable expectation to be treated respectfully by the Council and to have his valid concerns heard. When he was cut off and ignored, he was denied the right to participate in the meeting.

B. Tim O'brien

[144] The petitioner attaches other communications with Tim O'Brien, which I will not reproduce here. Mr. O'Brien attempted to explain BC Housing's position to the petitioner in an email dated May 2, 2017. I find that communication to be quite reasonable.

C. Chair Noordhof

[145] At the 2018 AGM, the petitioner attempted to read s. 128 of the *SPA* and was told by the chair that she would not read it at this time. When the petitioner said he had some questions to raise and would like to read the provision, the chair responded that she would not allow him to read two pages of the statute. Finally, the petitioner was allowed to read a synopsis of what s. 128 says.

[146] I do not find fault with these communications. Chair Noordhof may have expressed some frustration at the 2018 AGM when she thought that the petitioner was going to read a volume of legal material but when he explained he would only read the synopsis, he was allowed to do so. There is nothing unfair about that conduct.

D. Separate Mailing List

[147] The petitioner says that he suspects he may be on a separate mailing list from other owners. He suspects that Council is using separate mailing lists to be selective about notices it sends to owners. This is a suspicion that the petitioner has not proved in evidence. If it was occurring, it would constitute significantly unfair conduct but I cannot find that it has occurred.

E. Conclusion and Direction under s. 164

[148] I find the conduct of Chair Yee to be significantly unfair. The petitioner has the right to raise concerns at meetings. His numerous objections may be frustrating for Council but he should be treated with respect and given the same rights to speak that other owners are given. These are directions to Council. I see no need for any further remedial action at this point.

VIII. APPOINTMENT OF ADMINISTRATOR

[149] The court may appoint an administrator if it is satisfied that it is in the best interests of the strata corporation: s. 174(2) of the *SPA.*

[150] In *Lum v*. *Strata Plan VR 519*, 2001 BCSC 493 at para. 11 (*Lum*), Justice Harvey set out the factors for determining whether appointing an administrator is in the best interests of the strata corporation:

> [11] In my view after reviewing the authority available, bearing upon this question, factors to be considered in exercising the Court's discretion whether the appointment of an administrator is in the best interests of the Strata Corporation include:
>
> (a) whether there has been established a demonstrated inability to manage the Strata Corporation,
>
> (b) whether there has been demonstrated substantial misconduct or mismanagement or both in relation to affairs of the Strata Corporation,
>
> (c) whether the appointment of an administrator is necessary to bring order to the affairs of the Strata Corporation,
>
> (d) where there is a struggle within the Strata Corporation among competing groups such as to impede or prevent proper governance of the Strata Corporation,
>
> (e) where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the Strata Corporation.

[151] I do not find that any of these conditions have been met in this case. I have not found that the Strata Corporation is incapable of managing its affairs. I have found some errors and certain instances of misconduct. However, I do not find that these issues rise to the level of substantial misconduct. I do not believe the appointment of an administrator is necessary to bring order to the affairs of the Strata Corporation.

[152] Furthermore, the petitioner has not proposed an administrator who is willing to take on the task or who has provided affidavit evidence indicating the cost of administration.

IX. CLOSING COMMENT

[153] The respondent submits that the petitioner's motivation is to be proven right and that this is an improper motive. I find that the petitioner's motivation in this petition is to be heard and to have errors corrected. I do not agree that this motive is improper and in many respects, I have agreed with his submissions. He has sought declarations from the court on how Council should conduct its business in the future.

[154] With these rulings, I am hopeful that the respondent will change some of its conduct and that the petitioner will put to rest some of the issues he has repeatedly raised. Hopefully this decision will allow those issues to conclude.

X. COSTS

[155] In his submissions, the petitioner urged me to find that the members of the Council have been dishonest or fraudulent.

[156] I have found no fraudulent or dishonest activity on behalf of the council members. At times, they have been careless in their decision-making but I recognize that the Council is staffed by volunteers who make their best efforts. I do not find any intention to deceive.

[157] I agree with the respondent that an allegation of fraudulent conduct is a serious matter and should not be taken lightly by the court. It is particularly egregious when alleged against volunteer council members who live in the building.

[158] At the hearing, I encouraged the petitioner to think carefully before making such allegations because if unfounded, they could result in cost consequences for him.

[159] Counsel for the respondent urges me to award special costs against the petitioner in this matter. The respondent referred the Court to *Lum* where the court ordered a higher scale of costs because of unfounded allegations of bad faith in an *SPA* dispute.

[160] The respondent also referred the Court to *Pacific Hunter Resources Inc. v. Hoss Management*, 2009 BCSC 1049, where serious allegations of fraud were alleged. In that case, Justice Ross set out the following test for special costs at para. 22:

> The test for an award for special costs is whether the litigant's conduct has been reprehensible, as that term has been defined in the jurisprudence. Reprehensible conduct has been found to encompass scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Special costs may be warranted when the court seeks to disassociate itself from the conduct of a litigant; see *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740, 9 B.C.L.R. (3d) 242 (C.A.). Special costs have been awarded:
>
> (a) where a party unsuccessfully alleges criminal conduct: *Kurtakis v. Canadian Northern Shield Insurance Co.* (1995), 17 B.C.L.R. (3d) 197, 70 B.C.A.C. 76 at para. 9;
>
> (b) where there is a totally unfounded allegation of fraud: *Paz v. Hardouin* (1996), 25 B.C.L.R. (3d) 201, 138 D.L.R. (4th) 292 (C.A.) at para. 9;
>
> (c) where there are unproven allegations of fraud, dishonesty or incompetence against lawyers: *Patriquin v. Laurentian Trust of Canada Inc.*, 2002 BCCA 6, 96 B.C.L.R. (3d) 318 (C.A.) at para. 29;
>
> (d) where the plaintiff shows reckless indifference to the legitimate interests of the defendant by failing to come to terms with "the manifest deficiency in its claim at an early stage in the proceedings": *Concord Industrial Services Ltd. v. 371773 B.C. Ltd.*, 2002 BCSC 900 at para. 27.

[161] I find that the petitioner has been substantially successful in this petition and the ordinary rule would be to award party and party costs to him. However, I find reason to depart from that rule because he persisted in unfounded allegations of fraud and dishonesty against council members. I exercise my discretion to deny him costs.

[162] Special costs have been awarded against litigants who make unfounded allegations of fraud in some cases. However, I dismiss the application for special costs against this petitioner. An award of special costs is always discretionary. The petitioner has been denied his costs and, as an owner, he will be contributing to the fees of the respondent's legal counsel in any event.

"B.M. Young, J."
The Honourable Madam Justice Young