

Case Name:

**East Gate Estates Essex Condominium Corp. No. 2
v. Kimmerly**

Between

East Gate Estates Essex Condominium Corporation No. 2,
plaintiff, and

Kenneth Kimmerly and Barbara Kimmerly, defendants

[2003] O.J. No. 582

Court File No. 99-GD-46945

**Ontario Superior Court of Justice
Cusinato J.**

Heard: February 3, 2003.

Oral judgment: February 3, 2003.

(14 paras.)

Counsel:

William F. Wright, for the plaintiff.

Kenneth Kimmerly and Barbara Kimmerly on their own behalf.

¶ 1 **CUSINATO J.** (orally):— The plaintiff, known as East Gate Estates, are a registered condominium corporation described as Essex Condominium Corporation No. 2. It comprises approximately 125 units. The operation of the corporation for all of its repair requirements or for common areas is governed by an elected Board of Directors. This Board directs policy as per the by-law for all areas relating to what is described as common elements - Exhibit 1 (Tab 1 & 2).

¶ 2 Procedurally for action to be instituted by a condo owner for any item involving a common area an action slip is submitted to the elected Board - Exhibit 1, Tab 5. This Board will then consider the propriety of the request to be taken. If rejected, accepted or varied, notice back to the condo unit owners will be provided.

¶ 3 In this instance, in August 1998 the owner of 1807 East Gate Estates initiated a request for a flower garden in front of their unit - Exhibit 1, Tab 6. The measurements of that flower garden are as shown on Tab 6 in Exhibit 1. The measurement in issue before this court is the dimension extending easterly from the wall of 1807 East Gate Estates. That measurement is shown to have been approved at 9'.

¶ 4 There is no dispute that the existing landscaping does not conform to this measurement and, in fact, is twice that depth.

¶ 5 Several letters were sent to the defendants as well as a hand written note - Exhibit 1, Tabs 8, 9, 10, 11; all to rectify and reduce the size of the landscaping.

¶ 6 During those exchanges, discussion ensued as to a number of compromises. This involved a period of extended time to the spring of 1999 to do the renovation to the flower garden - Exhibit 10. There was, in addition to this variation of when the work was to be completed, a discussion that the Japanese maple tree as planted could remain, with a rock surround. While dimensions are not identified by the evidence, it appears that such surround was not to be extensive.

¶ 7 In considering the evidence, there is one additional factor for this court's review. The defendants state, immediately after submitting the action slip filed into evidence, he advised Marny Sadler, that the dimensions shown on Exhibit 1, Tab 6 were in error and a new drawing or sketch submitted. Neither Marny Sadler, president of the condo corporation, or Frank Willis, vice-president acknowledged that any other sketch was provided to them, and, in fact, state they were aware of none. Added to this, Marny Sadler in her evidence never confirmed any discussions concerning another sketch or that any error by the defendants to the original dimensions - Exhibit 1, Tab 6 - were submitted to her. On the size of the flower bed, the defendants have taken the position there are other units with flower gardens and landscaping exceeding theirs, including 1778 East Gate, a unit owned by Kenneth Kimmerly's parents.

¶ 8 That is not, however, the issue before me, or is the wording landscaping like 1778 East Gate shown in Exhibit 1, Tab 5 of assistance. This wording is not of itself a reference to size or dimensions of the flower bed but rather the type of landscaping to be completed. That landscaping is identified by Exhibit 2.

¶ 9 It matters not therefore, that other units may have landscaping larger than a protrusion of 9'.

¶ 10 On the facts before this court the by-laws clearly provide p. 15, para. 17.11, Tab 2, Ex. 1 that hedges, gardens or other vegetation are not to be placed in the areas of the common elements unless provided or undertaken by the corporation.

¶ 11 The corporation is composed of a board of 10 directors, elected as provided by the procedures within the by-laws set out.

¶ 12 In this instance the Board provided an authorization for landscaping which was exceeded. There has been no movement from their position that there must be rectification. It matters not as shown by the photos - Exhibit 7 - that the landscaping appears to be beautifully done, or that all other unit holders find it pleasing. Where the elected Board concludes it is unacceptable for an area of the common elements which they are elected to govern their word is final. In a democracy, the manner in which to

overturn such a determination is through the election process and there is no evidence the condo Board ever rescinded their initial approval.

¶ 13 On this basis and for these reasons, the relief sought by the plaintiff is granted. There shall be an order declaring that the flower garden in front of 1807 East Gate violates and exceeds the authorization of the Board. This court on its own determination has decided to impose certain time limits. The defendant is to have 15 days from April 15, 2003 when the weather is amenable to carry out landscaping to correct the problem to conform with Exhibit 1, Tab 6. That is on or before April 30, 2003 the landscaping is to be rectified. If the work is not completed by that time, the Board of Directors are authorized to receive competitive estimates to have the work done at the defendants' expense. Such cost estimates as submitted are to be provided to the Master at Windsor on a reference with notice. Such estimate as approved by the local Master as deemed appropriate to rectify the flower bed for compliance shall upon confirmation by the trial judge constitute a judgment. Upon completion of the reference to the Master, her determination and approval, shall require approbation by this court. On the issue of rectification, this court makes no order as to relocation of the Japanese maple. It appears to be in line with the other trees fronting the other lot owners' units. (See Exhibit 7 - the elongated photo) In fact, the referral to the Japanese tree replaces a tree formerly there and which was dead. This judgment does not however authorize or extend to the surrounding of the Japanese tree with any stones, since there is no confirmation by the Board permitting this.

¶ 14 The plaintiff's action having succeeded, they are entitled to costs to be fixed. This court shall now fix those costs.

CUSINATO J.

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