
The Case of the Disappearing Landscaping

Publication / Date: The CHOA Journal- Fall 2015

Written by: Adrienne Murray / Hammerberg Lawyers LLP

A recent decision of the British Columbia Supreme Court, *Getzlaf v. The Owners, Strata Plan VR 159*¹ will be of assistance to strata corporations that are dealing with owners who object to changes to common property and that are dealing with owners who, without permission, make alterations to common property. In 2010, Mr. Getzlaf purchased a ground floor strata lot at the rear of the building which contained 36 strata lots. All rooms in Mr. Getzlaf's strata lot overlooked a lush and extensive back garden. The garden at the rear of the building formed the roof of the underground parkade. The parkade membrane covered a large area below the garden as well as below Mr. Getzlaf's strata lot and his patio. At the time the strata lot was purchased, the patio consisted of a solid concrete aggregate slab over the parkade membrane. The patio was surrounded by a brick perimeter wall approximately 18 to 24" high.

In 2013, the strata corporation received advice from three engineering firms that the parkade membrane needed to be replaced. During the investigation of the membrane failure it became apparent to the strata corporation that roots of plants and trees had contributed to the failure. All owners were provided with the information about the need to replace the membrane and the problems created by the landscaping in a memo in July 2013. The strata corporation then held an information meeting in November 2013. At that information meeting, owners were advised that the existing landscaping would be replaced with rock ballast.

The strata corporation held a special general meeting in March 2014 for the owners to approve a resolution to replace the parkade membrane. The notice indicated that the specifications for the membrane replacement had been prepared by a roofing consultant. The Judge commented that pursuant to section 71 of the *Strata Property Act* (the "SPA") the resolution required approval by means of a 3/4 vote. Section 71 of the SPA provides that a strata corporation may 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 annual or special general meeting. Thus, although not specifically stated in the Court's decision, it appears that the resolution that was to be voted on by the owners was for the purpose of approving a significant change to the appearance of common property or, at a minimum, included such a provision as part of the resolution.

The specifications provided that high density concrete pavers were to be installed over the filter cloth which covered the membrane on the patios adjacent to Mr. Getzlaf's strata lot and the patio of another strata lot also on the ground floor. Clear washed river rock was to be installed on the remaining roof surface. Rock ballast was therefore being proposed to replace the existing landscaping on the upper parkade roof. Although Mr. Getzlaf attended the meeting and voted against the resolution, the resolution was overwhelmingly approved by 32 of the 34 owners present at the meeting. The membrane replacement work was carried out in the Fall of 2014.

¹ 2015 BCSC 452

In September 2014, Mr. Getzlaf wrote to the strata corporation requiring permission to install a fence to enclose his patio. The strata council refused permission for a number of reasons including that the construction of any fences or enclosures on common property needs to be carefully considered so as to not compromise the design and integrity of the new roof system. The strata council confirmed that nothing was to be installed on the patio. The strata council also advised that once the reroofing project was complete, the inspection company would provide recommendations for the type of construction for which permission may be requested.

Notwithstanding that the strata council had denied Mr. Getzlaf permission, Mr. Getzlaf constructed a fence on the patio adjacent to his strata lot. The strata council advised Mr. Getzlaf that he would be fined for constructing the fence without permission and that he should submit detailed plans for consideration by the strata council. In the meantime the strata council advised that he should cease all work on the fence. Subsequently, Mr. Getzlaf replied that he would not remove his privacy screen and he advised that he would reinstall a shed on the common property. Mr. Getzlaf proceeded to place a firepit and gazebo type structure on the patio. The strata council invited Mr. Getzlaf to attend a strata council meeting however Mr. Getzlaf refused. The strata corporation proceeded to levy fines against Mr. Getzlaf.

In January 2015, the strata council received an estimate from a construction company for the installation of a privacy fence, bench seating area and a garden shed consistent with the appearance of the rest of the strata complex for the two ground floor strata lots.

Mr. Getzlaf petitioned the Court for an order that:

- the strata corporation restore the upper parkade to its original design which was a rooftop garden;
- the strata corporation restore the brick wall foundation at the perimeter of the patio so that Mr. Getzlaf could install anchor posts for the installation of a fence;
- the strata corporation be ordered not to remove the existing privacy screen without Mr. Getzlaf's authority; and
- all fines be removed.

Mr. Getzlaf argued that the strata corporation had acted in a manner that was significantly unfair particularly because it had not restored the landscaping to the situation prior to the membrane project. The failure to restore the landscaping resulted in a lack of privacy for Mr. Getzlaf and reduced the strata lot's market value. Mr. Getzlaf also argued that the strata corporation's obligation to maintain common property meant that it must restore areas affected by remedial work to substantially the same appearance as it was before the work began.

The strata corporation argued that Mr. Getzlaf was in breach of the bylaws for:

- altering common property without permission;
- placing a propane fueled patio heater underneath the balcony and adjacent to Mr. Getzlaf's new combustible structure thereby increasing the risk of fire; and
- attaching a structure of combustible construction to the building in violation of the strata corporation's bylaws and the zoning.

The strata corporation also argued that the structure Mr. Getzlaf erected posed a risk of damage to the roof membrane. The potential risk was confirmed by the roof consultants.

The Judge rejected Mr. Getzlaf's argument that the strata corporation acted in a manner that was significantly unfair. The Judge noted that the strata corporation took reasonable steps to inform the owners of the repairs and that they were required for maintenance and the preservation of common

property. The owners were clearly advised that the garden that was removed was a contributing cause in the need for the extensive renovation project. The Judge noted that the strata corporation also complied with the SPA's notice and voting requirements when obtaining authorization to proceed with the membrane replacement.

The Judge also emphasized that the strata corporation had not disregarded the petitioner's desire for privacy. Rather, it was in the process of obtaining estimates for the installation of privacy screening, fencing and plants for the benefit of both units 103 and 104, which was Mr. Getzlaf's unit, that would be consistent in appearance with the rest of the strata complex. The Judge emphasized that the strata corporation has a statutory mandate to care for the common property and ensure its available use for all owners. The Judge referred to the decision in *Fenby v. The Owners, Strata Plan NW 228* as authority for the proposition that it is not significantly unfair to order an owner to remove items from common property that had not been permitted by the strata corporation.

The Judge found that there was no basis for reversing the fines that had been levied against Mr. Getzlaf as Mr. Getzlaf was clearly in breach of the strata corporation's bylaws. The Judge noted that Mr. Getzlaf had ignored clear warnings that he should not proceed with his intended course of conduct and that the consequence of doing so included the fact that fines would be levied. In reaching his decision, the Judge considered that the legal principles related to the matter included the following:

- a strata corporation must act in the best interest of all owners and it must endeavor to accomplish the greatest good for the greatest number; and

- strata corporations must often utilize discretion in making decisions which affect various owners and that, at times, the strata corporation's duty to act in the best interest of all owners is in conflict with the interests of a particular owner or group of owners.

The *Getzlaf* decision confirms that strata corporations are not prevented from making significant changes to common property nor are they required to restore common property to its original state when repair and maintenance is required. However, in addition to noting that a 3/4 vote of the owners had been obtained, the Judge also considered whether the decision to install rock ballast rather than landscaping, notwithstanding that it had been approved by a 3/4 vote, was significantly unfair to Mr. Getzlaf. Thus, simply because the decision to install rock ballast was approved by a 3/4 vote of the owners was not enough to avoid a possible outcome that the strata corporation had acted in a manner that was significantly unfair to Mr. Getzlaf.

In reaching the decision that the strata corporation had not acted in a manner that was significantly unfair, the Judge considered that the strata corporation had a good reason not to replace the landscaping based on advice that the plantings and tree roots contributed to the damage. The Judge also considered that the strata corporation had obtained a quote to install a privacy fence, bench seating and a garden shed consistent with the appearance of the rest of the strata complex for both ground floor strata lots that faced the rear of the building thereby demonstrating that the strata corporation intended to restore Mr. Getzlaf's patio area in a manner consistent with the appearance of the building and in a manner that did not compromise the newly installed membrane.

By upholding the fines against Mr. Getzlaf, the decision should also serve as a warning to owners that, by altering common property without permission, they do so at their peril.