



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

OLC, PSF, LRE, FF, O

Introduction

This hearing was scheduled in response to the tenant's application for dispute resolution in which the tenants have requested an Order the landlord comply with the Act, that the landlord provide services or facilities required by law, that conditions be placed on the landlord's right to enter the site and that a Notice terminating or restricting a service or facility be found non-compliant and unconscionable and to recover the filing fee from the landlord for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence and testimony provided.

Issue(s) to be Decided

Must the landlord be ordered to comply with the Act?

Should the Notice terminating the use of the shed and garden be set aside or is that Notice valid?

Should limits of entry to the site be placed on the landlord?

Background and Evidence

The tenancy commenced in mid-2012. Rent for the site is \$300.00 per month. There is no signed tenancy agreement. The tenants live in a small home, constructed on wheels. The parties agreed that the tenancy is ending effective 1 p.m. on August 31, 2015 as the result of the landlord's Notice to convert the property to a non-park use.

The tenants supplied copies of 2 previous hearings related to the end of the tenancy. The landlord has been issued an Order of possession.

Both parties submitted maps of the rental site and adjoining properties owned by the landlord. There was no dispute that since the start of the tenancy the tenants have had exclusive use of a large shed that is immediately next to their home and a garden area on a property owned by the landlord, next to the lot on which the tenant's home is sited. At the start of the tenancy the tenants and landlord worked together, to raise the shed off of the ground onto supports. The shed was then left for the tenant's use.

On November 26, 2014 the landlord issued a Notice Terminating or Restricting a Service or Facility. The tenants were informed that effective January 1, 2015 they must cease using the garden area and the shed next to their home. The Notice indicated that no further use of the garden area, no planting or harvesting would be allowed. The shed would be dismantled and removed from the property.

Photographs of the shed show that the tenants use it for lumber storage, which is required as part of a business the tenants operate, building garden sheds and planter boxes. The shed has the power breaker box for the home mounted on an interior wall and has water service which runs to the home. The tenant's large freezer and composting toilet are also located in the shed.

The tenants submit that the shed has been an important part of their tenancy and agreement with the landlord. The shed forms part of the essential services in use by the tenants and forms a part of their livelihood. The tenants view the attempt to remove the shed as somewhat retaliatory.

Photographs taken of the garden at the start of the tenancy show an area that was overgrown with weeds. The tenants have brought in soil and bark mulch, installed raised beds and planted many shrubs, fruit bushes and perennials. The tenant freezes much of the produce for their use. Photographs showed a well-developed, organized, large garden area.

The tenants said it was unreasonable for the landlord to remove the use of the garden; particularly when the tenancy will end in August. The tenants do not wish to move plants until the last day of frost passes; April 19, 2015. The plants should be dormant when moved, or be dug up after the last frost date. The tenant has twenty-five years' experience as a gardener and disputed evidence supplied by the landlord suggesting trees could be moved in the winter months. The tenants planned to use the garden for spring food; which would be harvested in June and July. No harvest would occur in the fall as the tenants will be vacating the site.

The tenants said that the area the landlord wishes to remove from use constitutes at least 2/3rds of the site they rent. The site rental that they pay covers the use of the shed and garden area. The tenants submit that removal of the building and use of the garden would affect their quiet enjoyment of the property and affect their livelihood.

The tenants stated that on July 15, 2014 the landlord and a CVRD inspector entered the site without proper notice of entry. The tenants were upset that the inspector took photographs of the site, including their belongings.

On October 8, 2014 the landlord gave notice he was going to enter the site on October 9 to take pictures for insurance purposes. The tenants responded to an October 8, 2014 email from the landlord, informing them of entry. The tenants replied that they wanted proof the landlord required photographs for insurance purposes. The landlord replied that his insurance company had asked for photographs' and on October 9, 2014 he again emailed indicating he would be on the site the next day.

The tenants want the landlords' right of entry to the site restricted. The tenants believe the landlord is attempting to disturb them, to encourage the tenants to vacate.

The landlord confirmed that the tenants have had use of the shed and the garden area since the start of the tenancy. The landlord is now concerned that his inability to obtain liability insurance places him at some risk. The landlord submitted a December 22, 2014 letter from an insurance provider who state that since the property is not vacant they cannot offer liability coverage; they point out the landlord has no insurable interest in the tenant's structure. The private structure (the shed) does not meet the eligibility for insurance as the roof and foundation are not to code.

The landlord said that removal of the shed would at least reduce the possibility of liability and, on the advice of his lawyer; he has notified the tenants they must cease use of the shed.

The landlord views the garden as another possible source of liability. Further, the landlord said that he has now rented the home that is situated on the lot where the garden sits. This is a neighbouring property owned by the landlord. Those new occupants may wish to use the garden area; so it needs to be made available to those occupants.

The landlord said that the tenants have use of another shed where they could place the toilet and freezer. The tenants replied that the shed is full of belongings.

The tenants said that if the landlord plans on possibility allowing the occupants next door to use the garden the landlord would be faced with the same liability issues that he says exist with them.

The landlord said he spoke with an information officer with the RTB who told him he was within his rights to issue the Notice removing use of the shed and garden. The landlord believes he has acted in good faith.

The landlord said that as the tenants believe the use of the shed and garden constitutes 2/3rds of the site, he is willing to reduce the rent to \$100.00 per month; vs. the \$200.00

on the Notice. This sum was suggested by the tenants, if the Notice should be found to be valid.

Analysis

As indicated on the Notice issued by the landlord a landlord may terminate or restrict a service or facility if it is not essential to the use of the site. The Notice may also be set aside if the service or facility is found to be a material term of the tenancy.

The Manufactured Home Park Tenancy Act defines a service or facility as:

***"service or facility"** includes any of the following that are provided or agreed to be provided by a landlord to the tenant of a manufactured home site:*

- (a) water, sewerage, electricity, lighting, roadway and other facilities;*
- (b) utilities and related services;*
- (c) garbage facilities and related services;*
- (d) laundry facilities;*
- (e) parking and storage areas;*
- (f) recreation facilities*

Therefore, I find that the shed, used for storage, is a service or facility.

Residential Tenancy Branch (RTB) policy suggests that a landlord must not restrict a service or facility that is essential to the tenant's use of the rental unit or that is a material term of the tenancy. An essential service is considered one that is necessary, indispensable or fundamental. If the facility is not essential an arbitrator may also consider whether provision of the facility, in this case the shed, forms a material term of the tenancy agreement. This goes to the root of the agreement between the parties and the circumstances at the time the tenancy agreement was created.

From the evidence before me I find that the use of the shed was agreed upon at the very start of the tenancy. The landlord assisted the tenants in preparing the shed for use; which has continued until this day. I find that the use of the shed is fundamental to the tenant's enjoyment and use of the property and has formed a critical part of the way they live. The shed houses their portable toilet, their freezer and their wood working equipment and lumber. Use of the shed forms part of a business operated by the tenants, allowing them store lumber and completed some basic woodworking on site.

The only substitute for use of the shed would be another shed or structure, which would have to be constructed or purchased by the tenants for use until the end of August. The tenants would then be faced with the disruption of destruction of a shed immediately next to their home; the need to move electrical service and water lines, the cost of a new shed or structure and the cost of removing any new structure once the tenancy

ends. I find this would be unreasonable; particularly given that the tenancy will end in 8 months.

The landlord has raised the issue of liability insurance as the reasoning behind the Notice terminating the use of the shed. The landlord's submission that removal of the shed would reduce the possibility of liability did not satisfy me that any real concern exists. By virtue of allowing tenants on the property it is not unreasonable to think that some liability might exist; there was no evidence before me confirming that removal of the shed would satisfy the desire to avoid liability. It is up to the tenant's to obtain insurance for their property and any damage they may cause to the landlord's property.

Therefore, pursuant to section 55 of the Act, I find that the Notice terminating use of the shed is invalid. The tenants will have use of the shed, as it stands, until the end of the tenancy.

A garden is not defined by the legislation as service or facility. From the evidence before me, given the landlord's acknowledgement that rent should be reduced for the loss of the garden, I find that the garden area is viewed as part of the site rented to the tenants. Otherwise the landlord would not recognize the garden as a part of the tenancy at all. Even though the garden is situated on an adjoining property owned by the landlord, I find it forms part of the site rented.

Therefore, pursuant to section 55 of the Act, I find that the Notice terminating the use of the garden is not valid, as the garden is not a facility or service. Only a service or facility may be terminated, not part of the site rented. The tenants are a liberty to continue to use the garden until such time as the tenancy ends.

In relation to the landlords' right to enter the site, I find that the tenants reaction to photographs having been taken is not aligned with the landlord's right to take photographs for insurance purposes. The tenants do not possess the right to demand any proof from the landlord's insurer of any request that has been made of the landlord.

In future the landlord is encouraged to issue the proper written notice of entry as set out in section 23 of the Act. A copy of the section is appended after the conclusion of this decision. The landlord is also advised to serve notice in accordance with the legislation, vs. email; which is not an appropriate method of service. The parties may reach agreement for entry via email. I can see no reason to limit the landlord's right of entry by issuing an Order; the landlord is only reminded that access to a site must comply with section 23.

As the tenant's application has merit I find they are entitled to deduct the \$50.00 filing fee from the next month's rent due.

Conclusion

The Notice Terminating or Restricting a Service or Facility issued on November 26, 2014 is of no force. The tenants will have use of the shed and garden until the tenancy ends effective August 15, 2015.

This decision is final and binding and is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: January 08, 2015

Residential Tenancy Branch

Landlord's right to enter manufactured home site restricted

23 *A landlord must not enter a manufactured home site that is subject to a tenancy agreement for any purpose unless one of the following applies:*

- (a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;*
- (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:*
 - (i) the purpose for entering, which must be reasonable;*
 - (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;*
- (c) the landlord has an order of the director authorizing the entry;*
- (d) the tenant has abandoned the site;*
- (e) an emergency exists and the entry is necessary to protect life or property;*
- (f) the entry is for the purpose of collecting rent or giving or serving a document that under this Act must be given or served.*

