Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, FFT

Introduction

This hearing dealt with the Tenant's application under the *Residential Tenancy Act* (the "Act") for:

- an order that the Landlord comply with the Act, the regulations, or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the Landlord pursuant to section 72.

The Tenant and the Landlord's agents KB, MS, and AA attended this hearing. They were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

All attendees at the hearing were advised that the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure") prohibit unauthorized recordings of dispute resolution hearings.

Preliminary Matter – Service of Dispute Resolution Documents

The Landlord's agents acknowledged receipt of the Tenant's notice of dispute resolution proceeding package and documentary evidence. The Tenant submitted an Xpresspost tracking number and registered mail tracking number in support of service. I find the Landlord was served with the notice of dispute resolution proceeding package and the Tenant's documentary evidence in accordance with sections 88(c) and 89(1)(c) of the Act.

The Tenant provided a document containing written submissions which was emailed to the Landlord's agents during the hearing. I find the Landlord to be sufficiently served with this document pursuant to section 71(2) of the Act.

The Tenant acknowledged receipt of the Landlord's documentary evidence. The Landlord submitted a registered mail receipt and tracking number of service. I find the Tenant was served with the Landlord's documentary evidence in accordance with section 88(c) of the Act.

Preliminary Matter – Amendment of Style of Cause

This application initially listed KB, MS, and AA in their personal capacities as respondents together with the Landlord. During the hearing, I confirmed that KB, MS, and AA are employees of the Landlord. I find that none of KB, MS, and AA are named on the tenancy agreement, which I find to be between the Landlord and the Tenant only. As such, I have removed KB, MS, and AA as respondents in this application.

Issues to be Decided

1. Is the Tenant entitled to an order that the Landlord comply with the Act?
2. Is the Tenant entitled to recover the filing fee?

Background and Evidence

This tenancy commenced on February 1, 2008 and is month-to-month. The rental unit is part of a multi-unit complex owned by BC Housing and managed by the Landlord, a non-profit society. A signed copy of the tenancy agreement has been submitted into evidence.

In this application, the Tenant argues that the Landlord is not complying with section 28 of the Act, under which the Tenant is entitled to "quiet enjoyment" including the use of common areas for reasonable purposes. The Tenant submits that the Landlord is breaching and violating this section by intimidating and harassing the Tenant, as well as unreasonably refusing the Tenant access to a common area that is not defined in the tenancy agreement.

The Tenant's oral and written submissions contain the following evidence and arguments:

- The Tenant received a letter dated March 15, 2022 from the Landlord which indicates that the Tenant had installed a greenhouse on common property along the south boundary of the complex without written permission from the Landlord.
- The Tenant explains the disputed area is in fact along the east boundary of the property, not the south.
- The Tenant interprets the disputed area as her area because this was what she had been verbally told by the past executive director and tenant liaisons for the Landlord. The Tenant argues the disputed area is not common space because it has landscaping borders like the Tenant's exclusive areas in front of and behind the rental unit. The Tenant argues that the disputed area had not been maintained by the Landlord during the tenancy.
- The Tenant previously planted and maintained perennial flowers in the disputed area. The Tenant subsequently added two raised garden beds placed on the surface without penetrating the ground, a compost, and a greenhouse owned by the Tenant's neighbour. The Tenant denies having altered the area.
- The Tenant states that other tenants have interpreted the area as their own as well. The Tenant states that there are other raised garden beds, pots, children's toys, buckets, a trampoline, and bird houses, but the Landlord has not asked other tenants to remove those items as of August 31, 2022.
- The Tenant states that the Landlord's letter dated May 11, 2022 conveniently left out certain wording when quoting Clause 19 of the tenancy agreement.
- The Tenant denies having made any structural alterations. The Tenant states that the raised garden beds are 4 to 6 inches away from the irrigation lines.
- The Tenant explains she removed the greenhouse as requested and did not put any dirt in the greenhouse. The Tenant states that there was no discussion about the raised garden beds even though they were already there, and the raised garden beds were not part of the violation. The Tenant questions why she would be asked to sign an Alteration Agreement if the suggestion was to relocate the items to the Tenant's own area, such as the Tenant's patio.
- The Tenant states the greenhouse was returned to her neighbour's front yard. The Tenant states that her neighbour currently has the greenhouse in an area that is not in his "tenant use area" based on his drawing, though the greenhouse had been there for 5 years previously and the neighbour was never asked to remove it.
- The Tenant states that the raised garden beds have been there prior to May 4, 2022. The Tenant states she received an email from the current tenant liaison CP on April 25, 2022 complimenting the Tenant's garden. The Tenant states she had been informed that the raised garden beds were not the issue in the

Landlord's letter dated June 27, 2022. The Tenant questions why the Landlord threatened removal of the garden beds and charging the costs to the Tenant.

- The Tenant argues the Landlord provided conflicting evidence about whether the raised garden beds were "over" or simply "close to over" a main irrigation line.
- The Tenant agrees to remove the raised garden beds promptly within a reasonable amount of time if the arbitrator decides she has to remove them. If this application is decided in the Tenant's favour, the Tenant agrees to remove the raised garden beds by the end of the tenancy.
- The Tenant denies having caused "damage" within the meaning of section 32(3) of the Act.
- The Tenant states that she was subject to threats, harassment, and bullying to remove the garden beds which were not part of the violation initially. The Tenant states that the Landlord has provided false information in its disclosure.
- The Tenant denied that her raised garden bed area would be a potential liability hazard for the Landlord. The Tenant denied that children play near the area.

The Tenant submitted further evidence including:

- A timeline of events from May 4, 2022 to June 15, 2022;
- Photographs and explanations regarding the Tenant's garden originally located near the Tenant's rear patio, planted between 2017 and 2021;
- Photographs and explanations regarding the Tenant's garden relocated to the disputed area with the greenhouse in the spring of 2022;
- Photographs and explanations showing the Tenant's garden in the disputed area post-greenhouse removal;
- Photographs of the greenhouse back in front of the neighbour's unit;
- Photographs showing gardening work performed by the Tenant's neighbour without permission from the Landlord;
- Photographs of the common area grass in the irrigation zone;
- A video clip of the raised garden bed demonstrating the sprinklers in action; and
- Email and letter correspondence between the parties.

In response, KB referred to paragraph (b) of clause 19 in the parties' tenancy agreement and argued that the Tenant did not obtain the Landlord's permission before affixing or erecting objects to the rental property.

KB testified that the Landlord is a non-profit housing society with limited staff, and that they are doing their best with managing the situation. KB acknowledged that there may

be some conflicting or new information in the correspondence as the current tenant liaison CP was involved in a medical accident and has gone on medical leave.

KB testified it was initially believed that the raised gardens are over the top of the underground sewer lines, but the Landlord clarified once the lines were later exposed. KB testified there had been a situation with another tenant who had caused damage to the irrigation line. KB testified that the rental property is old, and the pipes are old and brittle.

KB testified that the Landlord wishes to pre-empt problems in terms of any alterations. KB explained that the Landlord's process is to look at what is being proposed by a tenant and have them sign an Alteration Agreement before proceeding.

KB testified the Landlord was left with the cost of removing an old wooden deck left by a tenant in another case where there had been no written approval on file. KB described the Landlord's staffing limitations which prevented the Landlord from fixing all of the "past wrongs". KB testified that the staff try to make sure alterations are on file, so the Landlord will know who is responsible for them and who will pay to remove them.

KB testified that the Landlord's representatives have offered to meet with the Tenant to discuss options. KB stated that the Landlord is not against beautification of the rental property and would like to have community gardens with flowers and vegetables for the residents.

KB stated that the area in which the Tenant has set up the raised gardens is part of a common area on the property where children play.

KB argued that uncontrolled alterations will have long-term financial costs to the Landlord and the Landlord is at risk of liability if people get hurt as a result of those structures. KB explained that the Landlord does not want to be stuck with the next tenant who does not have a green thumb and the Landlord is left responsible for the costs of removal.

KB testified that the Landlord maintains the common area where the raised garden beds are. KB stated that the Landlord is responsible for mowing the lawn and weeding in that area within its budget. KB acknowledged that he would love to see more plants in the common area, but the Landlord does not have a sufficient budget to install or maintain them.

KB explained that he took over as the executive director for the Landlord in January 2019. KB stated that the employees referred to by the Tenant no longer work for the Landlord. KB testified that the Landlord was not picking on the Tenant in particular. KB testified that another tenant who enclosed a back patio then asked for permission had to have it taken down, pre-approved with modifications, and then re-built.

KB indicated that the process will be difficult to enforce if the Landlord allows the Tenant to sign an Alternation Agreement to have unapproved alterations be accepted after the fact. KB testified that the Landlord is willing to work with the Tenant to look at approving the Tenant's proposed alterations. KB acknowledged that this case involves "well-done" garden beds, but one person's "excellent" alteration can lead to another person's poor alteration and then everyone will suffer.

The Landlord submitted additional evidence including:

- Letter and email correspondence with the Tenant;
- A drawing of the rental unit showing the Tenant's use area;
- Photographs of the Tenant's raised garden beds with markings to show the approximate location of the irrigation line; and
- A copy of the Landlord's Alteration Agreement template.

Analysis

1. Is the Tenant entitled to an order that the Landlord comply with the Act?

Section 62(3) of the Act states that the "director may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies".

In this application, the Tenant argues that the Landlord has breached section 28 of the Act, which states:

> **Protection of tenant's right to quiet enjoyment**
> 28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
> (a) reasonable privacy;
> (b) freedom from unreasonable disturbance;

> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [*landlord's right to enter rental unit restricted*];
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

To determine whether the Landlord has breached section 28 of the Act, it is necessary to examine whether the Tenant is entitled to have her raised garden bed in the disputed area as part of the Tenant's exclusive use of the rental unit or use of the common areas for reasonable and lawful purposes.

Clause 19(b) of the parties' tenancy agreement, which is relied on by the Landlord, states as follows:

> **19. ALTERATIONS, DECORATIONS AND OTHER USE OF PREMISES AND PROPERTY.** Unless prior WRITTEN CONSENT is given by the Lessor, the Residents shall not
> […]
> (b) affix to the Premises or the Property, or erect thereon any radio or television equipment or any other object whatsoever; […]

In this case, I find Clause 19(b) to be applicable to the Tenant, the Landlord, and the disputed area where the raised garden beds are located as follows:

- Page 1 of the tenancy agreement identifies the Landlord as the "Lessor" and the Tenant as the "Tenant".
- Clause 3 of the agreement identifies the rental unit as the "Premises".
- Clause 1 of the tenancy agreement defines "Property" to mean "the building in which the Premises are situated and surrounding lands and buildings managed by the Lessor". The area on which the raised garden beds are located is undeniably part of either the "Premises" or the "Property" as defined in the tenancy agreement.
- Clause 1 defines a "Resident" to include the "Tenant".

Based on the parties' evidence, including the floor plan of the rental unit and the aerial image of the rental property showing the disputed area, I find that the disputed area is part of the outdoor common area of the rental property, not an area exclusive to the Tenant. For reasons that will be explained in greater detail below, I find there is insufficient evidence that the Tenant has received permission to treat the disputed area

as her exclusive area. I find that the disputed area is therefore part of the "Property" as defined in the tenancy agreement. I further conclude that the Tenant is not entitled to quiet enjoyment of the disputed area as her exclusive area under section 28(c) of the Act.

Continuing with the analysis of Clause 19(b), I find it is undisputed that the Tenant did not obtain the Landlord's written consent prior to setting up the raised garden beds and associated items such as the compost.

I note that for the purposes of Clause 19(b), it does not matter whether the object affixed or erected to the Premises or Property causes damage. I find the emphasis of this clause is prior written permission from the Landlord to have the object affixed or erected. I find that the Tenant's obligation under Clause 19(b) is distinct from the Tenant's obligation to repair damage caused by the Tenant's actions or neglect under section 32(3) of the Act.

I also note that Clause 19(b) covers objects affixed to or erected on the "Premises", for which the Tenant would have exclusive use.

Based on a careful consideration of the evidence before me, I find the Tenant's raised garden beds to fall under the wording of Clause 19(b) as I find the raised garden beds to be fixtures that have been affixed to or erected on the Property.

Firstly, I find the wording in Clause 19(b) to be sufficiently broad so as to capture fixtures other than "radio or television equipment", as Clause 19(b) specifically refers to affixing or erecting "any other object <u>whatsoever</u>" (emphasis added).

Secondly, Residential Tenancy Branch Policy Guideline 1. Landlord & Tenant – Responsibility for Residential Premises ("Policy Guideline 1") states that a "fixture" is "a thing which, although originally a movable chattel, is by reason of its annexation to, or association in use with land, regarded as a part of the land".

Policy Guideline 1 further states:

> Chattels, such as brick, stone and plaster placed on the walls of a building, become realty after annexation. In other words, where personal property does not retain its original character after it is annexed to the realty or becomes an integral part of the realty, or is immovable without practically destroying the

> personal property, or if all or a part of it is essential to support the structure to which it is attached then it is a fixture.

Based the photograph evidence provided by the parties, I find the raised garden beds have become an integral part of the Property by reason of their annexation to or close association in use with the land. I find that the raised garden beds would not be easily movable without destroying the contents. Although the Tenant's evidence is that the middle raised garden bed is supported by the outer two boxes, I find that a sufficient portion of the structure is annexed to the land such that the overall structure has taken on the character of a fixture.

In making the finding that the raised garden beds are affixed to or erected on Property within the meaning of Clause 19(b), I also refer to the Merriam-Webster online dictionary which includes the following definitions for "affix" and "erect":

> "affix" (*transitive verb*)
> (1): to attach physically
> (2): to attach in any way: ADD, APPEND
> (3): IMPRESS
>
> "erect" (*transitive verb*)
> (1): to put up by the fitting together of materials or parts: BUILD
> (2): to fix in an upright position
> (3): to cause to stand up or stand out

I find that the raised garden beds are "attached" to the ground by virtue of having become fixtures that have lost their original character as chattels and are annexed to the land. I further find that the raised garden beds were "put up by the fitting together of materials or parts" or built on area where they stand.

Based on the foregoing, I conclude that the Tenant has breached Clause 19(b) of the parties' tenancy agreement by building the raised garden beds on the disputed area without first obtaining the Landlord's written permission. I find that the Tenant is not entitled to leave her personal belongings in the common area as such area is not part of the rental unit for which the Tenant has exclusive use during the tenancy.

The Tenant argued that she received verbal permission from the past executive director and tenant liaisons for the Landlord to use the common area. The Tenant also referred

to an email from CP complimenting the Tenant's flowers. Therefore, I find that despite my conclusion above, it is necessary to consider whether the Landlord's past conduct, including the past conduct of the Landlord's agents, has estopped the Landlord from relying on Clause 19(b) to have the raised garden beds to be removed.

The Supreme Court of British Columbia in *Guevara v Louie*, 2020 BCSC 380 states at paragraph 63 that "the principle of estoppel does not require a reliance on unequivocal conduct, but rather 'whether the conduct, when viewed through the eyes of the party raising the doctrine, was such as would reasonably lead that person to rely upon it:' *Bowen v. O'Brien Financial Corp.*, 1991 CanLII 826 (BC CA), [1991] B.C.J. No. 3690 (C.A.)".

I find the Tenant has provided insufficient evidence to establish that she was given permission to use the disputed area as her exclusive area. I note that the Landlord's previous executive director and tenant liaisons were not available to provide any testimony and no longer work for the Landlord. I also find the Tenant has provided insufficient evidence to explain the scope of the permission granted, if any. I find that permission to plant flowers in the ground in a common area for example, would not necessarily equate to permission to set up a greenhouse, raised flower beds, compost, or other structures in the same space. I find I am unable to conclude that the Tenant had prior permission based on CP's email dated April 25, 2022 alone. I note it is acknowledged by the Landlord that the Tenant's garden beds are "well-done".

Furthermore, I find that whether the Tenant's neighbour may be getting away with any unapproved modifications does not negate the Tenant's own obligation to seek the Landlord's prior written consent for her own projects as may be required in the parties' tenancy agreement. I find it is possible for a neighbour's unapproved modifications to go unnoticed by the Landlord and it would not be reasonable for the Tenant to assume she had permission to do something similar without first confirming with the Landlord directly.

Based on the foregoing, I do not find there is sufficient evidence to suggest that the Landlord or the Landlord's agents have acted in a way that would lead the Tenant to reasonably conclude she had permission to set up her items in the common area.

I conclude that the Landlord is not estopped from relying on Clause 19(b) of the tenancy agreement.

Having reached this conclusion, I return to the Tenant's claim that the Landlord had breached section 28 of the Act. As I have found the area containing the raised garden beds and compost set up by the Tenant to be part of the common area of the rental property, and that the Tenant had not obtained the Landlord's written consent prior to setting up those items contrary to the tenancy agreement, I conclude that the Landlord has not breached the Tenant's right to quiet enjoyment under section 28(d) of the Act. I find the Landlord has not attempted to restrict the Tenant's use of common areas for "reasonable and lawful purposes", because I do not find the Tenant's setup of the raised garden beds, compost, and other items without prior permission to be a reasonable or lawful purpose. I find that is it not reasonable or lawful for the Tenant to carve out a portion of the common area for her exclusive use without the Landlord's express consent.

Accordingly, I dismiss the Tenant's claim to seek an order that the Landlord comply with the Act, regulations, or tenancy agreement, without leave to re-apply.

I note that I am not without sympathy for the Tenant in this situation. I find KB also acknowledged that the Landlord is not against beautification of the rental property in general and hopes to have community gardens with flowers and vegetables for the residents to enjoy. However, I find the correct procedure was not followed in this case and the Landlord has legitimate concerns of potential liability and setting negative precedents for uncontrolled modifications by other residents.

Therefore, as I have found the Tenant to have breached Clause 19(b) of the tenancy agreement, and as acknowledged by the Tenant in her written submissions, I order the Tenant to remove her property, including the raised garden beds and compost, from the common area of the rental property with fifteen (15) days of the date of this decision. I make this order to give effect to the parties' rights under the Act and the parties' tenancy agreement pursuant to section 62(3) of the Act.

2. Is the Tenant entitled to recover the filing fee?

The Tenant has not been successful in this application. I decline to order reimbursement of the Tenant's filing fee under section 72(1) of the Act.

Conclusion

The Tenant's application is dismissed without leave to re-apply.

Pursuant to section 62(3) of the Act, I order the Tenant to remove her property, including the raised garden bed and compost, from the common area of the rental property within **fifteen (15) days** of the date of this decision.

This decision 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: October 01, 2022

Residential Tenancy Branch