Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, ERP, RP, FF

Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Preliminary Matter:

On March 17, 2014 the landlord requested an adjournment on the basis that they had not sufficient time to prepare, the owners were out of the country and they had not yet had an opportunity to discuss this matter with their solicitor. The tenant did not oppose the application. The tenant testified the Application for Dispute Resolution had been sent by registered mail and the landlord received it on March 6, 2014. I determined it was appropriate to grant an adjournment.

The hearing was reconvened on May 14, 2014. The applicant presented his evidence. However, there was insufficient time to hear from the respondent and the matter was adjourned to July 9, 2014. The telephone reception was poor on July 9, 2014 and it was not possible to proceed. The matter was adjourned to September 11, 2014 at which time the respondent presented its evidence.

At the end of the presentation of the respondent's evidence it was apparent there was insufficient time for the parties to make final submissions. I proposed that the applicant be given to September 19, 2014 to make final written submissions, the respondent be given to September 26, 2014 to make final written submissions and the applicant be given to September 30. 2014 to respond to the written submission of the respondent. The solicitor for the applicant initially objected as he made provided lengthy written

submissions prior to the hearing. I confirmed that all of his submissions would be considered. I further proposed that the respondent be given the opportunity to present written submission but if he did not wish to make them that it was not necessary. The respondent provided written final submissions.

Both parties were given a full opportunity to present evidence and make submissions. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present. All of the evidence was carefully considered including the following:

- The oral testimony of the applicant
- The oral testimony of the respondent
- The applicant's written submission dated March 3, 2014 including accompanying documents
- The applicant's Additional Relevant Evidence dated April 28, 2014
- Applicant's Comments on Landlord's Second Response dated June 25, 2013
- Applicant's Closing Statement dated September 16, 2014
- Applicant's Response dated September 26, 2014 in which he stated he would not be making a further submission
- The Respondent's Submissions and Evidence Package dated April 30, 2014
- The Respondent's Further Submissions of the Respondent and Second Evidence Package dated June 4, 2014
- Rule 8.5 and 11.5 – Sur-reply of the Respondent dated June 25, 2014
- The Respondent's Final Closing Argument of the Respondent dated September 18, 2014

Unfortunately there is a great deal of animosity between the parties and they have shown reluctance to work together to try to resolve their difficulties.

Much of the evidence and many of the submissions made by the parties were not relevant to the issues raised in this application.

The Application for Dispute Resolution seeks the following relief:

- A monetary order in the sum of $500 to restore damage to plantings
- An order to suspend or set condition on the landlord's right to enter the rental unit
- An order to recover the $50 filing fee
- An order that the landlord provide a written tenancy agreement and site boundaries
- An order ending the landlord provide quiet enjoyment without harassment

At the hearing the applicant withdrew his claim for a monetary order in the sum of $500 to restore damage to plantings as the plants have regrown. The applicant also withdrew his application for an order that the landlord provide him with a copy of this written tenancy agreement as that has been provided.

Issue(s) to be Decided

The issues to be decided are as follows:

a. Whether the tenant is entitled to an order that the landlord provide him with a site plan showing the site boundaries?

b. Whether the tenant is entitled to an order suspending or setting conditions on the landlord's right to enter the manufactured home site?

c. Whether the tenant is entitled to an order that the landlord comply with the Manufactured Home Park Act, Regulations and tenancy agreement by providing quiet enjoyment without harassment?

d. Whether the tenant is entitled to recover the cost of the filing fee?

Background and Evidence

The parties entered into a written tenancy agreement that provided that the tenancy of the manufactured home pad would commence on February 1, 2009 and continue on a month to month basis. The tenancy agreement provided that the tenant(s) would pay rent of $250 per month payable on the first day of each month in advance.

The tenant testified he was not provided with a copy of the tenancy agreement and a site plan outlining site boundaries at the time he entered into the tenancy agreement as required by the Manufactured Home Park Tenancy Act and Regulations. The tenant was subsequently provided with a copy of the tenancy agreement. However, the landlord does not have a site plan showing the site boundaries.

Analysis:

Tenant's Application that the landlord comply with section 12(1)(b) of the Manufactured Home Park Tenancy Act and provide the site boundaries of the manufactured home site:

Section 12 of the Manufactured Home Park Tenancy Act Regulations provides as follows:

> **Terms that must be included in a tenancy agreement**
>
> **12** (1) A landlord must ensure that a tenancy agreement contains
>
> (a) the standard terms, and
>
> (b) the boundaries of the manufactured home site measured from a fixed point of reference.
>
> (2) The terms set out in the Schedule are prescribed as the standard terms.

The landlord has not provided the tenant with a site plan that shows the site boundaries. The landlord does not have such a document. The tenant submits that the arbitrator should use data from the City of Nanaimo website to establish the site's exterior dimension and site boundaries. He provided the hearing with a copy of this plan showing the site is a trapezoid of approximately 13.75 x 27.60 meters. The submission of the tenant states that the dimensions of the Nanaimo GIS data are accurate for sites but acknowledges they do not provide information on where the boundaries between sites are relative to a fixed point in the park. This would require the landlord to commission a survey of the park and the establishment of site corner markers based on that survey. The tenant submits as a practical matter he and his neighbour have

effectively agreed on where the boundaries are to his site and both maintain their lawns and gardens inside those boundaries. The tenant's submission further states he has consulted with his neighbour and they have no objection to the establishment of the boundaries as set out in the plan. The tenant submits he should not suffer adverse consequence because the landlord shirked their responsibilities in documenting the boundaries.

The landlord submits the "site map" produced by the tenant is not accurate and that the landlord should not be forced to use it. The landlord produced evidence from the Manager of the department for the City of Nanaimo responsible for the content of land records that provided as follows:

- The source of the "site plan" provided by the tenant was the produce of hand digitizing the approximate mobile home site boundaries using an orthorectified digital aerial photograph as a reference.
- Information that could have been construed as manufactured home park site plan information was shown on the City of Nanaimo's website until on or about March 31, 2014 for some manufactured home parks. It was removed after a review of it found that because it was arbitrarily captured by digitizing from aerial photographs it had no legal basis as it was not complied using accepted methods or personnel licensed for that purpose.
- "The City of Nanaimo does not warrant or guarantee the accuracy or completeness of the information…Although the website does contain tools that allow end users to make measurements I can confirm all information shown on our website is for reference only and is not authoritative."

The landlord further submits the obligation under section 12(1)(b) of the Regulations does not apply to it for the following reasons:

- The order sought by the applicant interferes with the vested rights of the landlord in its tenancy agreements with tenants in the park who have resided in the park

long before the Manufactured Home Park Tenancy Act was enacted and before the landlord was required to provide the boundaries of manufactured home sites.

- The application amounts to a contractual amendment imposed upon the landlord and the Residential Tenancy Board tribunal has no jurisdiction to make such an order.

The park has a 55 year age restriction. Many of the tenants are long term residents who have lived in the park for decades. There are 71 sites. The landlord estimates that approximately 1/3 of the residents are 80 years of age or older. The longstanding arrangement the landlord has with the tenants is that the landlord maintains the large shrubs but the tenants cut the grass. Many of the tenants are not physically capable of maintaining the large shrubs. The landlord does not have a document showing internal lot lines within the park. The landlords submits that a determination of site boundaries completely ignores the lengthy history the landlord has had with its tenants, many of whom have resided in the park for decades. Historically the park has operated under a system where the landlord has free access to all of the sites so that shrubs can be pruned and the park maintained. The landlord submits that it would be a breach of natural justice and procedural fairness to grant an order declaring the boundaries of the applicant's site when doing so would affect the interests of neighbouring tenants.

The landlord submits that on the basis of statutory interpretation it is not bound to comply with section 12(1)(b) of the Regulations for the following reasons:

- Section 12(1)(b) interferes with the landlord's vested rights in its tenancy agreement with other tenants in the park who have resided in the park long before the landlord was required to provide site boundaries to its tenants.
- Section 12(1)(b) provides no enforcement mechanism for older manufactured home parks in which its tenants have self-regulated site boundaries without the need for drawings from the Landlord. To require the landlord to comply with section 12(1)(b) amounts to a contractual amendment which requires the consent of both the landlord and its tenants. The tribunal can order the landlord or tenant

comply with the Manufactured Home Park Tenancy Act but it cannot order two parties to enter into contractual negotiations which may not be successful.

The dispute between the parties raises difficult questions where legislation is enacted to standardize an existing relationship but in the process has the potential of affecting pre-existing tenancies. Section 12(1)(b) of the Regulations imposes a legal obligation on the landlord to provide the tenant with a site plan the boundaries of the manufactured home site measured from a fixed point of reference. The landlord's submission provides that obligation came into force on July 1, 1996 under the Tenancy Agreement Regulation. I do not accept the submission of the landlord that section 12(1)(b) does not apply to it because the obligation of the landlord to provide site boundaries would interfere with the landlord's vested rights in its tenancy agreement with other tenants in the park for the following reasons:

- The landlord was obligated under section 12(1)(b) of the Regulations to provide the applicant with site boundaries as part of his tenancy agreement as that tenancy agreement was entered into in 2009.

- Section 2 of the Manufactured Home Park Act provides as follows:

> **What this Act applies to**
>
> **2** (1) Despite any other enactment but subject to section 4 *[what this Act does not apply to]*, this Act applies to tenancy agreements, manufactured home sites and manufactured home parks.
>
> (2) Except as otherwise provided in this Act, this Act applies to a tenancy agreement entered into before or after the date this Act comes into force.

The legislature has provided that the Act and Regulations are to apply to tenancy agreements entered into before and after the date this Act comes into force.

- While the landlord presented evidence that some of the tenancies date back several decades, there is no evidence that the neighbours of the tenant (those directly affected) have tenancies of that age.
- The landlord submitted that to require the landlord to set site boundaries would interfere with the vested rights of the landlord in their agreement with other tenants. In my view this is not an accurate submission. The requirement that the landlord provide boundaries of the manufactured home site measured from a fixed point of reference does not interfere with vested rights but at most, clarifies those vested rights. The essence of the tenancy agreement under the Manufactured Home Park Tenancy Act is the rental of a manufactured home site which has boundaries. The demarcation of adjoining site boundaries is an issue that existed in manufactured home parks long before the enactment of the obligation on the landlord to provide a site boundary. This requirement is beneficial for the landlord and all tenants as it would reduce boundary disputes. In my view the landlord does not have a vested right in failing to properly demarcate the boundaries of what it is renting.

- The failure of the landlord in the past to clearly demarcate what they are renting to an individual tenant is not a valid defense to its statutory obligation to provide boundaries as part of tenancy agreement.

- The landlord alleged the demarcation of site boundaries between tenants would create problems between tenants. This is not a defense to the obligation imposed by section 12(1)(b) of the Regulations. Further, the landlord failed to present evidence of such a problem. Neither party presented evidence from the neighbours of the applicant indicating whether they accept or reject the proposed demarcation.

- To give credence to the landlord’s argument would shield the landlord from any obligation the future from complying with the Act and would defeat the purpose of the legislation.

- I do not accept the submission of the landlord that the creation of a clearly demarcated site boundary would create problems for elderly tenants in maintaining their site. All tenants are expected to cut the grass around their site in the present situation. Policy Guideline #1 includes the following:

> **PROPERTY MAINTENANCE**
>
> 1. The tenant must obtain the consent of the landlord prior to changing the landscaping on the residential property, including digging a garden, where no garden previously existed.
>
> 2. Unless there is an agreement to the contrary, where the tenant has changed the landscaping, he or she must return the garden to its original condition when they vacate.
>
> 3. Generally the tenant who lives in a single-family dwelling is responsible for routine yard maintenance, which includes cutting grass, and clearing snow. The tenant is responsible for a reasonable amount of weeding the flower beds if the tenancy agreement requires a tenant to maintain the flower beds.
>
> 4. Generally the tenant living in a townhouse or multi-family dwelling who has exclusive use of the yard is responsible for routine yard maintenance, which includes cutting grass, clearing snow.
>
> 5. The landlord is generally responsible for major projects, such as tree cutting, pruning and insect control.
>
> 6. The landlord is responsible for cutting grass, shovelling snow and weeding flower beds and gardens of multi-unit residential complexes and common areas of manufactured home parks.

The parties are free to enter into whatever agreement they want for maintenance of the grounds and the demarcation of site boundaries does not need to affect this.

- I do not accept the landlord's submission that this tribunal does not have the ability to enforce section 12(1)(b) in old manufacturing home parks that have a long history of tenants self-regulating site boundaries as to enforce that section amounts to an order requiring the Landlord to enter into contractual negotiations with its tenants. The demarcation of the boundary lines does not

involve a negotiation of a new contract but involves a clarification of what already exists.

Section 5 and 6 of the Manufactured Home Park Tenancy Act provides as follows

Act cannot be avoided

5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Enforcing rights and obligations of landlords and tenants

6 (1) The rights, obligations and prohibitions established under this Act are enforceable between a landlord and tenant under a tenancy agreement.

(2) A landlord or tenant may make an application for dispute resolution if the landlord and tenant cannot resolve a dispute referred to in section 51 (1) *[determining disputes]*.

(3) A term of a tenancy agreement is not enforceable if

(a) the term is inconsistent with this Act or the regulations,

(b) the term is unconscionable, or

(c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

An order that a party comply with the Act or Regulations is not an order that the one party enter into contract negotiations with the other. It is a determination that a party has failed to comply with the Act or regulations which can be enforced by the other party. Any provision in a tenancy agreement that is inconsistent with the Act or Regulations is not enforceable.

However, I do not accept the submission of the tenant that the site plan he has provided should be used as the boundary. This does not comply with section 12(1)(b) of the Regulation which requires that the landlord provide the boundaries of the manufactured home site measured from a fixed point of reference. Further, the manager for the City of Nanaimo has stated that it was arbitrarily determined and does not have legal effect.

I order that the landlord comply with section 12 (1)(b) of the Manufactured Home Park Tenancy Act Regulation by creating an addendum to the existing tenancy agreement that clearly specify the current boundaries of the manufactured home site measured from a fixed point of reference by November 30, 2014.

This will require that the landlord undertake a survey of the park. It is impossible for the landlord to comply with its obligations under the Regulations for many present and future tenants unless such a survey takes place.

The tenant's submission expresses concern that the landlord may unilaterally create site boundaries that are not consistent with what has been given. The landlord has an obligation to act in good faith. The tenant has rented a manufactured home pad. If the site boundaries as set out by the survey are inconsistent with what the tenant has been given the tenant retains the right to file an Application for Dispute Resolution to have that dispute determined. Presumably, at that time the parties would either join the neighbours.

Whether the tenant is entitled to an order suspending or setting conditions on the landlord's right to enter the manufactured home site?

Section 23 of the Manufactured Home Park Tenancy Act provides as follows:

> **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.

The landlord submits the tenant failed to prove the landlord entered onto the manufactured home site in a manner contrary to section 23 of the Act. The landlord produced one witness. She worked in the office as the administrator and did not have day to day knowledge of the actions of the gardener. I am satisfied based on the evidence presented that the gardener and others employed by the landlord went about their business without providing notice as required under section 23 of the Act. I accept the testimony of the tenant that the landlord and its agent have entered on his site without giving proper notice.

I order that the landlord comply with section 23 of the Manufactured Home Park Tenancy Act. I determined it was not appropriate to make further orders with respect to the landlord entering onto the tenant's site. The landlord was erroneously operating under the understanding that all tenants wanted the landlord to prune the shrubs and trees and they could go and come as they please.

Tenant's Application that the landlord comply with the Manufactured Home Park Act, Regulations and tenancy agreement by providing quiet enjoyment without harassment?

I accept the submission of the landlord that it is not appropriate to make an order based on testimony from a tenant who was not a party to these proceedings and did not attend and testify at the hearing. Further, I determined it was not appropriate to

consider similar fact evidence relating to a dispute between the landlord and another tenant.

The tenant testified as to the ill-tempered conduct of a representative of the landlord who did not attend the hearing. Certainly the letter from the landlord dated December 16, 2013 from KO demonstrates such ill-tempered dealings with the tenant and supports his testimony. KO did not attend the hearing and did not testify or provide an affidavit of his version of events. The landlord's witness did not have a good recollection of events when the tenant attended the office and appeared to be avoiding answering the questions. Morland-Jones v Taerk [2014] O.J. No. 2378 is of no assistance in considering a claim of a tenant for breach of the covenant of quiet enjoyment. That case dealt with a dispute between parties who lived across the road from each other that got out of hand.

However, I determined it was not appropriate to make an order with that the landlord comply with section 22 of the Manufactured Home Park Tenancy Act. The statutory provision impose an obligation on the landlord to behave in an appropriate matter whether or not I make an order. Much of the animosity between the parties arises as a result of a misunderstanding of the landlord's obligations with respect to carrying out duties under the Act. Hopefully the parties will be able to work together in the future now that they have a better understanding of the provision of the Act and Regulations. I determined it would not be of assistance to the parties where the evidence is in dispute to make a determination as to whether the landlord has breached the covenant of quiet enjoyment as the tenant is not seeking financial compensation. As a courtesy to the parties I have attached section 22 of the Manufactured Home Park Tenancy Act and the Policy Guideline dealing with quiet enjoyment so that the parties can arrange their conduct with this in mind.

Section 22 of the Manufactured Home Park Tenancy Act provides as follows:

> **Protection of tenant's right to quiet enjoyment**
>
> **22** 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 manufactured home site subject only to the landlord's right to enter the manufactured home site in accordance with section 23 *[landlord's right to enter manufactured home site restricted]*;
>
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Policy Guideline 6 includes the following:

> This guideline deals with a tenant's entitlement to quiet enjoyment of the property that is the subject of a tenancy agreement. At common law, the covenant of quiet enjoyment "promis(es) that the tenant . . . shall enjoy the possession and use of the premises in peace and without disturbance. In connection with the landlord-tenant relationship, the covenant of quiet enjoyment protects the tenant's right to freedom from serious interferences with his or her tenancy."[1] A landlord does not have a reciprocal right to quiet enjoyment.
>
> The Residential Tenancy Act and Manufactured Home Park Tenancy Act[2] (the Legislation) establish rights to quiet enjoyment, which include, but are not limited to:
>
> - reasonable privacy
> - freedom from unreasonable disturbance,
> - exclusive possession, subject to the landlord's right of entry under the Legislation, and
> - use of common areas for reasonable and lawful purposes, free from significant interference.
>
> Every tenancy agreement contains an implied covenant of quiet enjoyment. A covenant for quiet enjoyment may be spelled out in the tenancy agreement; however a written provision setting out the terms in the tenancy agreement

pertaining to the provision of quiet enjoyment cannot be used to remove any of the rights of a tenant established under the Legislation. If no written provision exists, common law protects the renter from substantial interference with the enjoyment of the premises for all usual purposes.

· unreasonable and ongoing noise;
· persecution and intimidation;
· refusing the tenant access to parts of the rental premises;
· preventing the tenant from having guests without cause;
· intentionally removing or restricting services, or failing to pay bills so that services are cut off;
· forcing or coercing the tenant to sign an agreement which reduces the tenant's rights; or,
· allowing the property to fall into disrepair so the tenant cannot safely continue to live there.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of quiet enjoyment.

It is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises, however a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations.

Substantial interference that would give sufficient cause to warrant the tenant leaving the rented premises would constitute a breach of the covenant of quiet enjoyment, where such a result was either intended or reasonably foreseeable.

A tenant does not have to end the tenancy to show that there has been sufficient interference so as to breach the covenant of quiet enjoyment, however it would ordinarily be necessary to show a course of repeated or persistent threatening or intimidating behaviour. A tenant may file a claim for damages if a landlord either engages in such conduct, or fails to take reasonable steps to prevent such conduct by employees or other tenants.

A landlord would not normally be held responsible for the actions of other tenants unless notified that a problem exists, although it may be sufficient to show proof that the landlord was aware of a problem and failed to take reasonable steps to correct it. A landlord would not be held responsible for interference by an outside agency that is beyond his or her control, except that a tenant might be entitled to treat a tenancy as ended where a landlord was aware of circumstances that would make the premises uninhabitable for that tenant and withheld that information in establishing the tenancy.

• Harassment

Harassment is defined in the Dictionary of Canadian Law as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome”.[3] As such, what is commonly referred to as harassment of a tenant by a landlord may well constitute a breach of the covenant of quiet enjoyment. There are a number of other definitions, however all reflect the element of ongoing or repeated activity by the harasser.

• Application to a residential hotel or other license to occupy

If an arbitrator determines that an agreement is a residential tenancy under the Legislation, that tenant is entitled to the covenant of quiet enjoyment.

• Claim for damages

In determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed.

The Supreme Court has decided that arbitrators have the ability to hear claims in tort, and that the awarding of monetary damages might be appropriate where the claim arises from the landlord’s failure to meet his obligations under the Legislation. Facts that relate to an issue of quiet enjoyment might also be found to support a claim in tort for compensation in damages. An arbitrator can award damages for a nuisance that affects the use and enjoyment of the premises, or for the intentional infliction of mental suffering.

On application, an arbitrator may award aggravated damages where a very serious situation has been allowed to continue. Aggravated damages are those damages which are intended to provide compensation to the applicant, rather than punish the erring party, and can take into effect intangibles such as distress and humiliation that may have been caused by the respondent’s behaviour.

• Ending Tenancy for Breach of a Material Term

A breach of the covenant of quiet enjoyment has been found by the courts to be a breach of a material term of the tenancy agreement. A tenant may elect to treat the tenancy agreement as ended, however the tenant must first so notify the landlord in writing. The standard of proof is high – it is necessary to find that there has been a significant interference with the use of the premises. An award for damages may be more appropriate, depending on the circumstances.

• Non-payment of Rent

A tenant may not refuse to pay rent because of a breach of the covenant of quiet enjoyment by the landlord, except as ordered by an arbitrator.

Application for the Cost of the Filing Fee:

I determined the tenant is entitled to recover the cost of the filing fee. I order that the landlord pay to the tenant the sum of $50 for the cost of the filing fee such sum may be deducted from future rent.

Conclusion

In summary I made the following order:

- I order that the landlord comply with section 12 (1)(b) of the Manufactured Home Park Tenancy Act Regulation by creating an addendum to the existing tenancy agreement that clearly specify the current boundaries of the manufactured home site measured from a fixed point of reference by November 30, 2014.
- I order that the landlord comply with section 23 of the Manufactured Home Park Tenancy Act.
- I order that the landlord pay to the tenant the sum of $50 for the cost of the filing fee such sum may be deducted from future rent.

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

Dated: October 10, 2014

Residential Tenancy Branch