Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

AMENDED DECISION

Dispute Codes OLC, O, FF

Introduction
This hearing dealt with an application by the tenants for an order compelling the landlords to comply with the Act, Regulation or tenancy agreement? Both parties appeared and had an opportunity to be heard.

Issue(s) to be Decided
What is the correct interpretation of the tenancy agreement?

Background and Evidence
The rental unit is a suite located on the upper level of an up and down duplex. The duplex was built as a single family home in 1907 and was converted to a duplex in 1942.

The landlords have lived next to the duplex in another character home since 1978. They bought the duplex in 2000. The landlords take great pride in both properties as evidences by their statement that: “We have worked hard to restore both the buildings and the grounds of both these properties to a level of aesthetic beauty and function.”

To understand the dispute it is necessary to have an understanding of the two properties.

A paved driveway runs between the duplex and the landlords’ property. According to the site plan filed by the landlords the driveway is about 16’ wide; only wide enough for one vehicle.

The landlords’ side of the driveway is edged by a concrete retaining wall topped by a picket fence, and the exterior wall of the landlords’ house. The duplex side of the driveway is bordered by a low stone wall separating the front yard from the driveway, and the exterior wall of the duplex.

A fence and gate across the end of the driveway separate it from the back yard of the duplex. A set of exterior stairs goes from the back portion of the driveway to the rear of the second level of the duplex. This is the back entrance of the rental unit.

In 2006 a fence section, approximately 3-4' high by 3-4' wide, was bolted to the driveway near the front corner of the duplex, at right angles to the exterior wall. The design of this barrier is basically an open wooden square with two smaller pieces of wood forming an X in the middle of the square. It is fairly open in design. Throughout the hearing this fence section was referred to as a pony wall.

Again, according to the landlords' plan it is about 24' from the pony wall to the bottom landing of the exterior stairs. The landlords call this area the "common area". The landlords testified that in the 37 years they have lived next to the duplex they never saw anyone park in that area.

The landlords do not have a driveway on their property. If items are delivered that must go into the landlords' back yard, such as wood or dirt, access is from the duplex's driveway, through the gate at the end of the driveway and through another gate into the landlords' back yard.

The downstairs tenants burn wood in their unit. When firewood is delivered for them it is also dropped in the driveway and then moved to a designated storage area in the back. The tenants testified that these wood deliveries are always put away promptly.

This tenancy commenced November 1, 2012. At the start of the tenancy the rent was $1300.00 per month; it is now $1380.00. There is a written tenancy agreement with an addendum. The relevant clauses of each are:

> "20. STORAGE. All property of the tenant kept on the residential property must be kept in safe condition in proper storage areas . . .
> Vehicles. Only vehicles listed in the tenancy application and no other vehicles may be parked, but not stored, on the residential property. Vehicles must not leak fluids and must be in operating condition, currently licenced, and insured for on-road operation. . . .
> Bicycles. Bicycles are to be stored in designated areas only. They must not kept, left, or stored on a balcony or in a hallway. They must not be moved through a lobby or hallway, or placed in an elevator.
>
> 25. COMMON AREAS. The tenant must not misuse or damage common areas of the residential property, but must use them prudently and safely and must

conform to all notices, rules or regulations posted on or about the residential property concerning the use of common areas . .

2) Garden/patio Use: Tenants have principal use of the front garden/lawn, and exclusive use of the front upper balcony and upper solarium. Potted plants may be placed there provided they have saucers and feet that keep them off the ground. There is a designated area within the back garden area for the upper suite tenants within the vegetable garden which is shared by the landlords and tenants. Compost bins are also provided for the use of all.

3) Grounds Maintenance and Access: Because the landlords have the responsibility for the basic grounds maintenance of the property, they have right of access to the exterior grounds and exclusive use of the garden/wood shed. Every effort will be made however to respect the privacy of the tenants.

4) Storage: There are designated shelving and areas for each suite. To reduce silverfish and to avoid any moisture damage, please avoid cardboard boxes, use plastic or rubber bins, and keep up off the floor as possible.

5) Parking: The driveway had typically been given to the tenants of [lower unit]. The present tenants prefer to park on the street and hence may be used by both tenants as desired."

The landlords testified that at the start of the tenancy they talked to the tenants about an exterior storage area on the north side of the duplex and designated space in the basement. At that time they did not have the storage plan that was submitted as part of their evidence. Their written material indicates that the tenants have stayed within their designated area for basement storage.

The tenants testified that the exterior area on the north side of the duplex is just large enough for garden tools. Judging from the plan submitted by the landlords, that appears to be an accurate statement.

The first winter the tenants lived at the unit their son's motorcycle was stored in the common area, near the duplex, with the consent of the landlords and the agreement of the downstairs tenants. According to the tenants the motorcycle was there for seven months before it was sold.

Also the first year of their tenancy the tenants had a table and chairs set up in the common area. They never really used the spot as a patio and at the suggestion of the landlords they moved them to an upper balcony.

The issue is that in November of 2014 the tenants brought two sea kayaks from their vacation home in Desolation Sound to the rental unit. Each kayak is about 17' long and weighs about 40 pounds. In the tenants' photographs they appear to be in very good condition.

The parties have different recollections about conversations they had about the sea kayaks. It is not necessary to make any determinations about these conversations in order to decide this application.

After thinking about and talking about options the tenants bought specialized wheeled carts and placed the kayaks on them. They set the kayaks in the common area, parallel to the exterior wall and between the pony wall and the bottom of the exterior stairs. The area occupied by the kayaks was no wider than the pony wall.

Because the kayaks were on wheeled carts they could be easily transported to launch areas located within blocks of the rental unit. They could also be easily stolen so the tenants attached them to the exterior staircase with a loose, locked cable.

To place the kayaks in this location the tenants moved two oak barrel planters that had been sitting directly in front of the one window at street level on this side of the duplex, out a couple of feet.

The landlords felt this was an improper use of the space and there was an exchange of correspondence between the parties. The landlords wanted the tenants to find off-site storage for the kayaks. Finally, on January 26, 2015 the landlords served the tenants with a LandlordBC Caution Notice stating that the continued presence of the kayaks could be a ground for ending the tenancy because it was a breach of a material term that had not been corrected within a reasonable time after being given written notice to do so.

The tenants put the kayaks on top of their motor vehicle, where they remained until the date of the hearing, and filed this application for dispute resolution. The landlords sent them a thank you note for moving the kayaks.

The parties gave evidence about how the common area and the balance of the driveway have been used in the past few years.

From some time no one wanted to park in the driveway because of two large cypress trees that stood beside it. When the trees were cut down in the summer of 2013 the wood was stacked in the same spot where the tenants later put the kayaks; about 11/2' from the pony wall and the exterior wall. According to the landlords the woodpile was about 5' by 5' by 4' and covered with a tarp. The written material filed by the landlords states that "As the owner of that property, we believe we have the right to use that Common area for such temporary storage purposes as reasonable." They say the wood was stacked in such as way as not to preclude access in any way.

Eventually the wood was used up and the pile disappeared, a process that the tenants say took two winters. None of the tenants objected to the pile while it was there.

In the past the downstairs tenants were allowed to have a potted plant garden in this area. Currently there is an oak barrel planter in front of the pony wall and several other oak barrel planters situated around the area. Three of those planters were put in place between the time the tenants moved the kayaks and the hearing. The landlords said the planters are heavy but have been strategically placed so as not to interfere with necessary access. The landlords also said the planters were put in this area for esthetic reasons – to break up the expanse of concrete.

Sometimes the garbage and recycling bins for the two rental units have been placed in the common area; sometimes they are placed along the retaining wall closer to the street. In the photographs it appears that there are four or five roll out bins at this property.

When tradespeople work at either location they often use the driveway. According to the landlords regular maintenance includes:

- Delivery of sand or dirt for landscaping.
- Gutter cleaning once or twice a year.
- Window cleaning every year or two.
- Putting up and taking down the storm windows.
- Cleaning the drain located near the exterior wall about once a year.

The tenants' photographs show that stored along the driveway, by the retaining wall, besides the garbage and recycling binds are empty oak barrel planters, a large garbage can, tree stumps, and a small number of bricks and boards. These appear to be materials used in landscaping or gardening.

The landlords expressed the following concerns about having kayaks sitting in the common areas:

- Their location will block access for the landlords and tradespeople attempting to do regular maintenance or repairs. The tenants offered to move the kayaks anytime they were requested for these purposes. They suggested they could wheel them onto the front lawn. The landlords countered that this was not feasible because the lawns are mown and tended ten months of the year and, besides, who was move the kayaks because the tenants both work long hours. The tenants pointed out that the landlords always give advance notice before any work is done at the duplex.

- They do not want to create a precedent. What if both sets of tenants made the same request? They "could not reasonable accommodate one set of tenant's requests and not the other". They told previous tenants they could not store two canoes in the same area for this reason.

- Esthetics. In the hearing the landlords said they did not want the area to become a concrete jungle of storage.

The landlords argue that the common area is neither a designated storage area as set out in the tenancy agreement nor a parking area.

The landlords do say that "temporary storage of items could be deemed reasonable depending on the circumstances" and that the downstairs tenants, who have lived there for 12 years, have never objected to temporary storage. The tenants testified that they intend to use the kayaks at their vacation home in the summers.

The tenants argue that section 28 of the *Residential Tenancy Act* gives the tenants use of common areas for reasonable and lawful purposes, free from significant interference and that clause 5 of the Addendum to the tenancy agreement allows them to use the driveway as desired.

Analysis

In actual fact the distinction between "driveway" and "common area" on this property is quite artificial. The only separation between one area and the other is a small fence section. If one planter was moved there is sufficient room to drive a motor vehicle past the pony wall into the "common area". It is all one piece of concrete and despite the landlords' efforts to "green up" the space with a few planters, it is clearly still a driveway.

There are legal principles which govern the interpretation of express contractual terms. They are:

1) Where there is no ambiguity in a written contract it must be given its literal meaning.
2) Words must be given their plain, ordinary meaning, unless to do so would result in an absurdity.
3) If there are two possible interpretations, one which is absurd or unjust, the other of which is rational, the one which is rational shall prevail.
4) In cases of doubt, language should be construed against the drafter of the contract. This rule, called by its Latin name, is the “contra preferentem” rule.

If this area is a common area, the tenancy agreement says: “The tenant must not misuse or damage common areas of the residential property, but must use them prudently and safely and must conform to all notices, rules or regulations posted on or about the residential property concerning the use of common areas . . “. There are no notices, rules or regulations setting out the proper use of the common area, nor are there any directions regarding the accepted use of the common area in the tenancy agreement. The landlords and the tenants have stored a wide variety of items in this area, for greater or longer periods of time. Some have been heavier, smellier or uglier than the sea kayaks. As far as the landlords concern about access for tradespeople is concerned, the tenants have indicated their willingness to cooperate with any scheduled work. All of the maintenance tasks listed by the landlords are typically done once or twice a year, will be completed in a day or two, and are scheduled in advance. Finally, the evidence does not show that setting two sea kayaks in this area for several months of the year is going to damage the common area.

If this area is the driveway the addendum to the tenancy agreement says: “The driveway . . . may be used by both tenants as desired.” There is nothing in the tenancy agreement that says that use of the driveway is limited to parking motor vehicles only; only that vehicles that require a licence to operate must be licenced; and in fact, the evidence is that the driveway has been used for a variety of purposes over the years, including shorter-term storage.

With regard to storage the tenancy agreement provides that: “All property of the tenant kept on the residential property must be kept in safe condition in proper storage areas “, and, “There are designated shelving and areas for each suite. To reduce silverfish and to avoid any moisture damage, please avoid cardboard boxes, use plastic or rubber bins, and keep up off the floor as possible.”

As stated earlier the evidence is that the common area has been used for storage throughout this tenancy, including storage of items owned by the tenants, so it is hard to argue that it is not a proper storage area for recreational items that would not be suitable for basement storage. It could also be argued that the clause does not specify that it is referring to exterior as well as interior storage, as in the preceding clause the addendum specifically addresses the shed, which would be considered exterior storage.

In conclusion, I find that the terms of the tenancy agreement and the addendum thereto do not prevent the tenants from storing their sea kayaks on the driveway/common area from September 21 to June 20 of every year.

The tenants asked for a declaration that they are, in fact, entitled to principal use of the front garden/lawn as set out in the tenancy agreement. The landlords say that the tenants may have misunderstood something they said but they did not intend to suggest that the tenants could not make normal use of the front yard. In light of the evidence before me, no further order is required.

The tenants also claimed harassment. The communication between the parties, while perhaps upsetting to the tenants, does not come close to the behaviour generally found to be harassment.

As the tenants have only been partially successful on this application no order for reimbursement of the fee they paid to file it will be made.

Conclusion

An interpretation of the tenancy agreement has been provided

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: March 18, 2015

Residential Tenancy Branch