

Headline: The **Case of the Vanishing View**

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When will a Court determine that a decision or action of a strata council or the strata corporation is significantly unfair to an owner? What criteria should the Court take into account when making this decision? For example, should the Court consider the impact or effect of the decision on the owner who is complaining of unfair treatment or should the Court only consider whether or not the conduct the strata corporation or strata council was fair?

These issues were recently considered by the British Columbia Supreme Court in *Dollan v. Strata Plan BCS 1589*¹ in the context of a request by an owner to replace a window in their strata lot.

The window in question, which was installed by the developer, was a spandrel window. A spandrel window is opaque. The outside of the spandrel window was black. Spandrel windows were installed in only the windows on the west wall of the den in the 01 units. Vision glass windows were installed in all other windows in the 01 units and in all other windows in all other units. As a result of the configuration of the units, the spandrel windows created a vertical black strip along one side of the building.

The development consisted of two high-rise towers and a number of townhouses. At the time the purchasers purchased their strata lot, the marketing materials indicated that the unit would have vision glass in the windows facing three directions. At the time of completion of the sale, the spandrel window had been installed in the west window in the den. However, the plans filed with the City of Vancouver indicated that the windows in the den were to be vision glass.

The spandrel windows blocked the Petitioners view to the west. The Petitioners advised the developer that the spandrel window was a deficiency. Ultimately, the developer agreed to replace the window subject to strata council approval.

The Petitioners submitted a request to the strata council for permission to replace the spandrel window with a vision glass window. Because the strata council viewed the change from spandrel to vision glass to be a significant change in the appearance of common property, the strata council convened a general meeting of the owners in order that the window replacement be approved by means of a 3/4 vote as required by section 71 of the *Strata Property Act* (the "Act"). The resolution was defeated.

The Petitioners then applied to Court on the basis that the decision of the strata corporation was significantly unfair. Section 164 of the Act provides:

- (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
 - (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
 - (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

¹ 2011 BCSC 570

- (2) For the purposes of subsection (1), the court may
 - (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
 - (b) vary a transaction or resolution, and
 - (c) regulate the conduct of the strata corporation's future affairs.

The primary reason for the refusal to permit the Petitioners to install the vision glass window was that, as a result of the configuration of the buildings, if the spandrel window was replaced with vision glass, the privacy afforded to the O2 units would be affected. The Court agreed that the spandrel windows served as a privacy screen and that the owners of the O2 units would lose the benefit of the privacy screen if the spandrel window was replaced with vision glass.

In analyzing the competing interests of the desire of the Petitioners for a view with the desire of the O2 units for privacy, the Court recognized that the Petitioners got less than they bargained for by getting a window that blocked their view when they had expected vision glass. On the other hand, the O2 units got more than they bargained for by obtaining a privacy screen in one window of the O1 units. Because the marketing materials indicated that all windows would be vision glass, the Court found that the owners of the O2 units knew or ought to have known that there would be no privacy between the O1 and O2 units.

In reaching its conclusion, the Court restated the often repeated quotation from the case of *Sterloff v. Strata Corporation of Strata Plan No. VR 2613* that in discharging its duty to repair and maintain common property a strata corporation "must endeavor to accomplish the greatest good for the greatest number."

The Court concluded that by refusing to permit the Petitioners to replace the spandrel window with vision glass, the strata corporation was not accomplishing the greatest good for the greatest number. The Court held that the strata corporation "must fairly balance the competing tensions between those who want their view and those who want their privacy."² The Petitioners were permitted to replace the spandrel window with vision glass.

The Court found that by allowing the Petitioners to change the spandrel window to vision glass, both the O1 and O2 unit owners would have a view and each could have privacy by closing their blinds. In the Court's view this accomplished the greatest good for the greatest number.

Although previous cases have suggested that the determination of whether an action or decision of the strata corporation is significantly unfair should consider only whether the conduct of the strata corporation was fair and should not consider the consequences of the decision, the *Dollan* case did not limit itself to a review of only the conduct of the strata corporation. In *Dollan*, the Court clearly considered that the consequence of the decision to deny the Petitioners the permission to install a vision glass window was to deny the Petitioners a view to the outside through the west window in the den. Additionally, the consequence was to provide the O2 unit owners with privacy that they had no reason to expect. Although the strata corporation's process complied with the Act by requiring a 3/4 vote of the owners, this was not sufficient to convince the Court that the strata corporation had not acted in a manner that was significantly unfair.

When considering whether an action or decision is significantly unfair, strata corporations should therefore continue to consider the impact or effect of their decisions and whether their actions are accomplishing the greatest good for the greatest number of owners. Based on the *Dollan* case, simply following a fair process cannot guarantee that the strata corporation's actions will not be found to be significantly unfair.

² para 34, supra.