

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** May 5, 2020

**CASE:** 2020-00064R

**Citation:** Joan MacDonald v Wentworth Condominium Corporation No.96, 2020 ONCAT 14

Order under section 1.44 of the *Condominium Act, 1998*.

**Member:** Patricia McQuaid, Member

**The Applicant**  
Joan MacDonald

Cheryl St. James, Agent

**The Respondent**  
Wentworth Condominium Corporation No. 96

Samuel Nash, Agent

**Hearing:** April 27 - May 4, 2020, Written on-line and teleconference hearing

### **REASONS FOR DECISION**

#### **A. OVERVIEW**

- [1] Joan MacDonald (the “Applicant”) is a unit owner of Wentworth Condominium Corporation No. 96 (“WCC 96” or the “Respondent”). WCC 96 is a twelve-unit condominium. Ms. MacDonald has lived there for approximately 31 years. On March 10, 2020, she submitted a Request for Records (the “Request”) to WCC 96, under s. 55 of the *Condominium Act, 1998* (the “Act”). She requested five records.
- [2] Context for the Request, and for the way in which this case proceeded before the Tribunal are important to consider.
- [3] On May 6, 2020, a meeting is to take place at which the owners of WCC 96 will vote on the sale of WCC 96. As was apparent throughout this case, that is a very contentious issue between the parties. An agreement of purchase and sale has been signed and is the subject of a vote at that meeting. Section 124 of the Act states that the corporation shall not sell the property unless the owners of at least 80% of the units, at the date of the vote, vote in favour of the sale. The Applicant asserts that the requested records, described below, are required for her review and consideration. Given time sensitivity, the case has been expedited. The Stage

2 - Mediation ended on April 26 and the Stage 3 hearing started on April 27<sup>th</sup>. By agreement of the parties, witness testimony and closing submissions took place by teleconference on May 4, 2020.

- [4] The requested records are as follows:
- a. Minutes of meetings held within the past 12 months.
  - b. All correspondence for the sale between the seller's lawyer and the buyer from September 2019 to 'present'.
  - c. New insurance policy for 2020.
  - d. Technical audit for the Browne and Beattie Reserve Fund Study of July 2019.
  - e. A series of invoices (specific numbers provided) paid to WCC 96 by the Insurer.
- [5] In addition to the requested records, the Applicant seeks her costs and a penalty under s. 1.44 (1) 6 of the Act. WCC 96 did not provide the Applicant with the prescribed Response to the Request for Records, but did participate in this case. I note here that Mr. Nash, though a lawyer, appeared here as agent for WCC 96 in his capacity as director and president of the corporation.
- [6] At the time of the teleconference portion of this hearing, two records remained in dispute: the correspondence for the sale between the seller's lawyer (WCC 96) and the buyer, and the technical audit. The insurance policy was provided to the Applicant by May 1st. The Applicant stated that she had already received the invoices from a third party and as a result these were not in issue.
- [7] Regarding the minutes, WCC 96 agreed that the Applicant was entitled to these and undertook to provide them by April 30<sup>th</sup>. However, they were not delivered until noon on May 4<sup>th</sup>, approximately one hour before the teleconference hearing was scheduled to start. Mr. Nash explained that some redaction was required because of ongoing litigation between the Applicant and WCC 96 in other forums, which contributed to the delay. A brief recess was given for the Applicant to review the minutes and in the event that she wished to speak to them in the course of her testimony.
- [8] Ms. St. James submitted that she "objected" to the minutes as presented, on the basis that there is no documentation supporting the minutes, there is no indication of how each of the three directors voted on any motion and that they lacked detail. I explained that whether or not the minutes were as fulsome as the Applicant believes they ought to be have be is not an issue for me to determine. They cannot

be re-created at this point to include information that the Applicant believes they ought to contain. These are one of the records requested, to which the Applicant is entitled, and they have been provided, albeit, late.

## **B. RESULT**

[9] For the reasons set out below, I find that the Applicant is not entitled to the two records that remained in dispute: “*all correspondence for the sale between the seller’s lawyer and the buyer from September 2019 to present*” nor to the technical audit as requested.

[10] Further, I also find, for the reasons set out below, that no penalty is payable by the Respondent. The applicant is awarded costs in the amount of \$200.

## **C. ISSUES AND ANALYSIS**

### **ISSUE 1: The request for all correspondence for the sale between the seller’s lawyer and the buyer from September 2019 to present**

[11] The Applicant explained that the unit owners of WCC 96 became aware of a proposed sale in October 2019 and she has, since then, been seeking information about the property listing and details about the proposed agreement to sell. She has concerns about the listing price, the lack of transparency about the sale and the speed at which the transaction is progressing.

[12] The Applicant, along with other owners, was provided with a copy of the agreement of purchase and sale which was executed in January 2020, and with its various amendments. The closing date listed is June 24, 2020. The agreement of purchase and sale makes specific reference to s. 124 of the Act and the requirement for compliance with s. 124 as a condition of the sale. As noted above, the meeting for owners to consider the sale, and vote on it, is to take place on May 6<sup>th</sup>.

[13] The Applicant testified that her real estate lawyer has looked at the documents, but she needs more information to make such a significant decision on May 6<sup>th</sup>. As she stated in her evidence, she “has no idea what her ‘net’ amount will be after a sale” and how long she would have to move out. There are important issues about which the Applicant reasonably wants clarity before she votes on the proposed sale.

- [14] Cris Krnjeta, one of the three members of WCC 96's board of directors (the "Board") testified. He described the decision-making process of the Board in listing the property for sale. He stated that they did retain their lawyer to review the terms of the agreement of purchase and sale, but testified that at this time there is no correspondence between their lawyer and the buyer. I accept his testimony on this point. There is, therefore, no documentation to be provided pursuant to this request.
- [15] During this hearing, the Applicant expanded upon her request, to include "fees, costs and disbursements with respect to the sale by termination." She also submitted that the background information that caused them to accept this particular offer ought to be included within her request as well. Whether or not this information and/or documentation is currently available, this is not encompassed by the record request before me. As I stated at the hearing, I appreciate that the uncertainties caused by a potential sale of the Applicant's home are very significant, but it appears, based on the evidence before me, that the May 6 meeting is the appropriate forum by which to obtain the information she seeks. Furthermore, the questions raised by the Applicant in this hearing about the Board's decision-making process regarding the proposed sale may relate to Board governance issues, but not to this specific records request.
- [16] I do note that Mr. Krnjeta testified there may be correspondence between the WCC 96 lawyer and the Board related to his review of the terms of the agreement of purchase and sale. Any such correspondence, by email or otherwise, was not part of the Request and I will not order that it be provided to the Applicant. However, in the interests of transparency, given the Applicant's stated concerns about the terms and completeness of the agreement that owners are being asked to consider on May 6<sup>th</sup>, disclosure of any such correspondence is encouraged.

## **ISSUE 2: The request for the technical audit**

- [17] Brown and Beattie Building Science Engineering completed a Reserve Fund Study Update report, dated July 5, 2019. Their analysis included an approximate \$3 million special assessment in order to address certain expenditures including balconies and stone cladding. The Board accepted the report (as documented in Board minutes). Owners were given a copy of the report.
- [18] The Applicant questions the "sustainability" of the numbers presented in the report - whether the report findings have been examined by an accountant to evaluate whether they can be substantiated and whether WCC 96 can afford what is being

proposed. The Applicant also questions whether the board has complied with certain provision of s. 94 of the Act related to reserve fund studies.

[19] In cross examination, the Applicant acknowledged that she has been on the WCC 96 Board in the past and not seen a document called a technical audit before. However, she stated that there should be an audit type document to substantiate the findings or to evaluate the financial analysis of the reserve fund study in this instance - something she called a technical performance audit.

[20] I accept and agree with the Respondent's submission that a "technical audit" is not a record prescribed by the Act that a corporation is required to keep. There is, therefore, no entitlement to such any such record.

[21] Whether or not, to use the Applicant's term, there is "*sustainability*" in the numbers related to the expected life span of certain building components and/or the dollar amounts set out in the reserve fund study is not an issue that this Tribunal can determine. I recognize that the issues highlighted in the study are closely intertwined with the issues behind the proposed sale, but these are all issues beyond the jurisdiction of this Tribunal.

### **ISSUE 3: Costs**

[22] The Tribunal's Rules of Practice allow the me to award costs, which are usually an applicant's costs of filing a case with the Tribunal. If an applicant is successful, in the normal course, their filing fees are ordered to be reimbursed by the respondent. Here success was divided. The Respondent agreed that there was entitlement to two of the records, but these were not provided until just before the teleconference portion of this hearing. Though the Applicant was not successful in her request for the two records which were in issue in the hearing, I find that she did have to pursue her case before the Tribunal to obtain at least some of the records. I therefore award of costs in the amount of \$200.

### **ISSUE 4: Penalty**

[23] The Tribunal, pursuant to s. 1.44 (1) 6 may make an order directing the corporation to pay a penalty if it considers that the corporation has **without reasonable excuse refused** (emphasis added) to permit the person to examine or obtain copies of records under s. 55 (3) of the Act.

[24] The Request was delivered to the Respondent on March 10<sup>th</sup>, specifically, to the third Board member, Anna Procwat. Ms Procwat was new to the board having joined in January 2020. Mr. Krnjeta testified that the fact that they did not respond within the prescribed time was in error and that the previous two requests made by the Applicant had been addressed in a timely manner, but this one, by inadvertence on their part, was not. Based on the evidence before me, I do not find that the Respondent has refused the records without reasonable excuse. This is not a situation where inadvertence can be attributed to a respondent's casual approach to obligations under the Act. The insurance policy and the minutes were provided, and while provided late in this CAT process which was expedited in light of the May 6th meeting, the Applicant has received them within two months of making her Request.

[25] Lateness in providing a record is not necessarily a refusal as per s. 1.44 (1) 6 of the Act. WCC 96 did not refuse to provide the records that the Applicant now has in her possession – the minutes and the insurance policy. It was simply late in providing them. Regarding the two records which I have determined that WCC 96 does not have to provide (as they do not exist), there was a refusal, but it was not unreasonable.

[26] I find that a penalty is not warranted on these facts.

### **ORDER**

[27] Therefore, for the reasons set out above, the Tribunal orders as follows:

1. The Applicant has been provided with the following records: the minutes of meetings from September 2019 to the date of the request and the new insurance policy for 2020.
2. The Applicant is not entitled to any other records.
3. The Respondent shall pay costs of \$200 to the Applicant within 30 days of this decision.
4. No penalty is payable by the Respondent.

---

Patricia McQuaid  
Member, Condominium Authority Tribunal

RELEASED ON: May 5, 2020