

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** September 20, 2021

**CASE:** 2021-00240R

**Citation:** Van Zyll de Jong v. Durham Standard Condominium Corporation No. 284,  
2021 ONCAT 85

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

**Member:** Mary Ann Spencer, Member

**The Applicant,**

Jan van Zyll de Jong

Self-Represented

**The Respondent,**

Durham Standard Condominium Corporation No. 284

Represented by Karen Wallace, Agent

**Hearing:** Written Online Hearing – July 30, 2021 to September 9, 2021

### **REASONS FOR DECISION**

#### **A. INTRODUCTION**

- [1] Jan van Zyll de Jong (the “Applicant”) is the owner of a unit of Durham Standard Condominium Corporation No. 284 (the “Respondent”). He alleges that the Respondent failed to respond to a Request for Records and requests that the Tribunal order the Respondent to provide the requested records at no cost. He also requests that the Tribunal assess a penalty to the Respondent for its alleged refusal to provide records. Finally, he requests his costs in this matter.
- [2] The Respondent’s representative advised that she is working to compile the requested records. She provided no reason for the Respondent’s delay in responding to the Applicant’s Request.
- [3] For the reasons set out below, I order the Respondent to provide the Applicant with the requested records at no cost, and, as agreed by the Respondent’s representative, current to the date of this decision. I find the Respondent’s delay in providing records to the Applicant within the legislated timeframe is an effective refusal to provide records without reasonable excuse and I assess a penalty of \$1,500. I also order the Respondent to pay the Applicant \$150 in costs.

## **B. BACKGROUND/PROCEDURAL MATTERS**

[4] On May 30, 2021, the Applicant submitted a Request for Records to the Respondent in which he requested electronic copies of the following records:

### Core Records

- Minutes of board meetings held within the last 12 months.

### Non-Core Records

- All records relating to venting issues in the plumbing including plumbing or engineering reports, invoices from plumbers or engineers, work orders sent to plumbers or engineers, and all communications exchanged between plumbers or engineers.
- All records relating to drain back-up issues in the plumbing including plumbing or engineering reports, invoices from plumbers or engineers, work orders sent to plumbers or engineers, and all communications exchanged between plumbers or engineers.
- All reports, invoices, and documents pertaining to investigations and work regarding the spalling of concrete on balconies.
- All reports, invoices, and documents pertaining investigations and work regarding the water penetration through the building envelope.
- The complete first year performance audit.
- The complete second year performance audit.
- The most recent tracking schedules setting out the status of all deficiencies identified on both first and second year performance audits.
- All board meeting minutes from turnover.

[5] The requested records pertain to what the Applicant described as common element deficiencies pertaining to his unit which include the kitchen sink drain, water penetrating the exterior envelope of the building and peeling concrete on the balcony. He indicated:

I am requesting these records related to deficiencies that have kept my wife and I from occupying our unit since last October. On July 6, 2021 one of these deficiencies triggered substantial damage to the unit and the unit

below. The Corporation has taken a very similar approach to these issues as with the records request, which is to not engage or respond. I have advised the Corporation in writing of potential litigation in these matters.

- [6] The Applicant did not receive the prescribed Board Response to Request for Records from the Respondent. On June 29, 2021, the Respondent's previous condominium manager requested a time extension to reply to the Request. The Applicant initially agreed to a two-week extension but subsequently withdrew that agreement and filed this case with the Tribunal on July 7, 2021.
- [7] No representative of the Respondent participated in the first stage of the Tribunal's process. Therefore, there was no Stage 2 mediation and this case moved directly to the Stage 3 hearing which commenced on July 30, 2021. Notwithstanding that a Respondent's representative was listed on the Tribunal record, I received no response to requests that they confirm they had joined the hearing. On August 6, 2021, I asked Tribunal staff to contact the Respondent. Staff were advised that the Respondent was transitioning to a new condominium manager who would join the proceeding. At my request, staff followed up with the Respondent on August 11, 2021. On August 12, 2021, new condominium manager Karen Wallace joined the proceeding and advised she was working to compile the requested records.
- [8] I asked Ms. Wallace to clarify whether the Respondent intended to now produce a Board Response to Request for Records, to request a fee to produce the requested non-core records, and/or to upload the records responsive to the Applicant's request to the CAT-ODR system and noted that it might be possible to resolve the matter and/or narrow the issues to be heard. Ms. Wallace did not respond to my questions. Further, the Applicant advised he was not prepared to attempt to resolve the matter. Therefore, I proceeded with the hearing and asked both parties to disclose documentary evidence and witnesses. The Respondent made no disclosure. Evidence was heard by teleconference on August 26, 2021.

### **C. ISSUES & ANALYSIS**

- [9] The issues to be addressed in this matter are:
1. Is the Applicant entitled to receive the requested records?
  2. Is the Respondent entitled to charge fees for production of the requested records and what should the amount of those fees be?
  3. Has the Respondent refused to provide the records without reasonable excuse and, if so, should a penalty be assessed?
  4. Should an award of costs be assessed?

### **Issue No. 1: Is the Applicant entitled to receive the requested records?**

- [10] The Applicant and his spouse, Tara Burgoyne, testified on his behalf. Karen Wallace, the Respondent's condominium manager, testified on its behalf.
- [11] The Applicant testified that on May 30, 2021, he submitted his Request for Records to the Respondent because there have been disputes relating to what he described as deficiencies in his condominium unit. He did not receive a Board Response to Request for Records.
- [12] Ms. Burgoyne testified that on June 29, 2021, she met with the Respondent's previous condominium manager who requested an extension to provide a response and indicated they needed to check with counsel to confirm that the records could be released. The Respondent's assistant property manager sent a confirming e-mail to the Applicant asking for the time extension and indicating that the requested minutes of board meetings were available to the Applicant on the Respondent's Condo Control website. The Applicant testified that no minutes were available when he accessed the website. The Applicant and Ms. Burgoyne initially agreed to a two-week extension to July 14, 2021; however, in an e-mail dated July 3, 2021, the Applicant withdrew this agreement and advised the Respondent of his intent to file an application with this Tribunal. The Applicant testified that he has heard nothing further from the Respondent and has received none of the requested records.
- [13] Ms. Wallace testified that she is attempting to locate the requested records although she advised that she could not confirm their existence. She explained that she believed her firm, which has been working for the Respondent for approximately one year, was the third condominium management firm retained by the Respondent and she herself had been the manager for only three weeks. She stated that she found the corporation's records were not organized and were in boxes which would require searching. She testified that she could not locate the performance audits. She also stated that she did not understand why the Applicant was unable to access the minutes of board meetings on the Condo Control website, but she had produced copies and would provide them. Ms. Wallace provided no explanation for the Respondent's delay in responding to the Applicant's request.
- [14] Section 55 (3) of the *Condominium Act, 1998* ("the Act") sets out an owner's entitlement to examine or obtain copies of a corporation's records:

The corporation shall permit an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing, to examine or

obtain copies of the records of the corporation in accordance with the regulations, except those records described in subsection (4).

The exceptions set out in s. 55(4) of the Act include records related to employees, to actual or contemplated litigation, and to specific units or owners.

[15] The Applicant's right to receive copies of the corporation's records is clearly set out in s. 55(3) of the Act and I will order the corporation to provide the requested records, redacted as required by s. 55(4) of the Act. Given Ms. Wallace's testimony that she cannot confirm the availability of the requested records, I will also order the Respondent to provide written confirmation if the records do not exist.

[16] The Applicant requested that the date range of the requested records be extended to the current date in order to avoid the need to file a further Request for Records. Ms. Wallace agreed to provide records to the current date.

**Issue No. 2: Is the Respondent entitled to charge fees for production of the requested records and what should the amount of those fees be?**

[17] A condominium corporation is entitled to a fee for the production of non-core records in accordance with the requirements set out in s. 13(8) of O. Reg. 48/01. In this case, the Respondent did not produce a Board Response to Request for Records. And, notwithstanding that I specifically raised the issue of fees and gave Ms. Wallace more than one opportunity to indicate whether the Respondent intended to charge a fee for the non-core records requested by the Applicant, I received no response. Therefore, I am ordering the Respondent to provide the requested records to the Applicant at no cost.

**Issue No. 3: Has the Respondent refused to provide the records without reasonable excuse and, if so, should a penalty be assessed?**

[18] Section 1.44 (1) 6 of the Act provides that the Tribunal may order a penalty of up to \$5,000 if it finds that the corporation has, without reasonable excuse, refused to permit a person to examine or obtain records. The Applicant requests a penalty of \$2,500 be assessed to the Respondent for the delay in providing its response to his Request for Records. He referred me to the Tribunal's decision in *Sunil Kainth v York Condominium Corporation No.506*, 2019 ONCAT 31 (CanLII), a case in which the Tribunal found the respondent failed to respond to a Request for Records and ordered a penalty of \$2,500.

[19] In this case, the evidence does not indicate that the Respondent has refused to provide the requested records; on June 29, 2021, the Respondent requested a

two-week extension in order to consult with counsel on which records it could release and Ms. Wallace testified that she is attempting to compile the requested records. I note that in her closing statement, she advised that she needs some time to locate the records and indicated that she has contacted the engineering firm which conducted the performance audits to obtain copies of those documents.

- [20] However, the evidence is also that the Respondent did not provide the Applicant with the prescribed Board Response to Request for Records form and the Applicant has yet to receive any of the records requested in his May 30, 2021 Request for Records. Section 13 of O. Reg. 48/01 requires a corporation to provide records to a requester within 30 days of receipt of the request and of any fee payable for the request. Ms. Wallace provided no reason for the delay in the provision of records. In previous decisions, the Tribunal has found that a delay in the provision of records can equate to a refusal to provide records. I find that the delay in this case represents an effective refusal to provide records without reasonable excuse and that a penalty is warranted.
- [21] The purposes of a penalty include impressing upon a Respondent the importance of meeting its statutory obligations and serving as a deterrent to future similar action. The amount of penalty is dependent on the specific circumstances of each case, and I assess a penalty of \$1,500 to be appropriate in this case. In determining this amount, I have considered the facts that the Respondent did not provide a Board Response to the Applicant's Request for Records and that the Applicant heard nothing further from the Respondent after it requested a time extension on June 29, 2021 until Ms. Wallace joined this hearing on August 12, 2021. I have weighed these facts against Ms. Wallace's testimony that she is currently working to locate and compile the records.

#### **Issue No. 4: Should an award of costs be assessed?**

- [22] Rule 45.1 of the Tribunal's Rules of Practices states that the Tribunal may order a User to pay to another User or the CAT any reasonable expenses or other costs related to the use of the CAT any fees paid to the CAT by the other User including any fees paid to the CAT by the other User and another User's expenses or costs that were directly related to this other User's participation in the case. Rule 45.2 states that if a case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful User will be required to pay the successful User's CAT fees and reasonable dispute-related expenses, unless the CAT member decides otherwise.
- [23] The Applicant requested \$390 in costs comprising \$150 in Tribunal fees and \$240

in legal fees. The Respondent requested no costs.

[24] The Applicant was successful in this application and I award him \$150 in costs representing his Tribunal fees. The Applicant indicated that the \$240 he requested in legal fees was paid for a consultation with a lawyer before he filed his application with this Tribunal. Rule 46.1 of the Tribunal's Rules of Practice states that the Tribunal will not order payment of legal fees unless there are exceptional reasons to do so. That the Applicant consulted with counsel is not an exceptional reason. Therefore, I award no costs with respect to his request for legal fees.

**D. ORDER**

[25] The Tribunal Orders that:

1. Within 30 days of the date of this decision, the Respondent shall provide the Applicant with electronic copies of the records listed below, redacted as required in accordance with the provisions of s. 55(4)(b) of the Act, or, with written confirmation that the records do not exist. If the records are not kept in electronic form, the Respondent shall provide paper copies. The records shall be current to the date of this decision and shall be provided at no cost to the Applicant.
  - a. All records relating to venting issues in the plumbing including plumbing or engineering reports, invoices from plumbers or engineers, work orders sent to plumbers or engineers, and all communications exchanged between plumbers or engineers dated from July 18 forward.
  - b. All records relating to drain back-up issues in the plumbing including plumbing or engineering reports, invoices from plumbers or engineers, work orders sent to plumbers or engineers, and all communications exchanged between plumbers or engineers dated from July 18 forward.
  - c. All reports, invoices, and documents pertaining to investigations and work regarding the spalling of concrete on balconies dated from July, 2018 forward.
  - d. All reports, invoices, and documents pertaining investigations and work regarding the water penetration through the building envelope dated from July, 2018 forward.
  - e. The complete first year performance audit.
  - f. The complete second year performance audit.

- g. The most recent tracking schedules setting out the status of all deficiencies identified on both first and second year performance audits.
  - h. All board meeting minutes from turnover.
2. Within 30 days of the date of this decision, the Respondent shall pay a penalty of \$1,500 to the Applicant.
  3. Within 30 days of the date of this decision, the Respondent shall pay costs of \$150 to the Applicant.
  4. To ensure the Applicant does not pay any portion of the costs or penalty awards, the Applicant shall be given a credit towards the common expenses attributable to his unit in the amount equivalent to his unit's proportionate share of the above costs and penalty.

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Mary Ann Spencer  
Member, Condominium Authority Tribunal

Released on: September 20, 2021