

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: May 31, 2023

CASE: 2023-00011N

Citation: Carleton Condominium Corporation No. 95 v. Frederick, 2023 ONCAT 74

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

Member: Patricia McQuaid, Vice-Chair

The Applicant,

Carleton Condominium Corporation No. 95

Represented by Anna Iordanidi, Agent

The Respondent,

Diane Frederick

Self-Represented

Hearing: Written Online Hearing – April 5, 2023 to May 17, 2023

REASONS FOR DECISION

A. INTRODUCTION

[1] Carleton Condominium Corporation No. 95 (“CCC 95”) has filed this application seeking an order for compliance with its non-smoking rule against Diane Frederick, a unit owner. The non-smoking rule came into effect on March 1, 2018. Ms. Frederick has been a unit owner in CCC 95 for over 25 years. When the non-smoking rule came into effect, Ms. Frederick applied for and received an exemption to the non-smoking rule under its legacy provision.¹ This provision allowed Ms. Frederick to smoke in her unit; however, the non-smoking rule stated that the exemption would continue until February 29, 2020, after which the non-smoking rule would apply to all owners.

[2] Ms. Frederick does not deny that she smokes in her unit but asserts that the non-smoking rule was enacted without due process and is not reasonable. She also

¹ In previous decisions, the Tribunal has indicated that the term ‘legacy’ is a preferred term to “grandfathering”. I will use that term in this decision instead of “grandfathering” despite the language in the rule.

asserts that there is no evidence that the smoking odour is emanating from her unit and states that other residents are smoking.

B. ISSUES & ANALYSIS

- [3] The core issue before me is whether Ms. Frederick is in breach of the non-smoking rule and if so, whether an order should be made requiring her to comply. However, as noted above, Ms. Frederick has raised issues about whether the non-smoking rule was properly enacted by CCC 95, whether the rule is reasonable, whether smoking odour is emanating from her unit and concerns about enforcement against her given her assertion that other residents are smoking. I will address each of these matters below.
- [4] Prior to this application, CCC 95 sent a letter dated August 12, 2022, to Ms. Frederick stating that they had “received reports of smoke originating from your unit and as a result affecting other units and the common element. You have been advised on multiple occasions that smoking is not permitted. We would like to take this opportunity to remind you that Queen Elizabeth Towers is a Non-Smoking community and ask that you to [sic] refrain from smoking on the premises.” Anna Iordanidi, the condominium manager for CCC 95, testified that reports of smoking were received and recorded as security incidents on June 11 and 14, 2021, November 7, December 3 and 5, 2022, February 10 and March 30, 2023. Ms. Frederick testified that the security guard has come to her unit to advise there had been a complaint, but that she has not received any other emails, notices or phone calls from CCC 95.

ISSUE 1: Did CCC 95 follow proper procedure when enacting the non-smoking rule in March 2018?

- [5] Ms. Frederick asserts that the rule was put in place without consultation with owners and without an invitation to vote on it before implementation. In the hearing, I did inform Ms. Frederick that board governance issues are not within the Tribunal’s jurisdiction to decide. That said, I do note that in evidence before me was a copy of a letter dated January 15, 2018, to owners, which attached the proposed non-smoking rule passed by resolution of the board on October 16, 2017. In that letter, CCC 95 cited provisions of the *Condominium Act, 1998* (the “Act”) that require that owners must be formally notified of a rule change before the rule comes into effect, and that owners have a right to request a meeting to amend or repeal rules². In addition, CCC 95 advised in the letter that it was required,

² See sections 46 and 58 of the Act.

under the Act, to hold a meeting when 15% of unit owners make such a request, which request was to be made in writing by no later than February 15, 2018.

- [6] Ms. Frederick wrote to the board on February 12, 2018, requesting a meeting on the proposed non-smoking rule, stating that she would be requesting an amendment of the rule to allow existing owners to retain the right to smoke until they sell or move out of their units. She went on to state that she considered the rule to be an infringement of her right of enjoyment of her home.
- [7] CCC 95 appears not to have responded to Ms. Frederick's letter. While it may have been courteous to do so, to keep Ms. Frederick informed about the process, the fact that they did not does not mean that the non-smoking rule was not properly enacted. In submissions, Ms. Iordanidi stated that the board did not receive requisitions for a meeting from 15% of the owners within the prescribed time. As a result, the rule, as specified in CCC 95's notice, became effective as of March 1, 2018. And, as noted, Ms. Frederick did then apply for the exemption pursuant to the rule. There is no evidentiary basis for me to conclude that the rule was not properly enacted by CCC 95.

ISSUE 2: Is the non-smoking rule reasonable?

- [8] Ms. Frederick stated that she is a senior citizen with back problems that sometimes affect her mobility. The non-smoking rule states that smoking is only permitted in an outside area of the common elements which has been designated as a smoking area by the board, which area is at least nine meters from any entrance. Ms. Frederick stated that sometimes it is not feasible for her to leave her unit to smoke outside. She also noted that she has installed an air purifier to ensure that smoke odour does not travel outside her unit. An owner who cleans Ms. Frederick's unit testified that she noticed a large improvement in the unit due to the air purifier and does not smell smoke in the hallway when coming to clean Ms. Frederick's unit.
- [9] Though Ms. Frederick may firmly believe that the rule is unreasonable because it is not an option for her to smoke outside in any weather and at any time of the day, when the Tribunal is called upon to assess whether a rule is reasonable, it will take note of the considerations set out in s. 58 of the Act. Under s. 58 (1) of the Act, a rule must be made for one of the two purposes allowed under the Act:

The board may make, amend or repeal rules under this section respecting the use of the units, the common elements or the assets, if any, of the corporation to,

(a) promote the safety, security or welfare of the owners and of the property and the assets, if any, of the corporation; or

(b) prevent unreasonable interference with the use and enjoyment of the units, the common elements or the assets, if any, of the corporation.

[10] Section 58 (2) of the Act requires a rule to be reasonable. It reads, “The rules shall be reasonable and consistent with this Act, the declaration and the by-laws.” Therefore, I must first determine whether the non-smoking rule falls within the parameters of s. 58 (1) of the Act and then, if it does, I will consider whether it is reasonable.

[11] The non-smoking rule in its recital references that second-hand smoke is known to be harmful to human health, that smoke is known to linger on surfaces for significant periods of time, and that it can travel through wall openings, ventilation systems and contaminate air in common areas and individual units. The recital also notes that the board had received complaints about second hand smoke and that it has a duty to take reasonable steps to address those complaints. These factors led the board to conclude that prohibiting smoking was a reasonable way to protect owners from second-hand smoke on the property.

[12] The non-smoking rule identifies a ‘welfare’ risk – the impact of second-hand smoke on residents’ health– as per s. 58(1)(a) of the Act, as well as the interference with the use and enjoyment of the units and common elements of the corporation as per s. 58(1)(b) of the Act. I find therefore that the non-smoking rule falls within the prescriptions of s. 58(1) of the Act.

[13] As noted above, I appreciate that Ms. Frederick believes that the application of the rule to her is not reasonable. She has lived in the building for many years and the fact that she considers the rule to infringe on her use and enjoyment of her property is understandable. She has noted in communications with CCC 95 that quitting smoking is not easy. But a board enacts rules for the condominium as a whole. It must balance the use and enjoyment of all residents. As noted by Ms. Jordanidi in her submissions, there is no right to smoke, but the board through the legacy provisions recognized that an immediate change in 2018 for residents who smoked might be unreasonable and unfair and allowed for a grace period of two years for the transition to a non-smoking building. I find that the rule is reasonable.

[14] In submissions, Ms. Frederick suggested that the rule could be amended as outlined in her letter to the board in February 2018 to make it more reasonable.

That may be an option for the board (though Ms. Frederick has stated that the board has shown no willingness to compromise), but amendment of the rule is not within the jurisdiction of the Tribunal. By virtue of s. 58 of the Act, the power to amend or repeal a rule rests with the board and/or owners. Ms. Frederick did propose in her submissions that there could be provisions for residents who smoke to have access to sheltered areas on the property. Given that Ms. Frederick is a long-time resident, and in the spirit of community, CCC 95 could consider measures that strike a fair and appropriate balance between residents such as Ms. Frederick and the broader community; but, again, that is not a matter which the Tribunal is empowered to direct.

ISSUE 3: Enforcement of the non-smoking rule

- [15] Ms. Frederick objects to the enforcement of the rule against her on the basis that there is no evidence that smoke and odour is emanating from her unit and because other residents are smoking in their units.
- [16] I accept Ms. Frederick's evidence that she has an air purifier and that she has made a genuine effort to ensure that smoke does not migrate from her unit; however, that is not the issue at this time, though it may have been relevant when the legacy provision was in effect. CCC 95 need not prove "without a doubt" (as suggested by Ms. Frederick) that smoke is coming from her unit. Migration of smoke and odour is not the issue. The fact is that smoking in her unit is prohibited by the non-smoking rule and she does not deny that she is smoking there. Pursuant to s. 119(1) of the Act, an owner or occupier of a unit shall comply with the declaration, by-laws and rules of the corporation.
- [17] Perhaps there are other residents who are smoking in violation of the non-smoking rule. CCC 95 may or may not be taking measures to seek their compliance with the rule. Whether CCC 95 is appropriately investigating complaints about other residents for smoking or for any other matters is not an issue before me. There is no evidence before me that the enforcement action taken by the board in relation to Ms. Frederick has been targeted or capricious. In this instance and given the history of complaints made about Ms. Frederick's smoking after the legacy provision ended, I find that it is appropriate that deference be given to the board's exercise of its enforcement efforts. The board has a duty under s. 17(3) of the Act to take reasonable steps to ensure that owners comply with the rules.

ISSUE 4: Costs

[18] CCC 95 made no request for costs. Rule 48.1 of the Tribunal's Rules of Practice states that if a case is not resolved and the CAT Member makes a final decision, the unsuccessful party will be required to pay the successful party's CAT fees (here, \$200), unless the Member decides otherwise. CCC 95 has been successful, but I am exercising my discretion in the particular circumstances of this case and will not award costs to CCC 95. Ms. Frederick's evidence and submissions were well thought out and revealed a genuine concern about the operation of the rule and its impact upon her personally. It appears that the situation has caused her stress; there is little need to add to that.

C. CONCLUSION

[19] Having found that the non-smoking rule is reasonable, and that Ms. Frederick is smoking in her unit in violation of the rule, I will order that she comply and refrain from smoking in her unit.

D. ORDER

[20] The Tribunal Orders that:

1. The Respondent shall immediately comply with Carleton Condominium Corporation No. 95's non-smoking rule and, for specificity, the Respondent shall refrain from smoking in her unit or on the common elements except in those outside areas on the common elements designated by the board as a smoking area and which are at least nine (9) meters from any entrance to the building.

Patricia McQuaid
Vice-Chair, Condominium Authority Tribunal

Released on: May 31, 2023