CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 8, 2024
CASE: 2024-00440N
Citation: Norfolk Condominium Corporation No. 7 v. Vogl, 2024 ONCAT 165

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

Member: Nicole Aylwin, Member

The Applicant,
Norfolk Condominium Corporation No. 7
Represented by Michelle Kelly, Counsel

The Respondent,
Marc Vogl
Self-Represented

The Intervenor,
Estate of Vicki Vogl
Represented by Marc Vogl, Agent

Hearing: Written Online Hearing – September 17, 2024 to October 22, 2024

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Norfolk Condominium Corporation no. 7 ("NCC 7" or the "Applicant") alleges that the Respondent, Marc Vogl, has failed to comply with the Applicant's governing documents. Specifically, its rules related to pets and visitor parking. It further alleges that Mr. Vogl and/or his fiancée are causing nuisances contrary to s. 117(2) of the *Condominium Act, 1998* ("the Act") by creating excessive noise and allowing smoke and odour from the unit he occupies to enter other units and the common elements.

[2] Mr. Vogl and his fiancée occupy a unit in the condominium that was owned by the Intervenor, Vicki Vogl, who passed away earlier this year. After Ms. Vogl's passing, Mr. Vogl and his fiancée moved into the unit. They have been occupying the unit since April 2024. As the unit is still listed as owned by Ms. Vogl, NCC 7 named Ms.

Vogl's estate as the Intervenor, and served both Mr. Vogl as well as his siblings Robyn Vogl and Scott Vogl on behalf of the estate as Mr. Vogl advised NCC 7 that he and his siblings were responsible for the estate[1]. However, as I discuss further below, the Respondent is the only person to have joined the case on behalf of the Intervenor.

[3] NCC 7 has asked the Tribunal for the following orders:

1. That the Respondent permanently remove his dogs from the unit.

2. That the Respondent and any occupant of the unit immediately comply with s. 117(2) of the Act and cease creating excessive noise and allowing smoke to exit the unit.

3. That the Respondent immediately comply with Rule 5 and cease using parking spaces reserved for visitors and to ensure any other occupants of the unit does not use the visitor parking space.

4. An order that the Respondent and Intervenor be jointly liable to pay the legal costs incurred by NCC 7 in relation to this application.

[4] Despite having joined the case, Mr. Vogl did not participate in the hearing. He posted a single message indicating that he had access to the case. However, despite messages from me outlining the seriousness of the allegations, the potential outcomes (i.e. orders being made that could affect him and/or the unit, including orders for costs) and encouraging him to participate and provide evidence – both on behalf of himself as the Respondent and for the estate as the Intervenor, which he indicated he was also representing – he did not do so. Thus, my decision is based on the uncontested evidence provided by NCC 7.

B. DECISION

[5] For the reasons that follow, I find the Respondent has not been complying with the Applicant's rules regarding pets and visitor parking and will order that the

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[1] Counsel for NCC 7 submits it served the notices to Ms. Vogl's estate via her children on July 17, July 31 and September 4, 2024. It sent these notices by mail to Robyn Vogl (at a mailing address they had been provided for her), and Scott Vogl, who was residing in the Intervenor's unit at the time (the unit is listed as the address of service for Ms. Vogl). It also sent the Notice of Case to the Respondent, by mail and email, and the Respondent acknowledged receipt of the Applicant's emails. NCC 7 further sent the Notice of Case, as a courtesy, to the email address they had on file for Viki Vogl. Based on these submissions from NCC 7, I am satisfied that the Respondent and the Intervenor were served notice of this case as per the Tribunal's Rules of Practice and were aware of the proceeding.

Respondent permanently remove his dogs from the unit and immediately cease using parking spaces reserved for visitors. He must also ensure any other person(s) residing in the unit do not use the parking spaces reserved for visitors.

[6] I further find that the Respondent (and/or other occupiers of the unit) is causing annoyances in the form of unreasonable noise, smoke and odour and order that the Respondent and any other occupant of the unit immediately comply with s. 117(2) of the Act and cease from creating excessive noise and allowing smoke to exit the unit into the common elements and/or other units.

[7] Finally, I order the Respondent and the Intervenor to reimburse NCC 7 for the cost it paid to file this application and a portion of the legal fees it incurred for participating in this proceeding. No costs or compensation for damages are awarded.

C. ISSUES & ANALYSIS

Issue No. 1: Has the Respondent failed to comply with the Applicant's pet provisions?

[8] NCC 7 has provisions in its Declaration and Rules that restrict both the number of pets per unit and the size of the pet ("pet provisions").

[9] Article VI 1 of the Applicant's Declaration states in part:

> Only one pet may be kept in any Unit without the prior written approval of the Board.
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> …
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> If any Unit owner keeps more than one pet in his or her Unit without prior written approval or keeps any animal, or bird, that is not a pet or any reptile or insect in his or her Unit or keeps any pet, animal bird reptile or insect on any part of the common elements such animal reptile bird, insect or pet shall be forthwith permanently removed from the units and the common elements upon the request of the board.
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> A Unit Occupant shall, within two (2) weeks of receipt or a written request form the Board requesting removal of a pet permanently remove such pet from the units and common elements.

[10] The Applicant's Rule 8 reads:

> There is to be no more than one (1) small pet per unit and must be on a leash when on the common area of the building. Practice the "poop and scoop" technique and pick up after your pet. Don't leave the cleaning to someone else.

[11] According to the evidence provided by NCC 7, when Mr. Vogl and his fiancée moved into the Intervenor's unit in April 2024 they brought with them two large dogs.

[12] On May 7, 2024, NCC 7 sent a letter addressed to the Estate of Vicki Vogl care of her unit address, notifying the occupier(s) of the unit that the dogs being kept in the unit were not allowed based on the Rules of the condominium, as only one pet per unit is allowed and that pet must be "small".

[13] On May 12, 2024, Mr. Vogl responded to this letter by email explaining that he and his fiancée were "temporary" occupants and that he was not aware of the Rules. However, having been made aware, he requested that the board make an exception to the provisions. He explained that he and his siblings, all of whom represented his late mother's estate, were planning on selling the unit and the situation would be temporary.

[14] NCC 7 responded by email, thanking him for the information about the circumstances, but reiterating that even as a temporary resident, he was obliged to follow the Rules. In response, Mr. Vogl made the same request again: that an exception be made due to the temporary nature of his situation.

[15] According to the testimony of John Balog, NCC 7's condominium manager, after receiving the two requests, the board of directors met to consider them. However, the board determined that while Mr. Vogl may have been entitled to keep one dog in the unit, that dog needed to be "small", and given the large size of both dogs, which are American Shepherds, and the fact that they had received complaints about the dogs, they felt it would be inconsistent with Rule 8 to allow them to stay, since neither dog met the "small pet" criteria as set out by the rule. As NCC 7 notes in its submissions, American Sheppards can weigh anywhere between 40 – 65 lbs. Thus, the board made the decision to decline Mr. Vogl's request that the dogs be allowed to stay.

[16] On May 17, 2024, the board notified Mr. Vogl that his request was denied and asked him to remove the dogs from the premises.

[17] Shortly after receiving the board's decision, Mr. Vogl indicated that the two dogs were emotional support animals ("ESAs"). He provided a note from a physician and requested that the dogs be allowed to remain as an accommodation under the *Ontario Human Rights Code*, RSO 1990 (the "Code"). The note reads:

> Patient has a history of Generalized Anxiety Disorder. His [sic] is requesting his dogs to be placed as emotional support animals, his dogs are Australian Sheppards (Oliver and Lexi). Thank you for the accommodations

[18] It is worth noting that prior to this point, Mr. Vogl had not made any mention of a need for an accommodation. In the several emails traded with the condominium manager he acknowledged that he was in breach of the Rules, and repeatedly indicated that the sole reason for asking for an exception was the fact that his living situation was temporary, as he was having to manage the property until it was sold. Nonetheless, NCC 7 considered the request. However, it determined that the note was insufficient to require it to accommodate Mr. Vogl as the note did not provide the opinion that the dogs were required to accommodate a disability, it only indicated Mr. Vogl had requested to keep the dogs as ESAs. Further, the note failed to explain why two large dogs were required to meet Mr. Vogl's disability-related needs. So, on June 3, 2024, NCC 7 wrote to Mr. Vogl asking for further documentation to support his request, they also followed up with another letter on June 7, 2024.

[19] No further information or documentation was provided by Mr. Vogl. Therefore, based on the information they had, the board determined that Mr. Vogl was not entitled to an accommodation and maintained their position that Mr. Vogl was in breach of the pet provisions and needed to remove his dogs.

[20] As noted in several Tribunal decisions[2], a request for an accommodation is a shared responsibility between the accommodation seeker and accommodation provider and there is an obligation on both to participate in the accommodation process. Based on the evidence before me, Mr. Vogl has not engaged in that process. When considering a request for accommodation, the condominium is entitled to ask for some, usually limited, additional information, including medical information, to help in its consideration of the accommodation request. If it does not receive that information, it must decide the accommodation based on the information it has. As Mr. Vogl did not respond to requests by NCC 7 for more information in making its decision on whether to grant an accommodation, the board relied on the brief note Mr. Vogl did provide.

[21] In this case, I agree with the Applicant that it is not clear from that note if Mr. Vogl currently has a disability as per the Code, or that his dogs provide necessary assistance in managing a disability. The note simply indicates that Mr. Vogl has a history of generalized anxiety and that he "requested" that the dogs be designated as ESAs, and thus I cannot conclude, based on the evidence before me, that Mr. Vogl is entitled to an accommodation under the Code. Accordingly, I see no

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[2] See, for example, *Tamo v. Metropolitan Toronto Condominium Corporation No. 744 et al*., 2022 ONCAT 40, and *Peel Condominium Corporation No. 415 v. Vokrri et al.*, 2024 ONCAT 78.

reason to interfere with the board's decision to require Mr. Vogl to remove his dogs because they do not meet the criteria as set out in the pet provisions.

[22] When, as in this case, the condominium's governing documents have provisions about animals, a unit owner, or in this case resident, cannot simply ignore those provisions. Regarding the weight limit rule particularly, NCC 7, argues, that weight limits for pets have been found by the courts, in some cases, to be reasonable (e.g. *York Condominium #382 v. Dvorchik*, 1997 CanLII 1074 (ON CA)). In this case, I have no evidence before me that such a provision is unreasonable; in fact, the evidence provides that the size of the dogs impeded NCC 7's ability to enter the unit in an emergency (to investigate and fix a leak), as entering the unit with two large dogs inside unaccompanied by the owner(s) raised safety concerns. I am satisfied, having reviewed NCC 7's submissions, that the provision falls within the range of reasonableness and that the Tribunal will not substitute its reasoning for that of the condominium's elected board so long as the rule is not obviously unreasonable on its face.

[23] Under s. 17(3) of the Act, a condominium is required to take all reasonable steps to enforce compliance with their rules, which they have done. They notified Mr. Vogl of a breach of the Rules, they provided him with plenty of opportunity to comply with the rule on his own accord, they acted reasonably in concluding that Mr. Vogl was not complying with the rule (clearly the dogs are not small and the rule states unequivocally only one pet is allowed per unit) and then when they received a request for accommodation, they considered it, but reasonably determined Mr. Vogl was not entitled to an accommodation. For all of these reasons, I will order that within 14 days of the date of this decision Mr. Vogl remove his dogs permanently from the unit as he is not complying with NCC 7's pet provisions.

Issue No. 2: Have the Respondent or other occupants of the unit, failed to comply with the Applicant's visitor parking rules?

[24] NCC 7's Rule 5 states in part:

> Unless you made alternative arrangements, you have been assigned on designated parking Space for your vehicle. Parking for visitors is designed by a "V" in selected spaces. These are for visitors only and whenever you have visitors ensure they have parked in such areas and not a numbered spaces assigned to a resident …

[25] According to NCC 7, Mr. Vogl and his fiancée have repeatedly parked in the spaced designated for visitor parking. NCC 7 suspects that Mr. Vogl and his fiancée do this because they have two vehicles and there is only one designated

parking spot for the unit. Mr. Balog, stated in his testimony that he has personally confirmed that Mr. Vogl and/or his fiancée had parked their vehicle in visitor spots. NCC 7 argues that Mr. Vogl and his fiancée are not visitors and accordingly should not be parking in spaces designated for visitors. According to Mr. Vogl's own correspondence with NCC 7, he and his fiancée both reside in the unit and have since April 2024.

[26] While it may be the case that Mr. Vogl and his fiancée's occupancy in the unit is temporary, I agree that they are not visiting and thus should not be parking in the visitors' parking spaces. The rule is clear: the designated visitor spots are for "visitors only". Yet, based on the evidence before me, I find that it is more likely than not that Mr. Vogl and/or his fiancée are doing so. Thus, I will order that the Respondent and any other occupants of the unit immediately comply with Rule 5 and cease using parking spaces reserved for visitors.

Issue No. 3: Is the Respondent creating a nuisance in the form of, noise, smoke and odour contrary to s. 117(2) of the Act?

[27] According to NCC 7, Mr. Vogl is in breach of s. 117(2) of the Act. They assert that Mr. Vogl and his fiancée have been making excessive noise in the unit in the form of loud noise, music, parties and screaming and yelling "at all hours", including late at night. Additionally, they allege that Mr. Vogl and his fiancée are also creating a nuisance in the form of smoke and cannabis odour that seeps out of their unit into the areas of nearby units.

[28] Section 117(2) of the Act, states:

> (2) No person shall carry on an activity or permit an activity to be carried on in a unit, the common elements or the assets, if any, of the corporation if the activity results in the creation of or continuation of,
>
> (a) any unreasonable noise that is a nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation; or
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> (b) any other prescribed nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation.

[29] The "other prescribed" nuisances are defined in s. 26 of Ontario Regulation 48/01 ("O. Reg. 48/01") and include odour and smoke.

[30] Mr. Balog testified that he personally spoke with Mr. Vogl on June 4, 2024, about complaints the condominium had received about the noise, smoke and odour emanating from the Respondent's unit. He states that during this conversation, Mr.

Vogl admitted that his fiancée was causing the noise. He indicated he would speak to her about it. He also confirmed that his fiancée was regularly smoking in the unit.

[31] A few days later, on June 7, 2024, NCC 7 sent a letter to Mr. Vogl summarizing the conversation and reminding him of his responsibility to comply with s. 117(2) of the Act. Despite the conversation and the letter, NCC 7 asserts that the noise, smoke and odours have continue to disturb other residents.

[32] In considering whether something is a nuisance as per s. 117(2) of the Act, factors such as the frequency and duration of the interference may be considered, along with contextual factors such as when the interference is taking place, the context of the condominium community, etc. To support a claim of nuisance there must be evidence that the interference caused by the nuisance is substantial and unreasonable.

[33] Despite NCC 7's claim that the noise created by Mr. Vogl and his fiancée occurs late at night and into the morning hours and keeps people up at night, there is scant evidence to support this claim. There is also no evidence in front of me, only an allegation, that the "yelling and screaming" has prompted residents to call the police. There is also little evidence to support that the smoke and odours are frequent, regular, and that their level of severity is unreasonable, given that the building allows smoking. Thus, I am not persuaded that Mr. Vogl and his fiancée are engaging in an activity that causes a nuisance in the form of smoke, odours and noise.

[34] However, s. 117(2) of the Act does not just prohibit noise and other nuisances that rise to the level of a nuisance; the smoke, odour and noise could still qualify as annoyances for the purposes of s. 117(2) of the Act, and it is my conclusion that they do. I accept the evidence, including Mr. Balog's testimony, that NCC 7 has received several complaints about the noise, smoke and odour created by Mr. Vogl and his fiancée. Further, I accept the evidence that Mr. Vogl acknowledged that there is noise and smoke emanating from his unit and has not rectified the situation. I am persuaded that, on the balance of probabilities, Mr. Vogl and his fiancée are engaging in activities that are resulting in an objective annoyance in the form of smoke, odours and noise. For these reasons, I will order that Mr. Vogl and any other occupier of the unit immediately comply with s. 117(2) of the Act and cease from creating excessive noise and allowing smoke to emanate from the unit.

Issue No. 4: Is the Applicant entitled to costs and/or compensation?

[35] The authority of the Tribunal to make orders for costs and compensation is set out

in s. 1.44 of the Act.

[36] Section 1.44(1)3 of the Act states that the Tribunal may make an order "directing a party to the proceeding to pay compensation for damages incurred by another party to the proceeding as a result of an act of non-compliance up to the greater of $25,000 or the amount, if any, that is prescribed."

[37] Section 1.44(1)4 of the Act states that the Tribunal may make "an order directing another party to the proceeding to pay the costs of another party to the proceeding." Section 1.44(2) of the Act states that an order for costs "shall be determined in accordance with the rules of the Tribunal".

[38] The cost-related rules of the Tribunal's Rules of Practice relevant to this case are:

> 48.1 If a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party's CAT fees unless the CAT member decides otherwise.
>
> 48.2 The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements ("costs") incurred in the course of the proceeding. However, where appropriate, the CAT may order a Party to pay to another Party all or part of their costs, including costs that were directly related to a Party's behaviour that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.

[39] The Tribunal's "Practice Direction: Approach to Ordering Costs" provides guidance regarding the awarding of costs. Among the factors to be considered are whether a party or representative's conduct was unreasonable, for an improper purpose, or caused a delay or expense; whether the case was filed in bad faith or for an improper purpose; the conduct of all parties and representatives; the potential impact an order for costs would have on the parties; the indemnification provisions in a corporation's governing documents and whether the parties attempted to resolve the issues in dispute before the CAT case was filed.

[40] NCC 7 has requested $150 in Tribunal filing fees. NCC 7 was successful in this case, and I find it appropriate to award this cost.

[41] Regarding the amount of $566.47 for damages incurred because of an act of non-compliance, NCC 7 indicates that it incurred this amount in legal expenses prior to this application in an attempt to enforce its Rules. It had counsel review Mr. Vogl's request to keep both dogs, the complaints, and provide advice on its legal rights and obligations, particularly regarding Mr. Vogl's accommodation request.

[42] Assessing accommodation requests, which may include getting legal advice, is part of NCC 7's responsibilities as a housing provider and I do not find in this case that seeking legal advice on its rights and responsibilities amounts to a damage for an act of non-compliance, but rather is simply flows from the normal function of the corporation attempting to manage such requests. I decline to award costs for damages under s. 1.44(1)3.

[43] Finally, NCC 7 has requested $5112.08 in legal costs associated with participating in this proceeding. I do find that in this case an award for legal costs is appropriate. The evidence provided is that NCC 7 attempted to resolve these issues before commencing this case. They took several actions including sending emails and letters to Mr. Vogl and having conversations with him about the issues. However, it appears that there was no effort made on the part of Mr. Vogl to resolve these issues. As noted in this decision, Mr. Vogl made no meaningful attempt to engage in an accommodation process, which he triggered by requesting an accommodation; he acknowledged that noise and smoke were emanating from his unit but seems to have failed to take any action to eliminate or mitigate these disturbances; and is parking in spots clearly designated for visitors. Given that NCC 7 has a duty to enforce its rules under s. 17(3) of the Act, when there was continued non-compliance with these matters, NCC 7 had no choice but to file this application, leading to the incurring of legal costs. I also find NCC 7's indemnification provisions (Article VI(2) of its Declaration) are of some relevance.

[44] The award of costs is discretionary, and I find that in this case an award of $3000.00, approximately 60% of their legal costs, is appropriate.

[45] Who should pay these costs? Typically, a unit owner is responsible for ensuring that any resident of their unit comply with the Act and the governing documents of the condominium. This means that often a unit owner must bear the burden of any costs associated with their resident's/occupier's failure to comply with the Act and/or governing documents. In this case, the unit owner is the estate of Vicki Vogl. However, the facts of this case are unique insofar as Mr. Vogl and his fiancée are the occupants of the unit who are not complying with the Act and governing documents, and Mr. Vogl is, by his own claim, partially responsible for the estate, which as owner of the unit should be ensuring that the occupants comply with NCC 7's governing documents and the Act. Thus, he bears responsibility on two fronts, and I find it appropriate that Mr. Vogl himself, separate from the estate, bear some accountability for the costs. I will order that the Intervenor (the estate of Ms. Vogl) and the Respondent, Mr. Vogl, be jointly and severally responsible for paying the costs.

D. ORDER

[46] The Tribunal Orders that:

1. Under s. 1.44(1)2 of the Act, within 14 days of the date of this decision, Mr. Vogl shall permanently remove his dogs from the unit.
2. Under s. 1.44(1)1 of the Act, the Respondent and any other occupants of the unit immediately comply with Rule 5 and cease from using parking spaces reserved for visitors.
3. Under s. 1.44(1)1 of the Act, the Respondent and any other occupants of the unit immediately comply with s. 117(2) of the Act and cease from creating unreasonable noise and allowing smoke/odours to exit the unit.
4. Under s. 1.44(1)4 of the Act, the Respondent and Intervenor will be jointly and severally liable to pay the amount of $3000 to the Applicant for its legal costs and $150 to reimburse NCC 7 for its Tribunal filing fees. These costs must be paid within 30 days of the date of this decision.

Nicole Aylwin
Member, Condominium Authority Tribunal

Released on: November 8, 2024