COURT OF APPEAL FOR ONTARIO

CITATION: Cottage Advisors of Canada Inc. v. Prince Edward Vacant Land Condominium Corporation No. 10, 2022 ONCA 107
DATE: 20220204
DOCKET: C69232

Doherty, Tulloch and Sossin JJ.A.

BETWEEN

Cottage Advisors of Canada Inc.

Appellant (Applicant)

and

Prince Edward Vacant Land Condominium Corporation No. 10

Respondent (Respondent)

Megan Mackey, for the appellant

Jason Mangano, for the respondent

Heard: January 6, 2022 by video conference

On appeal from the order of Justice Paul Schabas of the Superior Court of Justice dated February 17, 2021, with reasons reported at 2021 ONSC 1203.

REASONS FOR DECISION

I

[1] The respondent, Prince Edward Vacant Land Condominium Corporation No. 10 ("the Condominium"), is a 237-unit cottage resort built near the Sandbanks in Prince Edward County, Ontario. The units are individually owned. The property is

a summer resort, complete with pools, sports courts, and a fitness centre. The resort is not open in the winter. The units cannot be used as primary residences.

[2] From the outset, it was understood the owners of individual units could rent out their units on a short-term basis when they were not using them. Some owners chose to do so, and others did not. As of this application, over half of the unit owners rented out their units on a short-term basis. Renters had access to the common amenities on the property.

[3] The appellant, Cottage Advisors of Canada Inc. (“CAC”), has been involved in the Condominium from the beginning. CAC was the developer and declarant of the Condominium. It has owned multiple units in the Condominium from the outset. At the time of the application, CAC owned 25 units.

[4] The resort opened by 2011. CAC, through a sister company (“SSVRM”), provided management services for the Condominium and onsite rental services for those unit owners who wished to rent their units. SSVRM charged fees for those services. A by-law passed in July 2011 directed that renters would be subject to a “rental amenity fee charged by the Corporation from time to time”. SSVRM collected the amenity fee. None of the unit owners, including CAC, ever challenged the fee.

[5] The Condominium has been operating under the authority of a Board of Directors since 2016. The relationship between the Board and SSVRM has

deteriorated over the years. The Condominium and SSVRM have litigated over SSVRM's voting rights. The Condominium Board also terminated SSVRM's management agreement. CAC takes the position that the Board is controlled by owners who do not rent and favours the interests of that group over the owners who do rent. CAC is an owner/renter.

[6] The Board decided it would take over the oversight, control and management of the rental activities at the Condominium. In furtherance of that goal, the Board introduced By-Law No. 7 in November 2020. The By-Law passed overwhelmingly by a vote of 155 for and 16 against. CAC did not vote its 25 votes.

[7] By-Law No. 7 addressed various aspects of the rental activities. CAC challenged the *vires* and reasonableness of several components of the By-Law. The application judge struck down parts of the By-Law and upheld other parts. There is no appeal from the part of the application judge's order striking down parts of the By-Law. CAC does, however, appeal the application judge's refusal to strike down two specific components of By-Law No. 7.

[8] First, CAC submits the application judge erred in holding the Condominium had the authority to charge owners who rented their units an administrative fee of about $120 each time the unit was rented. According to the By-Law, the fee was intended to cover costs associated with the renting process, e.g. registering renters, providing parking passes, and controlling access to the property.

[9] Second, CAC argues the application judge was wrong in upholding the Condominium's power to impose an amenity fee of $310 per week. The fee was payable by any owner who rented his unit and was intended to compensate for additional wear and tear on facilities and additional staffing costs said to relate to short-term renting.

[10] CAC, like the application judge, begins with bedrock principles. Condominium corporations are creatures of statute. By-Laws passed by a condominium must be consistent with the declaration establishing the condominium and authorized under the terms of the *Condominium Act, 1998*, S.O. 1998, c. 19. A by-law which is either inconsistent with the condominium's declaration or not authorized by the *Condominium Act* is *ultra vires*: *Condominium Act*, *1998,* ss. 56(6)-(8).

[11] CAC submits that under the terms of the Condominium's Declaration, common expenses must be shared equally among the units. Section 84(1) of the *Condominium Act, 1998* requires that owners contribute to common expenses in the proportions specified in the declaration. CAC contends what the Condominium calls amenity and administrative fees are in reality fees directed toward the payment of common expenses. Under the terms of By-Law No. 7, they are not payable equally by all unit owners. Instead, unit owners who rent pay more and thereby subsidize the non-renting owners. CAC contends that the part of By-Law No. 7 which provides for administrative and amenity fees payable by owners who

rent are inconsistent, both with the Condominium Declaration and the *Condominium Act, 1998*. They cannot stand according to CAC.

[12] While CAC's primary argument is that the relevant parts of the By-Law are *ultra vires* the Condominium, it also argues those parts of the By-Law are oppressive, contrary to s. 135 of the *Condominium Act, 1998*.

[13] It is appropriate to begin the consideration of CAC's submissions by reference to the Condominium Declaration. Section 22 states:

> The Cottage Units are part of a "Cottage Resort Community" and are zoned Tourist/Commercial; and it is intended that the Cottage Unit shall be rented as tourist accommodation when not being used by the Owner. The rental of any Cottage Unit shall be governed by the Rules and Regulations with respect to the rental of Cottage Units approved by the Board from time-to-time.

[14] It is explicit in s. 22 that the Condominium consists of units owned by owners who do not rent and owners who do rent their units. It is equally explicit that those who choose to rent their units will be governed in part by "Rules and Regulations with respect to the rental of Cottage Units approved by the Board".

[15] The question becomes whether the By-Law, to the extent that it sets an administrative fee and an amenity fee in respect of rented units, is a "Rule or Regulation with respect to the rental of Cottage Units".

[16] This court does not answer that question as a matter of first impression, but must have regard to the application judge's factual findings and due deference to

the Board's own interpretation of the powers granted to it under the Declaration: *London Condominium Corp. No. 13 v. Awaraji*, 2007 ONCA 154, at para. 6.

[17] The application judge was satisfied that the fees offset costs attributable to the renting activities of some of the owners: Reasons, at paras. 32, 34. That finding was available on the evidence adduced on the application. The manner in which fees attributable to renting have historically been treated by the Condominium provide strong support for that conclusion. Amenity fees attributable to costs relating to renting units have been part of the operation of the Condominium from the outset when CAC was in control of the operation.

[18] The Board's interpretation of its powers under s. 22 of the Declaration is not unreasonable. Nor is it inconsistent with any provisions in the *Condominium Act, 1998*.

[19] Nor can the By-Laws providing for the fees be characterized as "oppressive" within the meaning of s. 135 of the *Condominium Act, 1998*. Oppressive conduct connotes conduct that runs contrary to the reasonable expectations of those said to be oppressed. Once again, the history of charging these kinds of fees throughout the life and operation of the Condominium belies any claim that the owners who rented did not anticipate and agree to such fees: see *Walia Properties Ltd. v. York Condominium Corp. No. 478*, 2007 CanLII 31573, at paras. 23-24 (Ont. Sup. Ct.).

[20] Any argument that the By-Laws were oppressive falls under the weight of the application judge's finding that there was a reasonable basis upon which the Board could conclude the renting activities generated added costs and expenses. The revenue generated by the fees lowered the common expenses of all unit owners equally. As the application judge appropriately put it, at para. 42:

> The By-law reflects a reasonable balancing which is confirmed by the overwhelming vote of the owners in favour of it.

[21] The appeal is dismissed.

[22] The respondent is entitled to costs of the appeal, fixed at $15,000, inclusive of taxes and disbursements. We see no reason to modify the costs order made by the application judge. However, if the parties wish to make submissions on that issue, they may do so in writing within 7 days of the release of these reasons. The submissions shall not exceed 3 pages.

L. SOSSIN J.A.