CITATION: TSCC No. 1556 and No. 1600 v. Owners of TSCC No. 1556, et al.
2017 ONSC 6542
COURT FILE NO.: CV-17-573434 & CV-17-573435
DATE: 20171102

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Toronto Standard Condominium Corporation No. 1556 Applicant	Megan Mackey, for the Applicant
– and –	
All Owners and Mortgagees of record of Toronto Standard Condominium Corporation No. 1556 Respondent	Patrick G. Duffy, for the Respondent 1453371 Ontario Inc.
– and –	
Toronto Standard Condominium Corporation No. 1600 Applicant	Megan Mackey, for the Applicant
– and –	
All Owners and Mortgagees of record of Toronto Standard Condominium Corporation No. 1600	Patrick G. Duffy, for the Respondent Sam Siu Man Fung René A. Clonfero, for the Respondent Mason Hatahet
	HEARD: October 17, 2017

AKBARALI, J.

Overview

[1] Two sister condominium corporations seek an order amending their declarations to eliminate provisions, deliberately inserted into the declarations, that expressly permit transient,

short-term rentals within the condominiums. There have been no complaints or problems with short-term rentals, but the condominium corporations seek to prevent future problems. They argue that the leasing provisions are inconsistent with the provisions of the *Condominium Act, 1998*, S.O. 1998, c. 19, with the applicable zoning by-law, and with a restrictive covenant registered on title to the lands on which the condominiums are situate.

[2] The owners of the 714 residential units in the condominiums were served with the Notice of Application. Three participated in the hearing of the applications. Mason Hatamet, an owner and resident in TSCC No. 1600, filed an affidavit in that proceeding. Sam Siu Man Fung, an owner of a unit in TSCC No. 1600, also filed an affidavit in that proceeding. Gerry Courey, the president of 1453371 Ontario Inc., an owner in TSCC 1556, filed an affidavit in that proceeding.

[3] Mr. Fung and 1453371 Ontario Inc. are represented by counsel who is retained by an entity known as DelSuites Inc., a company in the business of providing furnished short-term rental accommodations across the Greater Toronto Area. DelSuites manages a number of units in the condominiums. It is related to Del Condominium Rentals, which is in the business of condominium rental management. Both DelSuites and Del Condominium Rentals are part of the Tridel Group of Companies. Tridel was the developer of the condominiums and the declarant of the declarations of TSCC 1556 and TSCC 1600.

[4] The respondents argue that the declarations, which read as they were intended, contain no inconsistency or error with the *Act*, the zoning by-laws or the restrictive covenant. They also argue that if there were an inconsistency or error, an amendment would not be necessary or desirable. They argue that to change the declarations to remove the short-term leasing provisions would be a fundamental alteration to the rights the unit owners understood they had when they purchased their units. They argue that such a change should be undertaken under s. 107 of the *Act*, which allows a condominium corporation to amend its declaration on the satisfaction of various criteria, including that the owners of at least 80 percent of the units have consented to the amendment in writing.

Issues

[5] These applications raise the following issues:

a. Is there an error or inconsistency in the declarations because:

i. they are inconsistent with the *Act* because the declarations impermissibly grant rights with respect to occupancy and use or because they interfere with the ability of the condominium boards to make rules;

ii. they are inconsistent with the applicable municipal zoning by-law; or

iii. they are inconsistent with the restrictive covenant registered on title to the lands?

Are the declarations inconsistent with the *Act*?

[6] The applicants argue that the declarations are inconsistent with the *Act* in two ways: because they impermissibly grant rights with respect to occupancy and use and because they interfere with the ability of the condominium boards to make rules.

[7] Although there was argument about whether the inconsistency contemplated in s. 109 could be with instruments external to the declaration, it is not necessary for me to address this question. For the purposes of my analysis, I assume that an inconsistency for which an amendment may be necessary or desirable can include an inconsistency with a document external to the declaration.

Do the declarations grant rights with respect to occupancy and use?

[8] In s. 7(2), the *Act* sets out what a declaration must contain. In s. 7(4), the *Act* sets out what a declaration may contain. Of relevance here, a declaration may contain "conditions or restrictions with respect to the occupation and use of the units or common elements": s. 7(4)(b) of the *Act.* The applicants rely on this provision to argue that the declarations at issue here impermissibly contain rights with respect to occupancy and use.

[9] It is necessary to consider the wording in the declarations that the applicants seek to remove. The wording is the same in both declarations.

[10] In the section entitled "Use of the Dwelling Units", the declarations provide that

> Each dwelling unit shall be occupied and used only for residential purposes, or for the business of providing transient residential accommodation on a furnished and/or unfurnished suite basis (with or without ancillary maid, cleaning and/or laundry services), through short term or long term licence/lease arrangements, in accordance with the provisions of the applicable zoning by-law(s) of the Governmental Authorities, as may be amended from time to time, and for no other purpose whatsoever, provided however that the foregoing shall not prevent or in any way restrict:
>
> …
>
> (ii) Any unit owner, or any property manager acting on behalf of any unit owner or group of unit owners, from leasing or renting any dwelling unit(s) in this Condominium from time to time, for any duration and on any number of occasions, and whether in a furnished or unfurnished state, with or without ancillary maid, cleaning and/or laundry services.

[11] The "general use" provisions of the declarations similarly set out restrictions on the use of units (for example, not to occupy or use units in such a way that is likely to damage or injure any person or property). After providing for a number of restrictions, these provisions provide that "the foregoing provisions of this subparagraph shall not, however, be construed so as to prohibit or restrict…the transient residential accommodation arrangements made…"

[12] The provisions of the declarations dealing with the general use of the common element areas provide that each owner may make reasonable use of the common elements, however "no condition shall be permitted to exist, and no activity shall be carried on" that meets certain descriptions laid out in the declarations. These provisions go on to provide that "none of the foregoing provisions shall be construed so as to prohibit or restrict…the transient residential accommodation arrangements made…"

[13] The declarations also set forth the duties of the condominium corporation, which include:

> To ensure that no actions or steps are taken by or on behalf of the Corporation, or by anyone else, which would prohibit, limit or restrict the Declarant and/or any other unit owner(s), or any property manager acting on behalf of any unit owner or group of unit owners, from leasing or renting any dwelling unit(s) in this Condominium from time to time, for any duration and on any number of occasions, and whether in a furnished or unfurnished state (with or without ancillary maid, cleaning and/or laundry services), and to ensure that no by-laws or rules are hereafter passed or enacted by the Corporation which would limit, restrict or otherwise affect the minimum duration of any proposed tenancy, license or occupancy period in respect of any dwelling unit(s), and/or impose any restrictions (or additional conditions to be satisfied) regarding the transient residential accommodation arrangements made (or to be made from time to time) by or on behalf of the Declarant and/or any other unit owner(s).

[14] In my view, these provisions of the declarations do not purport to grant rights. The right to lease a property short-term, or at all, is a right of ownership. The declarations restrict the uses to which the units may be put, and in defining the scope of the restrictions, make clear that occupancy and leasing, including short-term leasing, of the units are not restricted uses. The declarations do not create the right to lease; they merely make clear that in restricting other uses, they do not restrict the right to lease.

[15] Accordingly, I reject the argument that the impugned provisions of the declarations grant rights with respect to occupancy and use. There is no inconsistency between the *Act* and the declarations on this basis.

Are the declarations inconsistent with the* Act *because they interfere with the ability of the condominium board to make rules?

[16] Pursuant to s. 58(1) of the *Act*, a condominium board

> …may make, amend or repeal rules respecting the use of common elements and units to:
>
> (a) promote the safety, security or welfare of the owners and of the property and assets of the corporation; or

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

[17] Pursuant to s. 58(2) of the *Act*, "the rules shall be reasonable and consistent with this Act, the declaration and the by-laws".

[18] There is no doubt that a unit owner's right to lease her condominium unit may legitimately be restricted by a rule enacted by the condominium board. For example, in *Metropolitan Toronto Condominium Corp. No. 1170 v. Zeidan*, 2001 CarswellOnt 2495 (S.C.) the court approved of rules restricting short-term leasing that were enacted by the condominium board. Notably, however, the rules did not conflict with the declaration.

[19] The court in *Zeidan* noted the four sources of provisions restricting owners and affecting units in a condominium: the *Act*, the declaration, the by-laws of the condominium corporation and the rules passed by the condominium board. It noted the hierarchy: the *Act* is at the top, followed by the declaration, then the by-laws, and finally the rules. "No provision in any given category can be inconsistent with a provision higher up in the hierarchical chain": para. 36.

[20] Thus, the condominium board in *Zeidan* was free to make rules respecting short-term leasing because those rules were not inconsistent with any of the provisions higher up in the hierarchical chain.

[21] The hierarchy is also reflected in s. 58(2) of the *Act*, which, as I have noted, provides that the rules enacted by a condominium board must be consistent with the provisions of the *Act*, the declaration and the by-laws.

[22] In this case, the condominium corporations cannot make rules respecting short-term leasing because to do so would be inconsistent with the declarations. The restriction on the boards' ability to make rules is not inconsistent with the *Act.* By virtue of s. 58(2), the restriction is mandated by the *Act.*

Are the declarations inconsistent with the zoning by-law?

[23] The parties, without any evidence from any expert land use planners, made argument about the proper interpretation of the zoning by-law applicable to the condominium corporations. There was debate about whether the condominium units that are being rented are "tourist houses" or "dwelling units", and how those terms should be interpreted.

[24] In my view, it is unnecessary to embark on a detailed analysis of the zoning by-law.

[25] The provisions of the declaration, which I have quoted above, make clear that the permitted uses (that is, occupancy and leasing) must be "in accordance with the provisions of the applicable zoning by-law(s) of the Governmental Authorities, as may be amended from time to time". The requirement in the declarations to abide by applicable zoning by-laws allows for the amendment of those by-laws over time without necessity to amend the declarations. It also accommodates minor variances that may be obtained from time to time. On their face, the

declarations require compliance with the zoning by-laws. They are not inconsistent with the zoning by-laws.

[26] If a use of a unit is inconsistent with the applicable zoning by-law, remedies are available to address such inconsistency under s. 380 of the *City of Toronto Act, 2006*, S.O. 2006, c. 1, Sched. A, which provides that any contravention of a city by-law may be restrained by application at the instance of a taxpayer or the city or local board.

Are the declarations inconsistent with the restrictive covenant?

[27] The applicants rely on a restrictive covenant registered on title to the lands on which the condominiums are situate. They argue the restrictive covenant prohibits any commercial gross floor area on the lands. They state that leasing a unit is a commercial use of the unit and thus inconsistent with the restrictive covenant.

[28] The restrictive covenant was registered on the lands by Wittington Properties Limited, a major shareholder of George Weston Limited, one of North America's largest food processing and distribution groups operating under the Weston Foods and Loblaw banners.

[29] There is evidence from the Executive Vice President of Sales and Market for the Tridel Group of Companies that the intent of the restrictive covenant was to prohibit the construction of commercial space on the lands on which it is registered. It is not clear how the affiant has information about the intent of Wittington.

[30] In any event, I must interpret the restrictive covenant based on the terms of the instrument itself, not a third party's belief about the drafter's intent.

[31] In para. 2, the restrictive covenant defines various terms. These include "maximum density" which is defined to mean "630,000 square feet of GFA and nil square feet of Commercial GFA". This definition is the subject of a later amendment, but the "nil square feet of GFA" remains in the amended definition of maximum density.

[32] In no other place does the restrictive covenant refer to commercial GFA. However, "maximum density", which includes "nil commercial GFA" is the subject of one restriction in the restrictive covenant. Paragraph 20 provides that "no buildings or other improvements shall be constructed on the Property which contain greater than the…Maximum Density."

[33] The restrictive covenant thus restricts the construction of commercial GFA.

[34] The condominium buildings contain residential units. The use of a residential unit for leasing may be a commercial use, but it is not a commercial construction. There is no specific prohibition on commercial use of non-commercial GFA.

[35] In contrast, the restrictive covenant sets out a number of other restrictions that apply to the property. These are very specific in nature and include, for example:

a. para. 6, which requires, among other things, that all grass areas be kept cut and trimmed;

b. para. 9, which prohibits temporary construction signs unless the subdivider has approved them;

c. para. 13, which prohibits the warehousing or storage of goods, equipment or other materials unless required for construction;

d. para. 15, which prohibits animals or birds other than household pets from being kept on the property;

e. para. 17, which prohibits, among other things, any camper van from being maintained on the property except wholly within a garage; and

f. para. 18, which prohibits clothes lines and clothes umbrellas.

[36] In my view, an instrument that is specific enough to restrict the use of clothes lines and clothes umbrellas would specifically restrict the commercial use of non-commercial GFA if that commercial use was meant to be captured. The restrictive covenant does not do so. In my view, the restrictive covenant is not inconsistent with the declarations. It does not prohibit leasing the residential units for a commercial purpose.

Short-term Leasing

[37] The applicants argue that the advent of organizations like Airbnb has changed the nature of short-term leasing. They argue that the developer, Tridel, included the provisions about short-term leasing in the declarations to protect its business model in the wake of cases like *Zeidan*. Indeed, Tridel's witness admitted that was the case. The applicants urge me not to allow developers to hold condominium boards hostage by allowing developers to enshrine whatever business protections they seek in a condominium's declaration. They argue that the process available to condominium unit owners under s. 107 of the *Act* is difficult, because there is much apathy on the part of condominium owners, such that getting the requisite 80% approval to amend a declaration is a practical impediment to desirable changes to a declaration. I have sympathy for these arguments.

[38] On the other hand, Mr. Hatahan deposes that the ability to earn rental income from Airbnb has allowed him to meet his daily living expenses including those related to his condominium. Mr. Hatahan deposes that he relied on the ability to rent or lease his condo when deciding to purchase it. He deposes, and it is not disputed, that before purchasing their units, the owners received disclosure statements which clearly stated that the declarant:

> intends to allow the dwelling units…to be marketed and sold to one or more owners…who intend or desire to lease same to tenants, on a short-term or long-term basis, whether as furnished or unfurnished residential apartments (and with or without ancillary maid, cleaning and/or laundry services), and the proposed declarations of the [condominiums] specifically permit such use.

[39] If developers can enshrine business protections in the declarations of the condominiums they develop, the solution for the unit owners who find this undesirable is to amend the declaration pursuant to s. 107 of the *Act.* If the 80 percent threshold is unreasonably high to facilitate change that is desirable, and perhaps especially desirable to some in the current climate where websites like Airbnb make short-term leasing widespread and readily available, the remedy lies in legislative change to the threshold. The remedy is not to take what is fundamentally an amendment to a declaration that the board desires and repackage it as an inconsistency in order to seek relief under s. 109 of the *Act*.

Conclusion

[40] The applications are dismissed. The declarations are not inconsistent with the *Act*, the municipal zoning by-law or the restrictive covenant.

[41] If the parties cannot agree on costs, the respondents shall deliver costs submissions not to exceed three pages within two weeks of the date of these reasons. The applicant shall deliver written submissions not to exceed three pages within two weeks thereafter. The respondents may deliver reply submissions not to exceed two pages within five business days thereafter. Submissions may be delivered to my attention at Judges' Administration, 361 University Avenue.

[42] Finally, I thank all counsel for their able assistance.

J. T. Akbarali J.

Released: November 02, 2017

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– and –

All Owners and Mortgagees of record of Toronto Standard Condominium Corporation No. 1556
Respondent

– and –

Toronto Standard Condominium Corporation No. 1600
Applicant

– and –

All Owners and Mortgagees of record of Toronto Standard Condominium Corporation No. 1600

Respondent

REASONS FOR JUDGMENT

Akbarali J.

Released: November 02, 2017