

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: May 2, 2022

CASE: 2021-00351N

Citation: Teno v. Essex Condominium Corporation No. 28, 2022 ONCAT 43

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

Member: Laurie Sanford, Member

The Applicant,
Richard Charles Teno
Self-Represented

The Respondent,
Essex Condominium Corporation No. 28
Represented by Laura Gurr, Counsel

Hearing: Written Online Hearing – February 15, 2022 to April 13, 2022

REASONS FOR DECISION

A. INTRODUCTION

- [1] The declaration of Essex Condominium Corporation No. 28 (“ECC28”) has a provision prohibiting pets or other animals on the premises (the “No Pets Provision”). There are signs at the entrance doors advising that pets are forbidden. New owners are pointed to restrictions in the declaration, including the No Pets Provision. However, from about 1985 until early 2017, ECC28 did not consistently enforce the No Pets Provision against owners of cats. Other pets were prohibited but cats were from time to time allowed to live in units. ECC28 began receiving requests to exempt dogs from the No Pets Provision on the grounds that cats were being permitted on the property. As a result of these requests, ECC28 decided that it needed to bring itself into compliance with its declaration. ECC28 enacted Rule 27, a rule which, among other things, established provisions relating to what it calls “legacy cats”. Legacy cats were individually identified and approved as exceptions to the No Pets Provision. Rule 27 provides that these legacy cats can live their lives out at ECC28 but may not be replaced. ECC28 submits that Rule 27 is the appropriate solution to its problem in that it phases out legacy cats while balancing the rights of owners of cats now on the premises.
- [2] Mr. Teno is a unit owner in ECC28. He submits that he bought his unit in 2016 on the understanding that he was buying into a no pets condominium corporation. He submits that Rule 27 is unreasonable and invalid. He contends that Rule 27 is

unreasonable because ECC28 did not take all reasonable steps to resolve the non-compliance issue before enacting it. Mr. Teno questioned aspects of the procedure used to enact Rule 27. Mr. Teno also submits that Rule 27 is both unreasonable and invalid because it conflicts with the provisions of ECC28's declaration. Mr. Teno wants Rule 27 declared invalid, at least insofar as it relates to legacy animals. He wants ECC28 to begin enforcing its declaration immediately.

- [3] For the reasons set out below, I conclude that the provisions of Rule 27 that relate to legacy cats are valid and enforceable. It is a reasonable attempt on the part of ECC28 to bring itself into compliance with its declaration while balancing the rights of current cat owners. The needs of those who wish to live in a no pets condominium building are at least partially addressed by restricting the legacy cats to the units of their owners. Therefore, I will dismiss this application. Neither party requested costs and no order as to costs will issue.

B. ISSUES & ANALYSIS

- [4] Rule 27 has two purposes. First, it addresses the fact that its declaration makes no allowance for service animals which may be permitted under the *Ontario Human Rights Code*. These provisions are not at issue in this case. Second, Rule 27 deals with cats which were previously permitted to be on the premises despite the No Pets Provision. These are the so-called legacy cats. The issue in this case is whether the provisions in Rule 27 that relate to legacy cats are valid. Mr. Teno challenges Rule 27 on the grounds that it is unreasonable and conflicts with ECC28's declaration.
- [5] The Tribunal has the jurisdiction to deal with this issue under subparagraph 1 (1) (d) (i) of Ontario Regulation 179/17 of the *Condominium Act, 1998*. This Regulation grants the Tribunal the jurisdiction to deal with disputes about provisions of a condominium corporation's governing documents that "prohibit, restrict or otherwise govern pets or other animals in a unit, the common elements or the assets, if any of the corporation."
- [6] The No Pets Provision is contained in Article III (5) of ECC28's declaration and states, "No pet, animal, livestock or fowl will be permitted or kept upon any part of the common elements or in any unit."
- [7] ECC28 submits that while it consistently enforced its No Pets Provision against dogs, livestock and fowl, its enforcement of the No Pets Provision relating to cats was "inconsistent and intermittent, at best". Permitting cats on the premises has apparently been the practice since the registration of ECC28's declaration in about 1985, a period of over 30 years. Mr. Teno made extensive submissions about the

inconsistency of the enforcement and made unsubstantiated allegations that certain senior employees and members of the board of directors unilaterally exempted themselves from the No Pets Provision. I conclude, on the basis of evidence provided by both parties, that ECC28 has for decades failed to consistently enforce the No Pets Provision as it relates to cats on the premises.

- [8] A member of the board of directors gave testimony. According to her, the board began receiving requests from unit owners to permit dogs on the premises around 2013 or 2014. It was this development which led ECC28 to conclude that it had to stop permitting cats and to begin consistently enforcing the No Pets Provision, in her testimony. ECC28 began what was apparently a multi-year consideration of the best way forward. Ultimately, the board decided in February, 2017 to enact Rule 27. The ECC28 witness testified that the board determined that the average life expectancy of an indoor cat was approximately 12 ½ years. Eventually, it decided to permit current owners of cats to keep their pets for life if they identified them with a picture and agreed not to replace a cat which died. Cat owners also had to agree to a set of restrictions on the legacy cats, including restricting the legacy cats to their units.

- [9] In submissions, ECC28 stated that it was aware of a number of cases dealing with attempts to enforce no pets provisions after a long history of non-compliance. It submits that on the basis of these cases, it concluded that owners of legacy cats would likely be successful in resisting attempts to enforce the No Pets Provision. There is a reference in the minutes of the February, 2017 board meeting to legal advice being given to set a transition period of five years before enforcing the No Pets Provision. In a subsequent notice to owners, the president of the board refers to seeking legal advice before passing Rule 27. The legal opinion is not before me. However, based on the testimony and submissions I conclude that ECC28 sought legal advice prior to enacting Rule 27.

- [10] Mr. Teno pointed to what he considers numerous inadequacies in the board's approach to the passage of what eventually became Rule 27. While there do appear to have been some procedural irregularities initially, on February 23, 2017, the board approved Rule 27 and I do not find any procedural errors in that approval. In March, 2017, the president of the board wrote to the owners advising of the rule and saying, "Over a period of years all current cats should be gone without replacement and hopefully the No Pet rule will be enforced." Mr. Teno points to the word "hopefully" in this sentence as an admission of failure. I think a better reading of the sentence is a reflection of the fact that it will be years before all legacy cats are gone and the president cannot predict what future boards will do.

- [11] In ECC28's submission, it decided to bring Rule 27 before the Annual General Meeting in June, 2017 because it was contentious. Mr. Teno offers a somewhat different account. He provided documentary evidence showing that some unit owners petitioned ECC28 for a vote. Mr. Teno submits that the owners sought a vote under section 107 of the Act, a section relating to the amendment of ECC28's declaration. In his submission, the unit owners were instead granted a vote under subsection 58 (7), which deals with owner approval of rules.
- [12] Section 107 of the Act sets out the procedure a condominium corporation must use if it wishes to amend its declaration. Unit owners cannot requisition a vote under that section. There is no vote taken, rather the written consent of a percentage of unit owners is required.
- [13] In this case, it appears that what happened was that a vote was taken at the Annual General Meeting of June, 2017 under the subsection 58 (7) of the Act, which deals with the adoption of a rule. The difference in procedure depends on whether Rule 27 is a rule or is in fact an attempt to amend the declaration. For reasons set out below, I conclude that Rule 27 is a rule, not an attempt to amend the No Pets Provision. Therefore, a vote under subsection 58 (7) was appropriate. After what ECC28 describes as a "fulsome discussion", the Rule was approved and has been in force since its approval on June 1, 2017.
- [14] Mr. Teno submits that Rule 27 is unreasonable because ECC28 did not take "all reasonable steps" under subsection 17 (3) of the Act to enforce the No Pets Provision before enacting it. ECC28 submits that in considering whether to begin enforcing the No Pet Provision immediately, it also had an obligation to consider the rights that the legacy cat owners might have. Mr. Teno argues, in effect, that these owners have gained no rights by violating the provisions of the declaration. As noted above, ECC28 sought a legal opinion on this matter.
- [15] Both parties referred to the case of *Metropolitan Toronto Condominium Corporation No. 949 v Staib*, 2005 CarswellOnt 7105, a decision of the Ontario Superior Court of Justice which was affirmed on appeal to the Ontario Court of Appeal. In the *Staib* case, the condominium corporation had a no pets provision in its declaration of which Ms. Staib was aware when she moved in with her cat. It was not until 10 years later that she was asked to remove the cat on the grounds of a violation of the declaration. By that time the cat was 12 years old and "essentially unadoptable" the court found. The court held that, having knowingly failed to enforce its no pet provision against Ms. Staib for 10 years, during which time Ms. Staib's position might be said to have worsened due to the aging of the cat, the condominium corporation could not now enforce the declaration against

her. The issue, the court found, was not whether the no pet provision was reasonable but rather whether the enforcement of it against Ms. Staib in the circumstances of the case would be reasonable.

- [16] It is true that condominium corporations have an obligation to enforce the provisions of their declarations, an obligation ECC28 acknowledges. However, what we are dealing with here is what to do in circumstances where a condominium has failed to meet this obligation. In this case, ECC28 submits that it is aware that *Staib* decision calls into question whether ECC28 could have successfully defended an action brought by a current cat owner to keep a legacy cat. ECC28 introduced testimony from a number of legacy cat owners who testified that they would not voluntarily remove their cats if Rule 27 was struck down. I find that ECC28 acted reasonably in considering whether it could in fact legally enforce the No Pets Provision against current owners of legacy cats, given its history of non-enforcement. Having determined that it was unlikely to succeed in an action brought by a legacy cat owner, it enacted a transition rule to permit it to bring itself into compliance with the No Pets Provision over time. In the circumstances of this case, this is not an unreasonable position.
- [17] Mr. Teno argues that Rule 27 is in substance an attempt to amend or selectively enforce the No Pets Provision in the declaration by granting an exemption to it for current cat owners. Mr. Teno argues that the decision in the *Staib* case is an example of the court's power to choose not to enforce a provision of the declaration. Mr. Teno submits that a condominium corporation does not have an equivalent power to selectively enforce its declaration.
- [18] ECC28 takes the position that Rule 27 is a reasonable solution to the problem of bringing itself into compliance with the No Pets Provision while balancing the rights of owners of cats currently on the premises. Rule 27 itself begins by reciting the No Pets Provision in the declaration. In paragraph 5, Rule 27 sets out the background of intermittent compliance and paragraph 6 provides that "previously approved" cats may continue in ECC28. Mr. Teno submits that there were no "previously approved" cats. Paragraph 6 of Rule 27 goes on to establish a set of conditions for legacy cats including a requirement to notify ECC28 of the cat by April 30, 2017 and a requirement that the cat have been living in a unit as of February 23, 2017. I conclude that legacy cats are adequately identified under Rule 27, despite the confusing reference to previous approval.
- [19] ECC28 argues that it is entitled to deference in its choice of solution to the problem of its prior non-enforcement of the No Pets Provision. It cites the case of *York Condominium Corp. No. 382 v Dvorchik* (1997), 12 R.P.R. (3d) 148 (Ont. C.A.).

That case dealt with an application under what is now subsection 134 (1) of the Act, an application to enforce compliance with the Act or governing documents. The court held:

In making its rules, the board is not performing a judicial role, and no judicialization should be attributed either to its function or its process. In an application brought under s. [134(1) of the Act], a court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly unreasonable or contrary to the legislative scheme. In the absence of such unreasonableness, deference should be paid to rule deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners.

- [20] ECC28 submits that Rule 27 is not “clearly unreasonable or contrary to the legislative scheme” and therefore, deference is owed. Mr. Teno submits that subsection 58 (2) requires rules to be reasonable and consistent with, among other things, the declaration. Mr. Teno’s position is that Rule 27 is clearly inconsistent with a No Pets Provision in that it permits pets on the premises.
- [21] Rule 27 may be viewed as a bridge to transition ECC28 from non-compliance with the No Pets Provision to compliance. It is an attempt to balance the provisions of the declaration with the interests of those who have had cats in their units, in some cases for years, due to the non-enforcement of the No Pets Provision. As noted above, ECC28 provided testimony from a number of these cat owners who argue passionately that they should be permitted to keep their pets and that they would seek legal relief if the removal of the cats were threatened. The restriction of legacy cats to the units where they live offers at least some protection for unit owners who wish to live in a no pets condominium. I conclude that Rule 27 is, on its face, both reasonable and an attempt to bring ECC28 into compliance with its declaration over time.
- [22] It is also relevant to consider whether ECC28 is enforcing Rule 27. A failure to enforce the rule would suggest an attempt by ECC28 to continue to selectively enforce the No Pets Provision. ECC28 submits that it is enforcing the rule. This includes both not permitting new cats on the premises and enforcing a number of other restrictions on cat ownership. ECC28 submits that there is a registry of legacy cats (the “Registry”) which it maintains. It conducts annual inspections of units which include noting any evidence of cats or other animals present in units. An ECC28 board member noted that when Rule 27 was enacted, there were about 39 cats living in a 319-unit condominium. With the passage of time, that number is down to about 26, she testified.
- [23] ECC28 pointed to one example of non-compliance with Rule 27 which it submits involves Mr. Teno himself. Mr. Teno was president of the board of directors of

ECC28 beginning shortly after Rule 27 was enacted. ECC28 provided testimony that Mr. Teno permitted an emotional support cat to live in a unit without following Rule 27's provisions for approval of such pets. Mr. Teno denies the incident. In any event, even if it did occur, the incident involved the Rule 27 provisions regarding service animals, which are not in issue here. Neither party identified any instance of non-compliance with the legacy cat provisions in Rule 27.

- [24] I note that the number of remaining cats in the condominium is listed in the Registry as 22, a number inconsistent with the testimony of the ECC28 board member. Moreover, three of the cats in the Registry are identified as being 4 years old or younger. Given that Rule 27 sets February 23, 2017 as the date on which a cat had to be living in a unit to qualify as a legacy cat, then either the Registry is inaccurate or Rule 27 was not initially enforced. I note that no cats are listed as being less than 3 ½ years old. One would wish for clearer evidence of compliance with Rule 27. However, I am persuaded that the number of legacy cats is declining and that ECC28 has acknowledged its obligation to enforce the rule.

C. CONCLUSION

- [25] I conclude that Rule 27 is a reasonable effort by ECC28 to bring itself into compliance with the No Pets Provision over time while balancing the rights of owners of cats now on the premises. Rule 27 is not unreasonable and is not contrary to the legislative scheme of the Act. ECC28 is entitled to deference in its choice of Rule 27 as the way to bring itself into compliance with the No Pets Provision. I conclude that Rule 27 as it relates to the legacy cats at ECC28 is valid and enforceable.

- [26] Neither party requested costs and no order as to costs will issue.

D. ORDER

- [27] The Tribunal Orders that this application is dismissed.

Laurie Sanford
Member, Condominium Authority Tribunal

Released on: May 2, 2022