CONDOMINIUM AUTHORITY TRIBUNAL

DATE: August 28, 2023
CASE: 2023-00089N
Citation: Bates v. Cannon et al., 2023 ONCAT 118

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

Member: Brian Cook, Member

The Applicant,
Mark Bates
Self-Represented

The Respondents,
Mark Cannon
Self-Represented

Dufferin Vacant Land Condominium Corporation No. 22
Represented by Michelle Kelly, Counsel

Hearing: Written Online Hearing – May 31, 2023 to August 2, 2023

REASONS FOR DECISION

A. INTRODUCTION

[1] Mark Bates alleges that a light on the outside wall of the unit owned by his neighbour, Mark Cannon, shines into his living space. He seeks an order directing Mr. Cannon to replace or modify the light. This dispute has been going on since approximately 2013.

[2] Mr. Bates and Mr. Cannon are both owner-residents of their respective units in Dufferin Vacant Land Condominium Corporation No. 22 (DVLCC 22). The units are townhouses and face each other. The space between them is about 30 feet.

[3] DVLCC 22 joined the case as a respondent. It supports Mr. Cannon's contention that the light is compliant with the DVLCC 22 governing documents and is not an unreasonable nuisance, annoyance, or disruption.

[4] At times during this hearing Mr. Bates has suggested that counsel for DVLCC 22 is

acting for Mr. Cannon. As counsel for DVLCC 22 has clarified, the corporation is a respondent and party to this case and has participated in that capacity and not as counsel for Mr. Cannon.

B. RESULT

[5] For the reasons that follow, I find that Mr. Cannon's light fixture is not compliant with the DVLCC 22 declaration that requires outdoor lighting to be diffuse.

C. THE LIGHT

[6] Mr. Cannon's evidence is that the outdoor light fixture on his unit has been replaced on three occasions. The first two fixtures did not last. He believes that the current fixture is consistent with the fixture installed by the builder, but of better quality.

[7] The current fixture is a "coach light". It features a bracket attached to the wall which suspends an oblong metal frame supporting glass sides which are clear glass.

[8] Mr. Cannon's evidence is that the fixture originally had a 60-watt bulb which he replaced with a lower 40-watt bulb, recently reduced to a 3- watt LED light, which is approximately equivalent to a 25-watt incandescent bulb. Mr. Cannon cannot understand how this light, which he equates to an appliance-type bulb, can possibly be producing an unreasonable annoyance.

[9] Counsel for DVLCC 22 advises that the complex has a variety of building designs. Construction was done in stages with different builders for the different stages. There is no uniformity of lighting. Units like those owned by Mr. Cannon and Mr. Bates had a light installed on the outside wall beside the patio door. Counsel provided a photo of the type of fixture that was installed on their units by the builder. It is similar to a photo submitted by Mr. Bates of an original fixture. It is a simpler and smaller design than Mr. Cannon's current light. The main distinguishing feature is that while the current fixture has four sides of clear glass, the original fixture had a glass enclosure covering the bulb which is not clear glass but rather has ripples and is somewhat opaque. For the purpose of this decision, the importance of the difference is that the original fixture would produce light that would be more "diffuse" than the current fixture.

[10] At various times, Mr. Bates has escalated his issues about the light to the DVLCC 22 board, and to the OPP and the municipality. He has also engaged in harassing behaviour, including temporarily installing a spotlight aimed at Mr. Cannon's unit.

According to Mr. Cannon, and not disputed by Mr. Bates, on July 30, 2023, while the hearing in this matter was underway, Mr. Bates again positioned a spotlight in his unit so that it was shining into Mr. Cannon's family room. Mr. Bates has also placed a garden gnome with an upraised middle finger that is placed so as to be visible from Mr. Cannon's unit.

D. MEDIATION/ADJUDICATION

[11] After considering the evidence and submissions of the parties, I asked the parties if they might be interested in exploring whether there might be a way to settle the dispute between the parties, rather than an adjudicated decision. The Tribunal's Rule 44.1 allows the Stage 3 adjudicator to offer mediation assistance to the parties with the understanding that the adjudicator will make a decision based on the evidence and submissions of the parties if the matter does not settle. If this happens, the adjudicator must ignore, for the purposes of the rest of the hearing and the decision, anything that was said or disclosed during mediation, unless the parties agree otherwise.

[12] Mediation/adjudication can be particularly helpful in resolving disputes arising out of condominium living, especially if the dispute is between neighbours who necessarily have an ongoing relationship.

[13] In this case, the parties agreed to participate in mediation/adjudication. That process was limited to one conference call with each of the parties. After that, I determined that a negotiated settlement was not likely, or would require excessive time and resources that would be disproportionate to the issues in dispute. The written record includes discussions about the use of mediation/adjudication, but does not include anything, such as offers to settle that should not be part of the record.

E. LEGISLATION AND THE DVLCC 22 DECLARATION

[14] Ontario Regulation 179/17 (O. Reg 179/17) gives the Tribunal jurisdiction over section 117(2) of the *Condominium Act, 1998* (the "Act") which provides as follows:

> 117(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

> (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.

[15] "Light" is a prescribed nuisance, annoyance, or disruption "if it is unreasonable" (section 26 of Ontario Regulation 48/01 (O. Reg 48/01)).

[16] Section 1(1)(d) of O. Reg 179/17 also gives the Tribunal jurisdiction over certain disputes with respect to provisions of the declaration, by-laws or rules of a corporation, including "provisions that prohibit, restrict or otherwise govern the activities described in section 117 (2)".

[17] In this case, DVLLC 22 has provisions in its declaration relating to outdoor lighting. Section 4.2(o) of the declaration, as amended, includes the following provision:

> Exterior property lighting shall be subtle and diffused. Exterior lighting other than originally installed by the builder or consistent with that installed by the builder, which by location or type impacts any other abutting property is not permitted.

[18] This wording was part of a 2019 amendment to the declaration that changed various parts of the amendment. The pre-amendment language did not include the phrase "other than originally installed by the builder or consistent with that installed by the builder". As discussed below, I find that the language that is germane to this case is the requirement that lightging be subtle and diffused, which was not changed as part of the amendment.

F. ANALYSIS

[19] It is clear to me that Mr. Bates experiences Mr. Cannon's light as at least an annoyance. Over a period of about 10 years, he has engaged, sometimes repeatedly, with Mr. Cannon, the DVLCC 22 board, the OPP, the Township, and now this Tribunal. Even though the impact of the light has decreased over the years as Mr. Cannon has progressively reduced the wattage, and therefore the amount of light emitted from the initial 60-watt bulb, the 40-watt bulb, and now a 25-watt equivalent bulb, the light is still visible and enters Mr. Bates' unit. Mr. Bates' evidence is that he has not noticed a decrease in the light intrusion into his unit with the lower wattage bulbs. He suggested that Mr. Cannon had in fact increased the wattage of the bulb during the time the hearing was underway, an allegation denied by Mr. Cannon.

[20] Mr. Bates' evidence is that the primary impact on his ability to enjoy living in his unit is that the light reflects from his television across the room. This is particularly a problem if he tries to watch with the lights in the living room turned off.

[21] The DVLCC 22 board suggested that Mr. Bates could use blinds to block the light. Mr. Bates has blinds on the living room window, but his evidence is that they do not block the light coming from Mr. Cannon's light. He also suggests that his preference is to not have the blinds closed because he prefers the view.

[22] Accepting that the light is at least an annoyance to Mr. Bates, the question then is whether the light is unreasonable. The test for this cannot be only whether it is unreasonable in the opinion of Mr. Bates. While his experience is certainly part of the equation, there must be evidence that the light is objectively unreasonable.

[23] I find that the language of the declaration and the requirement that outdoor lighting be subtle and diffused is relevant to the question of whether the light is unreasonable. I further find that Mr. Cannon's light is not compliant with the declaration. The current fixture has clear glass sides. Clear glass cannot diffuse light.

[24] In the absence of the qualification in the declaration that light be subtle and diffused, the light from Mr. Cannon's fixture might well be found to be reasonable, particularly since the bulb has now been reduced to the equivalent of a 25-watt bulb and because of the limited impact of the light on Mr. Bates' ability to enjoy his unit. However, because of the qualification, I conclude that the light is unreasonable.

[25] I appreciate that the DVLCC 22 board has concluded on at least two occasions that Mr. Cannon's light is consistent with the declaration. Counsel for DVLCC 22 submits that the "business judgement rule" should apply. This rule was discussed by the Ontario Court of Appeal in *3716724 Canada Inc* v *Carleton Condominium Corporation No. 375,* 2016 ONCA 650:

> This rule recognizes the autonomy and integrity of corporations, and the fact that directors and officers are in a far better position to make decisions affecting their corporations than a court reviewing a matter after the fact. …Therefore, where the rule applies, a court will not second-guess a decision rendered by a board as long as it acted fairly and reasonably.

[26] The business judgment rule does not mean that all decisions of a condominium board are conclusive. There must be evidence that the board acted fairly and reasonably and that it is consistent with the facts of the case. In this case, the board's finding of compliance is not consistent with the fact that the light is not diffused.

G. CONCLUSIONS

[27] As discussed above, my conclusion is that this case turns on the language of the declaration, and the requirement that outdoor lighting be subtle and diffuse. Because the light coming from the fixture is not diffused, it is not compliant with the declaration. I find that this means that the light is unreasonable. I have accepted that the light is an annoyance to Mr. Bates. I therefore conclude that Mr. Cannon must alter or replace the fixture so that the light coming from it is diffused.

[28] If Mr. Bates finds that the light from the adjusted or replaced fixture is still an annoyance, he may wish to adjust his window covering preferences.

H. COSTS

[29] The Tribunal's Rule 48.1 provides that if a final decision is issued, the unsuccessful Party will be required to pay the successful Party's CAT fees unless the CAT member decides otherwise. The awarding of costs is therefore discretionary.

[30] Mr. Bates submits that he should recover the $200 in filing fees that he has paid. I find that Mr. Bates is not entitled to recover the filing fees in this case because of his behaviour during the hearing towards Mr. Cannon. This includes reprisal of the earlier tactic of shining a spotlight into Mr. Cannon's unit while the hearing was underway, and unreasonably alleging that Mr. Cannon had increased the wattage of the fixture bulb.

I. ORDER

[31] The Tribunal Orders that:

1. Within 60 days of this decision, Mr. Cannon shall modify or replace his outdoor fixture so that the light is subtle and diffuse.

Brian Cook
Member, Condominium Authority Tribunal

Released on: August 28, 2023