

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: April 1, 2024

CASE: 2023-00288N

Citation: McGugan v. Ritchie et al., 2024 ONCAT 49

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

Member: Brian Cook, Member

The Applicant,

Sharlene McGugan

Self-Represented

The Respondents,

Bill and Sue Ritchie

Self-Represented

London Condominium Corporation No. 35

Represented by Joseph Mazzotta, Agent

Hearing: Written Online Hearing – January 18, 2024 to February 29, 2024

REASONS FOR DECISION

A. INTRODUCTION

- [1] The Applicant and the personal Respondents are residents of units in London Condominium Corporation No. 35 (“LCC 35”). The units are townhouses with backyards that back onto each other. The personal Respondents have a small water feature in their backyard.
- [2] The Applicant has a serious medical condition, which includes a bladder condition. One of the symptoms of this condition is that the sound of running water results in urinary urgency. The Applicant has provided medical confirmation of her medical condition and associated symptoms. The Applicant asserts that the noise from the water feature prevents her from enjoying her property because of her disabilities.
- [3] One of the personal Respondents also has a serious medical condition. The personal Respondents assert that the water feature was installed to help create a therapeutic relaxing environment.

- [4] The Respondents joined the case in the Stage 2 – Mediation stage of the Tribunal’s process. In the current Stage 3 – Tribunal Decision process, the personal Respondents advised that this case has resulted in significant stress and that they would prefer to wait for the decision and not otherwise participate. It appeared to me that it might nevertheless be preferable if the parties could agree on a resolution and proposed a conference call to discuss the situation. However, the condominium manager advised that one of the personal Respondents had been hospitalized and the conference call did not therefore occur.
- [5] The condominium manager, representing LCC 35, indicated that there is little more that he could add. The Applicant provided a number of documents and an explanation for why she has pursued this matter.

B. ISSUE

- [6] The issue in this case is whether the personal Respondents are creating/permitting an unreasonable noise which is a nuisance, annoyance, or disruption through the use of the water feature.

C. EVIDENCE

- [7] The water feature is a small portable one-gallon fountain. Water circulates from a basin to a fixture resembling an old-fashioned farmhouse pump. It is about 24 inches tall and 18 inches wide. The condominium manager advises that a stone has been placed in the basin to help reduce splashing.
- [8] The feature was first installed in 2018. The condominium manager addressed the Applicant’s complaints about noise, and it appears that in 2021 there was an agreement to repurpose the feature as a planter. However, in 2023 it was again used as a water feature, leading to this application. There is no evidence as to why this happened. The feature is only used in the warmer months and the Applicant is concerned about what will happen this spring.
- [9] The condominium manager advises that he measured the sound from the fountain at 29 decibels when measured from five or six feet away. He indicates that the sound from the water feature is “nearly impossible to distinguish from much of the surrounding outdoor sounds like birds, park /tennis courts, vehicle traffic, and typical human sounds”.
- [10] The Applicant disputes this. She says that she can clearly hear the sound from her balcony and patio. She has provided a statement from a friend who says that he frequently visits the Applicant to help her with various things. He says that in 2018

– 2020 and again in 2023, he could hear the water sound from her balcony and backyard.

- [11] The Applicant has tried various things to reduce the impact of the noise. Ear plugs irritated her ears. She has experimented with masking the noise with sounds produced by her computer, but this is not practical if she is outside. In 2023 the Applicant started to use a portable radio to mask the noise. The condominium manager says that the noise from the radio is much louder than the noise from the fountain. He is concerned that the noise from the Applicant's radio could disturb other neighbours although he did not say that any complaints have been received.
- [12] When the water feature was used again as a fountain in 2023, it was moved further away from the Applicant's backyard. The Applicant indicates that this reduces the sound from her patio but makes it louder when she is on her balcony. In 2023, the personal Respondents used a timer so that the pump is turned off from 7:00 pm to 7:00 am. The Applicant indicates that this is very welcome.
- [13] The Applicant submits that the water feature can only produce a therapeutic effect for the personal Respondents when they can hear it. She says that while the fountain is turned off at night, it is on all day, even when the personal Respondents are away or indoors with the doors shut.

D. ANALYSIS

- [14] Section 117(2)(a) of the *Condominium Act, 1998* ("the Act") reads as follows:

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.

- [15] I accept the Applicant's evidence, supported by the statement from her witness, that she can hear the sound of the water feature when she is outside on her patio or balcony. I also accept the evidence of the condominium manager that the sound produced by the fountain is not very loud.
- [16] I accept the Applicant's evidence, supported by medical evidence, that she has a disability that includes a bladder issue and that the sound of the water results in urinary urgency. I accept that this interferes with her enjoyment of the outdoor spaces of her unit. I accept that for her the noise is at least an annoyance.
- [17] Under section 117(2)(a) of the Act, the noise must be "unreasonable". The test for

whether the noise is unreasonable is not whether the Applicant experiences the noise as unreasonable, as she clearly does. Rather the test is whether a “reasonable person” would find the noise to be unreasonable.¹

[18] I am satisfied that a “reasonable person” would be unlikely to object to the sound of the water feature that the Applicant experiences. The sound is a natural sound, and it is not very loud. It is unlikely that other residents of the condominium community would find the noise to be unreasonable.

[19] It is important to note that this does not mean that the Applicant is not a reasonable person. The Applicant objects to the sound only because of her disability and related symptoms. But for her disability there is no reason to think the Applicant would find the noise objectionable.

[20] A person with a disability who is disproportionately affected by something may have rights under the Human Rights Code (the “Code”). A remedy can be sought under the Code if something that would not be an issue for others results in a barrier for a person because of disability. This could include a noise that because of disability is a barrier to the right to equal quiet enjoyment of living in a condominium unit.

[21] However, the Code does not apply in this case. The Code does not apply to all social interactions. It does not apply to disputes between neighbours although it may create an obligation on a condominium corporation to accommodate a person with a disability.

E. CONCLUSIONS

[22] I find that the personal Respondents are not creating or causing an unreasonable noise within the meaning of section 117(2)(a) of the Act.

¹ See *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 and *Tock v. St. John’s Metropolitan Area Board*, 1989 CanLII 15 (SCC)

[23] It appears that in the past, the parties to this case have engaged in discussions of how to respect the conflicting needs of the Applicant and the personal Respondents. Going forward, it may be possible to renew those discussions. The personal Respondents could, for example, consider turning off the fountain when they are not home in order to reduce the impact on the Applicant. The Applicant in turn must be considerate of others when she uses a radio or other noise masking device to ensure that she is not disturbing others.

F. ORDER

[24] The Tribunal orders that the Application is dismissed.

Brian Cook
Member, Condominium Authority Tribunal

Released on: April 1, 2024