CITATION: Durham Condominium Corporation No. 90 v. Carol Moore and Keith Wallace, 2010 ONSC 5301
DURHAM COURT FILE NO.: 63256/09
64230/09
DATE: 20100930

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
THE DURHAM CONDOMINIUM CORPORATION NO. 90	)	
	)	
	)	Paul Chornobay, for the Applicant
Applicant	)	
- and -	)	
	)	
CAROL MOORE and KEITH WALLACE	)	
	)	
Respondents	)	Christine Galea, for the Respondents
A N D B E T W E E N :	)	
	)	
CAROL MOORE and KEITH WALLACE	)	
	)	
Applicants	)	
	)	
- and -	)	
	)	
THE DURHAM CONDOMINIUM CORPORATION NO. 2	)	
	)	
	)	
Respondents	)	
	)	HEARD: September 24, 2010

ENDORSEMENT

LAUWERS J.

[1] The applicant Durham Condominium Corporation No. 90 ("D.C.C. 90") seeks an order under section 134 of the *Condominium Act, 1998*, S.O. 1998, c. 19 requiring Carol Moore and Keith Wallace (whom, for convenience, I will refer to as the respondents throughout),to bring the

deck built at the back of their townhouse condominium unit into conformity with the plan approved by the Board of Directors (the "Board"), and to remove both the overbuilt portion of the deck and the relocated patio stones that formerly formed part of the patio that the deck replaced. In the alternative, the applicant seeks an order permitting it to remove the non-confirming part of the deck and the patio stones and to restore the common elements at the expense of the respondents.

[2] The respondents have brought a corresponding application against D.C.C. 90 for a remedy under section 135(1) of the *Condominium Act* on the basis that they have been oppressed by the Board. They also seek an order requiring D.C.C. 90 to remediate an infestation of bats in their unit.

[3] Some years ago the current Board took office and decided that it would, by way of policy, oblige owners to keep patios or decks to the same dimensions as the original patios and decks. The Board decided to grandfather those decks that already exceeded the original size. The evidence is that no decks have been approved or built since that are larger than the policy permits.

[4] The board of a condominium corporation can, as Juriansz J. said in *McKinstry v. York Condominium Corporation No. 472* (2003), 68 O.R. (3d) 557 at para. 71 (S.C.J.) "stiffen the enforcement of the house rules". The Board can change the policies and rules from time to time. As in that case, there is no evidence here that the respondents have been treated differently than other unit holders from the point that the Board decided to change the policy.

[5] Under section 98 of the *Condominium Act* and section 2(b) of Article IV of the Declaration of D.C.C. 90, the respondents required the consent of the Board to alter the common elements of their units by building a deck. They submitted two plans for the deck. The first, which was approved by the Board, did not accommodate a 60-degree angle on the back of the house. The second did and was also approved. The deck was built, but not in accordance with either approved plan. There is an additional wedge-shaped section of the deck in which the apex is at the unit wall, and the wide edge is seven to eight feet wider than the approved deck in the second plan. Further, the patio stones that were on the common elements under the new deck were relocated to make the area covered by the patio stones and the new deck even larger.

[6] Ms. Moore admitted that the deck, as built, does not conform with either the first or second approved plan. The relocation of the patio stones was not indicated in either of the approved plans. Despite knowing that the Board's approval was necessary for the deck, submitting two sets of plans that were approved by the Board, and being sent correspondence stating that the deck had to comply with the plans, the respondents built a deck that did not comply with the final approved plan.

[7] The respondents have two complaints about the policy. First, this "policy" was not publicized to the unit holders and they did not know about it beforehand. There is no doubt, however, that the respondents recognized the requirement for approval and submitted drawings that conformed to the policy. The Board has issued a document entitled "Rules and Policies

(2008)". Section 58 (6) of the *Condominium Act* permits Boards to make rules but obliges them to provide notice to the members and allows for a membership meeting. This policy was not created in the same way as a rule under the *Condominium Act*. The question is whether it ought to have been or whether the court should deem the policy to be a rule for purposes of its enforceability.

[8] The Rules and Policies of D.C.C. 90 deal with a number of matters. For example, rule 3 states that: "No awning or shades shall be erected over and outside of the windows or balconies without the prior written consent of the Board". Under the heading of "Policies", there are a number of requirements, including specifications for new window replacements, sliding glass door replacement, garage rear-entry doors and so on. A policy requires, for example, that: "New window(s) are to be the same type of opening, and openings are to be in the same location as the window(s) they replace." There does not appear to be a rational distinction between matters addressed by the "rules" and matters addressed by the "policies". The respondents argue that the policy regarding deck construction should have been enacted by the Board of Directors as a "rule" under section 58 of the *Condominium Act*, which would have allowed them the opportunity to challenge the rule along with other unit holders or seek to have it modified. Now they have no remedy aside from hoping for a benign approach to approval by the Board, which they have been denied.

[9] There is no doubt that both section 98 of the *Condominium Act* and the Declaration require the respondents to obtain approval for their project. They did so. The approval could have been withheld by the Board but was not. The consequence of failing to comply with the terms of the approval is that the installation is illegal: see *Peel Standard Condominium Corporations v. Derveni*, [2007] O.J. No. 5585 (S.C.J.); *East Gate Estates Essex Condominium Corporation No. 2 v. Kimmerly*, [2003] O.J. No. 582 at paras. 7-12 (S.C.J.).

[10] The respondents' second complaint is that they have been treated unfairly. Although They point out that there are five decks on townhouse condominiums in this 82-unit development that have larger decks than the one that they built, including decks owned by two members of the Board. Ms. Moore did not realize that there were bigger decks at other condominium units until after she was told to limit the size of the deck. The other decks are larger; even though they were grandfathered under the policy an element of unfairness exists. Further, the Board considered a number of factors that in making the policy, and takes these into account in deciding whether to approve an alteration. The president concedes that that the alteration of the deck by the respondents does not interfere with the passage of lawn-cutting machinery. The second factor is privacy; it is not affected by the wider deck. The third factor is the size of the alteration relative to the size of the unit; the oversized decks in the other units are all larger than the one that the respondents built and the other units are smaller. The respondents argue that the Board's position is accordingly unreasonable. Aesthetically, the modified deck arguably looks better than the approved deck would look.

[11] In *East Gate Estates Essex Condominium Corporation No. 2 v. Kimmerly*, *supra* Cusinato J. said at paragraph 12:

> It matters not as shown by the photos… that the landscaping appears to be beautifully done, or that all other unit holders find it pleasing. Where the elected Board concludes it is unacceptable for an area of the common elements, which they are elected to govern their word is final. In a democracy, the manner in which to overturn such a determination is through the election process and there is no evidence the condo Board ever rescinded their initial approval [which limited the landscaped area]

[12] As Flynn J. said in *Halton Condominium Corporation No. 315 v. Sid Gucciardi* (Unreported, 15 April 2004): "The Board of Directors of this condominium was elected by the unit owners to administer this condominium in the best interests and for the welfare for the whole corporation. It is not for the court to step into this fray". In *Peel Standard Condominium Corporation No. 721 v. Derveni, supra,* at para 2 Van Rensburg J. said: "While there does not appear to be anything unsafe or unattractive about the walkway and while it may be very useful to the unit owners, nevertheless it contravenes the Declaration and the Act and must be removed".

[13] The question of whether something is to be a rule or a policy is ultimately a political question to be democratically determined under the *Condominium Act*. The legislation offers no guidance on the categories. The remedy for unit holders who oppose a policy or rule is to run for office and, once elected, to enact rules and policies that reflect the views of the majority of unit holders. Self-help and unilateral action, however, are clearly not acceptable.

[14] The oppression remedy provided in section 135 of the *Condominium Act* exists, as Juriansz J. said in *McKinstry, supra*, at para. 33 so that unit holders can "protect their legitimate expectations from conduct that is unlawful or without authority, and even from conduct that may be technically authorized and ostensibly legal." He continued at para. 33 :

> It must be remembered that the section protects legitimate expectations and not individual wish lists, and that the court must balance the objectively reasonable expectations of the owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property and assets.

[15] The respondents were well aware of the policy before they built. I see nothing oppressive in the conduct of the Board in these circumstances and decline to award a remedy based on section 135 of the *Condominium Act*.

[16] The respondents' complaint about D.C.C. 90's failure to eradicate the bat problem does not amount to oppressive conduct. The bats appear to be gaining access to the laundry room of the respondents. Although it originally seemed self-evident to me that they could only be getting to the laundry room by means of access through a common element such as the roof of the unit, that is now in doubt. The respondents are in the habit of leaving their garage door open and it may be that the bats have found a way to access the interior walls through the garage, which is part of their unit and not part of the common elements. Further, while the concrete wall in the

basement laundry room is part of the common elements, the interior finished wall where the bats are living is not.

[17] I am advised by Mr. Chornobay that D.C.C. No. 90 will absorb financial responsibility for repairing common elements if those are found to be in disrepair and giving bats access to the respondents' unit. But the Declaration is clear that the maintenance of the unit itself is the responsibility of the respondents. This includes the removal of pests like bats that are inside the unit. In the circumstances, the wiser course of action would be for the respondents to retain the appropriate experts to assist them in eradicating the bats. If the work of the experts reveals an access point through the common elements, then D.C.C. 90 must repair the problem and shoulder responsibility for the costs of the expert.

Order

[18] An order will go requiring the respondents to take steps to bring the deck into conformity with the second approved drawing and to remove the patio stones. If the respondents fail to do so within 180 days of this order, then D.C.C. 90 may, on 24-hours written notice to the respondents, undertake the work and add the expenses incurred in doing so to the common expenses for the respondents' unit.

[19] The applicant has been successful in its application and is therefore entitled to costs. Given the factual uncertainties in the respondents' application, subject to any offers to settle, I would not be inclined to award costs on the respondents' application. If costs cannot be agreed between the parties, I will accept costs submissions on a seven-day turnaround commencing with D.C.C. 90.

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P.D. Lauwers J.

RELEASED: September 30, 2010