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SPECIAL EDITION • ALL ABOUT PETS IN CONDOMINIUMS

The CondoReport

Pet Restrictions in Condominiums

The relationship between pet owners and their pets is strong and sacred. For this reason, it is essential that condominium corporations structure their governing provisions regarding pets in a clear, straightforward manner, and that those provisions are clearly communicated to all owners before they purchase their condominium unit.

Provisions regarding pet ownership are found in various places, from the *Condominium Act*, to the documents created by the condominium corporation itself: the declaration, by-laws and rules.

DECLARATION

A condominium corporation's declaration sets its framework; it is the equivalent of its constitution. It may also specify other restrictions and obligations on the corporation and unit owners – this is the basis under which declarations contain provisions prohibiting or restricting pets.

RULES

Subsections 58(1)(a) and (b) of the *Condominium Act* allow a corporation to make rules to promote the safety, security or welfare of the unit owners and the property and assets of the corporation, or to prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation. While a provision restricting pet ownership in a declaration need not be reasonable, any such provisions in the rules must be.

THE COURTS

Although there are many decisions in which pet restrictions in declarations and rules have been upheld by the courts, there are a few decisions that are of note, as they reflect the willingness of the courts in Ontario to look beyond the strict provisions of the *Condominium Act* and to be flexible in allowing pet owners to keep their pets in the face of rules and/or declarations to the contrary. ▶

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In *York Condominium Corp. No. 382 v. Dvorchik*[1], the trial judge struck down a condominium rule that prohibited dogs weighing more than 25 pounds from being in the condominium. While the condominium corporation had enacted other valid rules dealing with dogs that were a nuisance, the rule in question was one of general application and would, obviously, result in the exclusion of perfectly well-behaved large dogs, solely because of their size. The trial judge found the rule to be invalid because the condominium corporation presented no evidence that large dogs unreasonably interfered with the use and enjoyment of the common elements. This decision was reversed on appeal. The Court of Appeal cautioned against "judicialization" of the function of the board and held that a court should not substitute its own opinion about the propriety of a rule unless the rule is, "clearly unreasonable or contrary to the legislative scheme."

In the *Waddington*[2] decision, the landlord sought an order for the removal of Waddington's two cats. The condominium's rules provided that, "no pet shall be permitted in the building." The Court found that the corporation was not authorized to make a blanket rule banning all pets because it was not a "reasonable" rule and the rule was therefore not enforceable.

The Court went on to hold that where a declaration contains, "conditions or restrictions with respect to the occupation and use of the units or common elements," a condominium corporation cannot enforce the restrictions if it goes beyond that which is permitted in subsection 58(1).

The court's decision in *Waddington*, insofar as it deals with declarations, is contrary to the *Condominium Act*. The court imposed a reasonableness requirement for declarations where the Act contains no such requirement. This decision may have serious implications which extend far beyond the issue of pet restrictions.

In the *Staib*[3] case, a provision in the declaration absolutely prohibiting any pets was held by the trial judge to be unenforceable for equitable reasons. The Ontario Court of Appeal upheld the decision and leave to appeal to the Supreme Court of Canada was refused. In this case, the tenant moved into the unit with her cat, having full knowledge of the "no pet" provision in the declaration. The Court found that the condominium corporation failed to enforce the no pet policy for ten years, despite having knowledge of the cat's presence.

The trial judge refused to enforce the declaration due to the length of time the condo corporation had allowed the cat to remain, the age of the cat (making it "unadoptable"), and the tenant's attachment to the cat. The trial judge made it clear that he was not commenting on the reasonableness of the declaration provision; rather, he was exercising his discretion not to enforce it against the tenant in this particular instance. The Court of Appeal found no basis upon which to interfere with the application judge's discretion and, in fact, confirmed that it would have been inequitable to make the required compliance order under the circumstances. This is a noteworthy decision because it allows equitable defences to operate against provisions in the declaration that are clear and unambiguous.

SUMMARY

What does all of this mean for condominium corporations and unit owners?

For condominium corporations, it means that they should think carefully about exactly what types of pets should be prohibited from living in the building, if any. If a blanket "no pets" provision is appropriate, such a provision must be included in the declaration. A less restrictive provision, which is borne of reasonable considerations, may be included in the rules or the declaration.

Whatever provisions are in force, the condominium must be consistent in clearly informing all owners and potential owners of those provisions, and it must consistently and regularly enforce them. Failure to do either of these things puts the condominium corporation at risk of having a court strike down its pet restrictions.

With respect to a condo owner or potential owner, it is essential that they be aware of any pet restrictions that may be contained in the declaration or the rules. If they own a pet or plan on doing so in the future, owners should not rely on their real estate agents, but should ask their lawyer to confirm the absence of pet restrictions in the declaration and rules, before purchasing any condominium unit.

If condominium corporations and unit owners follow these simple steps, much time, energy and heartache can be avoided. ■

[1] [1992] O.J. No. 1152 (Gen. Div.); reversed on appeal at [1997] O.J. No. 378 (Ont. C.A.).
[2] 215 Glenridge Ave. Ltd. Partnership v. Waddington (2005), 29 R.P.R. (4th) 218 (S.C.J.)
[3] Metropolitan Toronto Condominium Corp. No. 949 v. Staib, [2005] O.J. No. 5265 (S.C.J.); affirmed at [2005] O.J. No. 5131 (Ont. C.A.); leave to appeal refused at [2006] S.C.C.A. No. 24

Condo Pet Eviction

A board member of a condominium corporation recently forwarded me an interesting article from the *New York Post* about Charlie, an adorable 3.5 pound Yorkie, whose owner was taken to court by the condominium association of a 24-unit development in Queens, New York.

The board of directors of this association had tried to get the owner, Donna Forman, to remove her previous dog, a Shih Tzu, named Rugby, and commenced an action in February 2001. During the court process and before the decision was rendered, the dog died. Donna then went on to replace Rugby with Charlie and attempted to get the consent of the board. The board refused based on its no pets policy. The board then commenced further proceedings under a separate action to have Charlie removed.

The lower court found in favour of the association and ordered that Charlie be removed. Then most recently, that decision was overturned when the Appellate Division ruled that Charlie could stay.

This case turned on a mere technicality in the wording of the condominium documents. Although the association had a policy that was in place that no pets were permitted, the bylaws of the associated stated that unit owners, their pets and guests shall not create a nuisance. The court found that by referencing that pets could not create a nuisance meant that pets were permitted and disregarded the no pets policy of the association.
This condominium association has now amended its rules to remove reference to "pets" in an attempt to retain its no pets policy.

Poorly drafted rules or inconsistent wording in a declaration may result in a board unable to enforce its provisions in the condominium documentation. I have on occasion been contacted by boards to enforce pet provisions and once reviewed, have determined the provisions are unenforceable because of drafting errors or inconsistencies. Charlie's action resulted in the association having to absorb over $100,000 in legal costs. This cost amounted to approximately $4,100 per owner.

Donna Forman was lucky. If the wording in the condominium documentation had been clear and consistent, Charlie would be gone by now. ■

Another Condo Pet Eviction

Pet owners in condominiums who fail to familiarize themselves with the condominium's restrictions on pets, or who blatantly ignore these restrictions, do so at the risk of having a court order that the pet be permanently removed from the property. The case of *Strata Plan LMS 2629 v. Blondin* dealt with a strata corporation whose by-law restricted the height and weight of pets permitted in the strata.

Prior to adopting an Australian Shepherd puppy from the Society for the Prevention of Cruelty to Animals (SPCA), the unit owner asked one of the Strata Council members to provide a written approval to the SPCA indicating that a dog was permitted. (The pet owner himself was, at the time, a member of the Strata Council). As the puppy grew, it exceeded the Strata's size restrictions and the owner was asked to permanently remove the dog from the property. Although the signed approval did not indicate the size of the dog, the unit owner took the position that this signed approval by one member of the Strata Council amounted to an authorized exemption from the size restriction by-law.

In response to the unit owner's subsequent request for a formal exemption, the Strata Council determined that the pet size restriction was a somewhat controversial topic and a resolution was put forward at a meeting of owners to remove the size restriction. Forty-two of the 59 owners who attended the meeting voted against the proposed amendment.

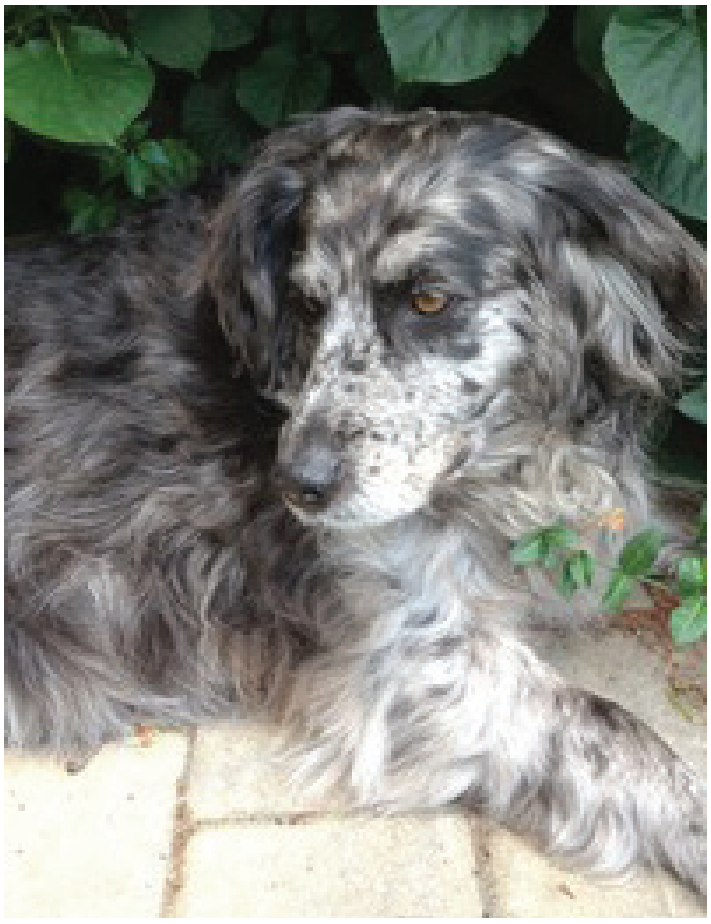
After that meeting, the Strata Council then advised the pet owner that as the dog was in breach of the strata's by-laws, the dog had to be removed. Failure to do so would result in a fine of $200 that would continue to accrue for each seven-day period the dog remained on the property while fines are permitted in British Columbia, the *Condominium Act* (Ontario) has no provision that permits a condominium corporation to fine non-compliant owners.

The pet owner challenged the Strata Council's decision on the basis that the Council violated the principles of natural justice and the decision was significantly unfair such that it was oppressive and unfairly prejudicial towards the owner.

The judge did not accept the owner's position and noted that some actions and decisions may be unfair to one or more owners as they serve the interests of the majority of the owners. In reaching this conclusion, the judge further noted that the pet owner had not acted in good faith at the outset as he made no mention of the size of the dog, or that he was seeking an exemption from the size restriction when he asked for the approval to submit to the SPCA, nor did he seek an exemption/approval from the Strata Council as a whole. This was particularly disconcerting because the owner himself was a Strata Council member and should have known better.

At the end of the day, the judge ordered that the dog be permanently removed from the property and the Strata Council was awarded judgment in the amount of $7,000 (being the amount of the accumulated fines), plus its costs. In addition, the owner was responsible for his own legal costs.

The result in this case could have been significantly different had the pet owner properly dealt with the size restriction and request for exemption before getting a dog. This case also illustrates that amending pet restrictions in a condominium's documents can be a challenge. Oftentimes, non-compliant owners believe that getting the requisite approval from other owners to amend pet restrictions in the condominium's documents is a "slam dunk", which is certainly not the case. In many cases, other owners are quite content with the status quo. ■



Enforcement of Pet Rules – Something New!

Most condo corporations have rules that state that pets are not permitted to soil on the corporation's property and owners must clean up after their pets. Despite rules like this, dog poop is often found on condo properties, particularly in the winter months when the short daylight hours enable offending pet owners to breach these rules, "under cover of darkness."

The *Toronto Star* reported about a service being offered to US condo associations to identify delinquent owners. PooPrints is a dog identification service that maintains a private dog DNA database for each property, so that any dog poop found on the property can be matched with the culprit.

Dog owners are required to register their pets with management, pay the registration fee and provide their dog's DNA sample by way of a cheek swab. When management finds poop on the property a sample is sent to the lab in Tennessee to identify the offending dog from the condo's dog database. The cost of the lab analysis is charged to the owner of the unit in which the dog resides.

PooPrints also provides a unique pet identification tag for each dog to wear on its collar so that it is easy for management to confirm if a dog has been registered.

In the US, condo associations are imposing hefty fines on owners whose pets soil the condo property, with the hope that the fines will be a deterrent to future breaches. While condo corporations in Ontario are unable to fine owners for a breach of the rules, this type of service can assist condo corporations in enforcing their rules, as it will enable them to identify those owners who are not complying.

However, before going ahead with this type of service, condo corporations will need to amend their rules to require that owners register their dogs and provide the cheek swab and to specify that unit owners are responsible for paying the registration fee and the costs related to the DNA analysis of the poop sample. Such rules could also specify that after a certain number of violations, as supported by the DNA evidence, the dog will be deemed to be a nuisance animal and must be removed from the property.

We expect that once these rules are circulated to the unit owners this will stir up considerable controversy, particularly among dog owners! ■

Nuisance Pets in Condominiums – It's not the Dog's Fault!

Although condominium ownership allows one to own a portion of a larger piece of property, the unit owner does not have the same freedoms with respect to that property as would be had in the case of a detached, freehold residential dwelling. The condominium unit owner is required to abide by the rules of the corporation that have been created for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation. While enjoying one's own unit, such enjoyment is not to be at the expense of interfering with the use and enjoyment of the other owners in the condominium community.

While many condominium corporations allow pets in the condominium, owners must comply with the rules regarding pets. If a unit owner breaches the rules, the unit owner runs the risk that the pet will be declared a nuisance animal and be required to be permanently removed from the property. This is what happened in the case of *York Condominium Corp No. 26 and Ramadani*.[1]

The unit owner permitted her dog to go out on the 2nd-floor balcony where it barked at passers-by and urinated, with the result that the urine flowed over onto the patio of the unit immediately below.

Property management wrote to the unit owner advising of these problems and asking how the unit owner intended to deal with those issues. Aside from an initial denial of all the allegations, the unit owner did not respond. After ignoring these letters, an additional letter was sent advising the owner that the dog was considered to be a nuisance and was to be removed from the property. That letter was also ignored and she failed to remove her dog from the property. A subsequent letter from legal counsel for the condominium corporation notified the owner that the dispute was being submitted to mandatory mediation and identified four mediators, one of whom she was entitled to select. The respondent failed to respond to this request as well, and as a result, legal counsel for the corporation wrote again to the unit owner initiating arbitration proceedings pursuant to Section 132(1)(b) of the *Condominium Act*. This letter was also ignored.

Not only did the unit owner ignore all of the written communication received from the corporation and its lawyer, she flagrantly disregarded the demand that the dog be removed and continued to allow her dog to go out onto the balcony and bark and urinate.

It was not until the corporation commenced legal proceedings that the unit owner retained a lawyer and decided to deal with these issues, most of which was a complete denial of all the allegations. Unfortunately for the unit owner and her dog, this was too little, too late.

Based on the fact that the unit owner failed to respond to the corporation's reasonable requests and allowed the offensive conduct to continue, the court had no problem in issuing an order for the unit owner to remove her dog from the unit and requiring the unit owner to pay $1384.25 for the cleaning costs the corporation had incurred and $806.65 for its legal costs in relation to the mediation and arbitration paperwork. The judge reserved its decisions as to the costs relating to the court proceedings. This turned out to be very costly for the unit owner.

As most pet owners consider their pets to be family members, having to permanently remove one's pet would be heart-breaking. The result in this case could have been significantly different had the unit owner addressed all of these issues and co-operated with management and the corporation in order to achieve a compromise that would allow her to keep her pet and not infringe on other unit owners. ■

[1] 2011 ONSC 6726

Case Comment: Free Speech v. Defamation/ Harassment

In a recent case out of Orleans, Massachusetts, the trial and appeals court found that an owner's right to free speech trumped the by-laws of a condo association.

Steven Preu, an owner at Old Colonial Village Condominium Association, had a long-standing history of erratic and disruptive behaviour, which translated into a strained relationship with the board. Things came to a head when Mr. Preu believed that the president of the board allowed his dog to defecate in a 'no-dumping zone' of the common elements. In response, Mr. Preu left bags of feces in the no-dumping zone and labeled these bags with the president's name. On other occasions, Mr. Preu flipped-off management (i.e., the one finger salute), wrote inappropriate comments on his monthly common element fee cheques, posted signs in the condo stating that it was dirty and wedged open fire doors.

The condo association subsequently brought an action against Mr. Preu, claiming that his actions violated the by-laws of the condo. The court shockingly found that not all of Mr. Preu's actions violated the by-laws of the condo association. The opening of fire doors and placement of bags of dog feces in the common elements were considered breaches of the by-laws. However, the inappropriate notes, signs and hand gestures were not. The court found that some of Mr. Preu's actions were considered to be "pure speech" and covered by the First Amendment (i.e., freedom of speech). The condo association appealed the trial court decision, but to no avail. The appeals court, more or less, agreed with the decision of the trial court.

We should point out that the above-noted case was decided in the United States. A different result may have occurred if the case was tried in a Canadian court. That said, the case demonstrates the need to balance the fundamental rights of owners to express their displeasure with the board with the social responsibilities of residing in a shared space. Boards should be mindful that owners have the right to publicly express their discontent with the board and management of the condo however, this right cannot be invoked carte blanche. If an owner's behaviour is defamatory or constitutes harassment (and a harassment rule has been created), the board may have recourse to address this behaviour. Each situation should be dealt with on a case-by-case basis, but the rule of thumb is, if an owner gives you the one finger salute, do not return the favour. ■

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