



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Whitworth Holdings Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC

Introduction

This was a hearing with respect to an application by the tenants to cancel a one month Notice to End Tenancy for cause. The hearing was conducted by conference call. The tenants and the landlord's named representatives called in and participated in the hearing

Issue(s) to be Decided

Should the Notice to End Tenancy dated September 4, 2015 be cancelled?

Background and Evidence

The rental unit is an apartment in the landlord's rental property. The property consists of a 25 unit apartment building on two levels and additional townhouse units. The tenancy began on June 1, 2012

On September 4, 2015 the landlord served the tenants with a one month Notice to End Tenancy for cause. The Notice required the tenants to move out of the rental unit by October 31, 2015. The grounds for the Notice alleged that the tenants have significantly interfered with or disturbed another occupant or the landlord; that they have seriously jeopardized the health, safety or lawful right of another occupant or the landlord and that they have breached a material term of the tenancy agreement and failed to correct it within a reasonable time after notice to do so.

The landlord's representatives testified that the tenants' neighbours have complained about the tenants and their guests smoking in and around the rental unit. The landlord's representatives testified that the tenants smoke outside their rental unit in close proximity to other rental units and the occupants of the other units have complained to the landlord about the tenants' smoking. The landlord's representative referred to

complaints from the occupants of the adjoining unit who alleged that the tenants have acted in a retaliatory fashion after complaints were made about their smoking. The occupant claimed that the tenants have stationed themselves precisely 10 feet away from the door and windows to their rental unit and blow their cigarette smoke directly towards the windows and doors.

The landlord referred to the tenancy agreement with the tenants; it provides that:

All units are **Non-Smoking**. Those tenants that wish to smoke must do so outside away from windows and doors out of respect for your neighbours. When smoking outside proper waste receptacles are to be used, cigarette butts are not to be thrown on the ground.

The landlord's representative referred to a memo dated September 3, 2015 sent to all tenants. It stated that the landlord would enforce the Tobacco Control Regulations regarding smoking. The memo said that:

Smoking will no longer be allowed in any common area. This includes all doorways, stairwells, walkways, laundry facilities, patios or by windows or air intakes.

Anyone who is smoking within 3 meters (10 feet) of any common area listed above or by windows or air intakes will be subject to a fine and possible eviction.

The tenants denied that they have violated the tenancy agreement or breached a material term of the agreement. The tenants testified that they have never signed or agreed to any provision that the rental property would be smoke free. The tenants denied that they have acted maliciously or deliberately to direct smoke towards any other unit. The tenant, M.C. said that the tenants and their guests always smoke away from the building, as shown in the landlord's photograph, at the fence marking the edge of the property. The tenant testified that there are other smokers who reside at the rental property. The tenant said that the landlord's smoking policy puts the tenant and his wife at risk if they are forced to stand on the side of the heavily trafficked road in order to smoke.

The tenant proposed that the landlord allow the tenant to smoke in the middle of the parking lot. The tenant said that other occupants use that area to smoke. At the hearing the landlord's representative agreed that the parking lot would be a suitable location to smoke.

Analysis

The tenancy agreement prohibits smoking in the rental unit, but it does not create the rental property as entirely smoke free. The tenants have lived in the rental unit for more than three years. Their smoking only recently became the subject of complaints. I accept the tenants' testimony that they are endeavouring to comply with the landlord's more stringent policies with respect to smoking. The tenants have proposed to conduct their smoking in a designated area of the parking lot. At the hearing the landlord's representative endorsed that proposal. Based on the evidence before me, I find that the landlord has not shown that the tenants have significantly interfered with or disturbed other occupants or that they have seriously jeopardized the health, safety or lawful right of another occupant. I allow the tenants' application and I order that the Notice to End Tenancy dated September 4, 2015 be and is hereby cancelled. The tenancy will therefore continue until ended in accordance with the *Residential Tenancy Act*.

This decision does not prevent the landlord from issuing a new Notice to End Tenancy in the future if it is determined that there are sufficient grounds to justify doing so.

Conclusion

The tenants' application has been allowed and the Notice to End Tenancy has been cancelled. No filing fee was paid for this application and I make no order with respect to payment of costs for this application.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: November 09, 2015

Residential Tenancy Branch

