CITATION: Cottage Advisors of Canada Inc. v. Prince Edward Vacant Land Condominium Corporation No. 10, 2021 ONSC 1203
COURT FILE NO.: CV-20-652288
DATE: 20210217

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: COTTAGE ADVISORS OF CANADA INC., Applicant

AND:

PRINCE EDWARD VACANT LAND CONDOMINIUM CORPORATION NO. 10, Respondent

BEFORE: Paul B. Schabas J.

COUNSEL: Megan Mackey for the Applicant

Jason P. Mangano and Mahdi Hussein for the Respondent

HEARD: February 3, 2021

REASONS FOR JUDGMENT

Introduction

[1] Cottage Advisors of Canada Inc. ("CAC"), is an owner of several units in the respondent, Prince Edward Vacant Land Condominium Corporation No. 10 (the "Condominium"). CAC objects to certain provisions of the Condominium's By-law No. 7 dealing with the rental of units by owners, and seeks an order declaring those provisions *ultra vires* and of no force and effect.

[2] For the Reasons that follow, the application is allowed in part. I find that the Condominium has the power to oversee, control and manage "Rental Activities." This includes controlling who may operate a rental program using the common elements and assets, charging Rental Management and Amenity fees, collecting refundable damage deposits, and imposing limits on the number of tenants who can occupy a rental unit. However, I find that the restriction on advertising and with whom owners may contract in order to market and lease their units, which requires Board approval, to be unreasonable.

Background

[3] The Condominium is a 237-unit cottage resort near the Sandbanks in Prince Edward County. It includes many common elements, including a Visitor Centre, Pavilion, beach, swimming pools, fitness centre and sports facilities. The Condominium's Declaration states that each unit "shall be occupied and used only for tourist accommodation" and that it was intended that cottages be rented out when not used by owners.

[4] CAC, an Ontario corporation, was the developer and declarant of the Condominium, which was turned over to a Board elected by the owners in 2016. CAC continues to own 25 units, although it is trying to sell them.

[5] The principal of CAC is Howard Johnston Hall ("Hall"). He is also the principal of Sandbanks Summer Village Resort Management Inc. ("SSVRM") which, until recently, provided condominium and property management services to the Condominium. SSVRM has also, over the past decade, operated an on-site rental program at the Condominium. This has involved arranging and managing rentals for many of the owners, including providing concierge services which was possible because SSVRM occupied the Visitor Centre at the entrance to the Condominium. SSVRM also manages all rentals for the cottages owned by CAC.

[6] Since 2018, the relationship between the Board of the Condominium (the "Board") and SSVRM has deteriorated, resulting in the termination of the SSVRM management agreements, and the termination of the lease of the Visitor Centre to SSVRM. This is the subject of separate litigation, including a motion for an injunction by SSVRM restraining termination of the lease which was heard by me on the same day as this application, and dismissed: *Sandbanks Summer Village Resort Management Inc. v. Prince Edward Vacant Land Condominium Corporation No. 10,* 2021 ONSC 989.

[7] One of the issues between SSVRM and the Board has been the operation of the rental business by SSVRM. This has included concerns about (1) SSVRM's marketing of the property without mentioning that it is a Condominium and not a conventional resort, (2) insufficient staffing to handle its rental business and the overlap, and potential conflict, between SSVRM's role as manager and its separate rental business, including its use of the Visitor Centre for that purpose, and (3) a lack of information and transparency in SSVRM's reporting obligations to the Condominium, including financial reporting.

[8] In addition, in 2020 the Condominium began to receive complaints from owners about the behaviour of renters as well as the strain renters were putting on common elements such as the beach, pools, and infrastructure.

[9] The Board established a committee to review the rental business on the property and in October 2020 proposed the passage of By-law No. 7. SSVRM actively opposed the passage of the By-law; however in November 20202 it passed overwhelmingly by a vote of 155 in favour and 16 against. CAC, with 25 votes, apparently abstained.

The By-law

[10] CAC's challenges to the By-law fall into four categories;

(1) Whether the Condominium has the power to oversee, control and manage "Rental Activities" on behalf of owners;

(2) Whether the Condominium can determine who may operate a "rental program or other business using the corporation's common elements and assets, or to advertise

and/or represent those common elements and assets (including through marketing), without the explicit approval of the Board";

(3) Whether the Condominium can charge an administrative or "Rental Management Fee" and a "Rental Amenity Fee" to "offset the additional expenses incurred by the Corporation to maintain, repair, manage and operate the common elements as a result of the use of such common elements by Short-Term Tenants";

(4) Whether the Condominium can require tenants to pay a refundable damage deposit; and

(5) Whether the Condominium can impose a limit on the number of tenants who can occupy a rented unit.

[11] In particular, the applicant impugns the following sections of By-law No. 7:

> II.(1)(b) The Corporation is responsible to oversee, control and manage ... Rental Activities, on behalf of all owners who enter into Short-term tenancies of their units;
>
> II.(3) Subject to paragraph (2) above[1], no individual or company is authorized to operate any rental program or other business using the corporation's common elements and assets, or to advertise and/or represent those common elements and assets (including through marketing), without the explicit approval of the Board. Furthermore, no owner is permitted to rent his or her unit through a rental manager, except a manager that is retained by, or approved by, the Corporation. Notwithstanding the foregoing, this provision is not intended to prohibit owners from directly entering into private Short-term leases for their respective units, provided they comply with the provisions of Article II of this by-law.
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> III.(4) In addition to the Rental Management Fee, an amenity fee (the "Rental Amenity Fee") will be payable to the Corporation for all short-term tenancies, whether arranged through the corporation or by other means. This fee will serve to offset the additional expenses incurred by the Corporation to maintain, repair, manage and operate the common elements as a result of the use of such common elements by Short-Term Tenants (including added required staffing, added required equipment and added wear-and-tear upon the common elements and resulting extra maintenance cost).
>
> III.(5) The Rental Amenity Fee will be determined by the Board, acting reasonably, and may be adjusted by the Board from time-to-time based upon any evidence that the Board may reasonably require. The Corporation will provide prompt written notice to all owners of any adjustment to the Rental Amenity Fee.

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[1] Paragraph (2) provides: "The Corporation may enter into one or more Management Agreements, in each case with a properly licensed condominium manager, for management and operation of the activities noted above."

III.(6) The Rental Amenity Fee will be payable to the Corporation, by any owner who enters into a Short-term tenancy. The Rental Amenity Fee will be collected from owners on such terms and conditions as may be reasonably approved by the Board.

III.(7) For owners who enter into Short-term tenancies through the Corporation's Rental Manager, the Manager may be charged with the responsibility to collect (either directly from the owner or from the Short-Term Tenant on behalf of the owner) and remit the Rental Amenity Fee to the Corporation. Owners may also collect the Rental Amenity Fee directly from the Short-Term Tenant and remit to the Corporation.

III.(8) All Short-Term Tenants will be required to pay a refundable deposit, in an amount to be determined by the Board, acting reasonably, to the Corporation for any damage/loss that may be caused to the common elements and/or assets during the tenancy. The refundable deposit will be returned to the Tenant(s), subject to costs incurred for any such damage and/or loss.

III.(9) The refundable deposit may be adjusted by the Board from time-to-time, as may be required to reasonably secure the Corporation's common elements and assets. The Corporation will provide prompt written notice to all owners of any required adjustment to the refundable deposit. The refundable deposit will be collected from and refunded to the Short-Term Tenants on such terms and conditions as may be reasonably approved by the Board, including through the Rental Manager, if applicable.

IV.(1) No more than 6 persons may occupy a rental unit as a Short term tenancy at any one time.

[12] The By-law confirms that the property is part of a “cottage resort community” that is occupied by the owners (or long-term tenants), or rented as “tourist accommodation” to short-term tenants. The By-law defines short-term tenancies as being 60 days or less.

[13] Two other relevant defined terms in the By-law are:

1. “Resort Condominium Activities” means those activities that are overseen, controlled or managed by the condominium corporation on behalf of, and for the benefit of, all owners, which activities are undertaken for the benefit of the entire property (ie. not in relation to specific units and/or tenancies) in order to maintain the Corporation's cottage resort community.

2. "Rental Activities", means additional activities undertaken by the Corporation (through a Rental Manager, if applicable) on behalf of specific owners (ie. in relation to specific tenancies) to assist those owners with the particular tenancies - including marketing, tenant registration and orientation, contracting with tenants, handling of rents, deposits and related accounting, housekeeping, cleaning and other expenses incurred as a result of the specific tenancies. The Board, acting reasonably, may further determine or define the Rental Activities.

General Principles

[14] Condominium corporations are creatures of statute. They are created under, and are subject to, the provisions of the *Condominium Act, 1998,* S.O. 1998, c. 19 ("the *Act*"). A condominium is established by its Declaration. By-laws passed by the condominium must be consistent with the Declaration and authorized under the *Act*. Section 56 of the *Act* sets out a wide range of topics on which condominium corporations may pass by-laws.

[15] By-laws and other rules passed by the condominium corporation or established by its board of directors must be reasonable. In this regard actions of a corporation, or its board, in passing by-laws and rules are owed deference, including their interpretation of their Declaration and by-laws, and should not be interfered with unless unreasonable: *London Condominium Corporation No. 13 v. Awaraji*, 2007 ONCA 154 at para. 6. As the Court of Appeal noted in *3716724 Canada Inc. v. Carleton Condominium Corporation No. 375*, 2016 ONCA 650 at paras. 52-53:

> The *Act* provides that the directors are the ones responsible for managing the affairs of a condominium corporation: s. 27(1). They are also required to act honestly and in good faith, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances: s. 37(1). Like their counterparts in corporate statutes, these provisions suggest that courts should be careful not to usurp the functions of the boards of condominium corporations.
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> Therefore, to summarize, the first question for a court reviewing a condominium board's decision is whether the directors acted honestly and in good faith and exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. If they did, then the board's balancing of the interests of a complainant under s. 135 of the *Act* against competing concerns should be accorded deference. The question in such circumstances is not whether a reviewing court would have reached the same decision as the board. Rather, it is whether the board reached a decision that was within a range of reasonable choices. If it did, then it cannot be said to have unfairly disregarded the interests of a complainant.

[16] In *Kapoor v. Toronto Standard Condominium Corporation No. 2450*, 2019 ONSC 3461, at para. 14, O'Brien J. applied this deferential standard of review in considering whether a condominium board's rule was inconsistent with its Declaration. A rule prohibiting transient uses of units had been passed under a Declaration which provided that there were "no restrictions on the minimum or maximum length of lease of a residential unit," and that "each residential unit shall be occupied and used as a private, single-family residence and for no other purpose." In the face of these seemingly contradictory statements, O'Brien J. held that it was reasonable for the board to interpret its Declaration to prioritize how units were used, and that they were not intended to permit a "hotel-like operation."

Jurisdiction to pass a by-law addressing "Rental Activities"

[17] Section 17(2) of the *Act* states that "[t]he corporation has a duty to control, manage, and administer the common elements and the assets of the corporation." Section 17(3) imposes a duty on the corporation to ensure that owners and occupiers of units comply with the *Act*, Declaration, by- laws and rules. In meeting these obligations, a condominium's board of directors must balance the private and common interests of unit owners, and courts must show deference to that balancing unless it is unreasonable.

[18] Section 56 of the *Act* provides, in subsections (1)(j), (l) and (m) that the Board may pass by-laws governing the management of the property, the maintenance of the units and common elements, and to govern the use and management of the assets of the corporation. In addition, s. 58(1) of the *Act* authorizes the Board to make rules "respecting use of the units, the common elements or the assets, if any, of the corporation to,

> (a) promote the safety, security or welfare of the owners and of the property and the assets, if any, of the corporation; or
>
> (b) prevent unreasonable interference with the use and enjoyment of the units, the common elements or the assets, if any, of the corporation.

[19] In this case, the Condominium's Declaration states that each unit "shall be occupied and used only for tourist accommodation in accordance with the by-laws and rules of [the] Corporation." Section 22 specifically states that "it is intended that Cottage Unit[s] shall be rented as tourist accommodation when not being used by the Owner." It continues: "The rental of any Cottage Unit shall be governed by the Rules and Regulations with respect to the rental of Cottage Units approved by the Board from time to time."

[20] This review of the constating documents clearly provides the Board with the authority and jurisdiction to pass by-laws and make rules relating to "Rental Activities" as defined in By-law No. 7.

Can the Condominium restrict advertising and who may operate a "rental program"?

[21] The applicant complains that Article II(3) is unreasonable, arguing that it removes an owner's right to hire a rental manager, or to advertise their unit, without prior approval of the Board. It is asserted that the Condominium is exerting a monopoly on rentals which interferes with the owners' property rights.

[22] The restrictions in Article II(3) stem from the Condominium's desire to control and limit rental managers from operating on the condominium property. The Condominium wishes to have more direct management and control of the rental process, including control access to and use of the common elements by short-term tenants. This is a legitimate objective of the Condominium and was lacking, in its view, when SSVRM was both managing the Condominium and running its own rental business on the property.

[23] The applicant complains that this is, in effect, a cash-grab by the Condominium, which will take over rental management by operating the front desk, where all tenants must register and obtain parking passes and other information including the rules of the Condominium upon arrival, and to collect fees for concierge services that were previously charged by CAC's related company, SSVRM. This is really a complaint to be made by SSVRM, not CAC. Nevertheless, given the duty of the Condominium to be responsible for and control the common elements and assets, I see nothing unreasonable, let alone *ultra vires*, in the decision of the Board to exert more control over these aspects of the rental process, which includes the restriction on outside rental managers using the common elements and assets without prior approval. This seems to me to be squarely within the jurisdiction of the Condominium to control and manage the common assets of the corporation and is reasonable in light of its experience with SSVRM.

[24] I also reject the applicant's argument that this portion of the By-law is impermissibly vague. The By-law is quite clear in stating that an individual or company is not permitted to operate any rental program or other business "using the corporation's common elements" without the approval of the Board. As the respondent puts it plainly in its factum – this means concierge services behind the front desk. It does not prevent an owner, including CAC, from renting directly, which is also clearly stated in the By-law.

[25] However, Article II(3) goes further and contains a broad restriction on advertising, and on the mere hiring of a "rental manager" to assist in renting out a unit, without prior approval of the Corporation.

[26] When confronted on these issues, the respondent stated that the applicant, and presumably any owner, is able to rent their unit through any renting platform or company, such as Air BnB or even SSVRM, and that the intention of the By-law is only to prevent rental managers other than those approved by the Board from providing services on the property itself. If this is the case, the restriction in the second sentence of Article II(3) overreaches and is an unjustified restriction on the ability of owners to find and contract with tenants which unreasonably infringes their "right to alienate property, which includes the right to lease": *Metropolitan Toronto Condominium Corp. No 699 v. 1177 Yonge Street Inc*., 1998 CanLII 3583 (ON CA) at para. 10; *Peel Condominium Corp. No. 11 v. Caroe* (1974), 1974 CanLII 706 (ONSC), 4 O.R. (2d) 543 (H.C.J.).

[27] As to the restriction on advertising, the respondent attempts to justify it by saying that it does not place any restriction on advertising owners' units, just on advertising common elements and assets. I understand the mischief sought to be addressed arises from advertising that does not make clear to prospective renters that the property is a condominium and not a hotel-resort, which has led to misunderstandings as to the responsibilities and behaviour expected of tenants in their use of the common elements.

[28] There are two problems with this explanation. First, while the Board has a duty to manage and oversee the common elements, it must be recognized that the common elements are owned collectively by the owners. Second, access to the facilities which make up the common elements are a major feature of renting a unit, and advertising and marketing a

unit without mention of the common elements would have little point, and perhaps be misleading.

[29] The By-law effectively gives the Board complete control and discretion over any advertising or marketing by owners. This is overly broad and unreasonable. If, as the respondent seeks to justify it in its factum, the purpose is "to ensure that it is describing the amenities of the Condominium accurately," then a more narrowly drafted By-law requiring, for example, a statement that the unit is part of a condominium and is not a hotel-style resort, would suffice.

[30] Accordingly, I find that Article II(3) of the By-law is invalid insofar as it restricts advertising without explicit approval, and that it is invalid to the extent it restricts the right of owners to only using rental managers approved by the Corporation. However, the rest of the section is valid, which allows the Board to determine who may operate a rental program or other business using the common elements and assets, and allows owners to enter into short-term leases "provided they comply with the provisions of Article II of this by-law," which are otherwise not impugned by the applicant.

Can the Condominium charge a rental management fee and an amenity fee?

[31] CAC does not take issue with the Condominium's ability to charge a rental management fee, which it describes as a fee for locating and collecting rent on behalf of a tenant, but in its factum it objects to the Condominium charging an administration fee to cover the cost of registration, including the provision of parking passes and other information to tenants. However, the Notice of Application does not challenge the validity of Article III(3) of By-law No. 7, which defines the "Rental Management Fee" as follows:

> All expenses for the performance of the Rental Activities (including any related management fees) are unit expenses, calculated and payable by the owners who choose to lease (rent) their units through the Corporation on such terms and conditions that may be reasonably determined by the Board (the "Rental Management Fee").

[32] Whether described as a Rental Management Fee or an administrative fee, the applicant objects on the ground that it requires owners to pay the Condominium for services they might prefer to obtain from another rental management company. However, as I have found that the Condominium may control who may provide rental management services on the property, it may also then determine who may charge a Rental Management Fee for those services. This was a fee that SSVRM charged when it operated the front desk and managed the property. It is a reasonable fee to charge owners who rent out their units for a profit and which puts an additional burden on the administration of the Condominium.

[33] However, the applicant goes further and also challenges the validity of the "Amenity Fee" which "will serve to offset the additional expenses incurred by the Corporation to maintain, repair, manage and operate the common elements as a result of the use of such common elements by Short-Term Tenants (including added required staffing, added required

equipment and added wear-and-tear upon the common elements and resulting extra maintenance cost)."

[34] CAC argues that this fee is *ultra vires* as it relates to common expenses which, according to the declaration, are to be shared by all owners in accordance with their proportionate interest. CAC cites s. 84(1) of the *Act* which provides: "Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration." The *Act* defines "common expenses" as "expenses related to the performance of the objects and duties of a corporation and all expenses specified as common expenses in this Act, in the regulations or in a declaration."

[35] The Declaration of the Condominium parrots the *Act* in defining common expenses as "the expenses of the performance of the objects and duties of the Corporation" and lists specific common expenses in Schedule "E" which includes "[a]ll sums of money payable for utilities and services servicing the Common Elements."

[36] Interestingly, the Amenity Fee is not new and is also permitted in By-law No. 1 passed by CAC when the Condominium was first established by it in July 2011. That By-law, which has not been challenged, provides that "[r]enters will be subject to the rental amenity fee charged by the Corporation from time to time." The evidence is that CAC's sister company SSVRM in fact charged an amenity fee, but CAC now claims it is illegal arguing that the fee improperly imposes a larger share of the common expenses on owners who rent out their units than those who do not.

[37] I disagree, for several reasons.

[38] First, while funds raised from the Amenity Fee may go towards the maintenance of the common elements, the funds offset additional staffing, equipment and wear-and-tear costs relating to renters' increased use of them. There is evidence, albeit limited, that short-term renters do put an additional strain on the Condominium's common elements. This conclusion is supported generally by findings of the Condominium Authority of Ontario, and has been observed in other cases: *Perrault v. Toronto Standard Condominium Corporation No. 2298*, 2020 ONSC 1011.

[39] Second, the Amenity Fee is similar to a user fee which can be charged for the use of specific amenities such as a party room, or excessive uses of a common element or service, as was the case in *York Region Condominium Corp. No. 771 v. Year Full Investment (Canada) Inc.*, 1993 CanLII 8639 (ON CA). Further, unlike the situation in *Perrault*, in this case the Declaration provides that the Board may make rules governing rentals, and those rules are entitled to deference unless unreasonable. In my view they are not unreasonable and, moreover, are supported by most of the owners, many of whom rent out their units.

[40] Third, owners who choose to rent know that rentals are to be governed by rules passed by the Board. In my view it is not unreasonable, or surprising, to have a rule making those owners liable for a fee arising from the rental. In this regard this case is quite different from the situation in *Re Basmadjian and York Condominium Corp. No. 52*, 1981 CanLII 1759 (ON SC), as in this case the property was set up with the intention of having owners rent

out their units, and the fee relates to a cost attributable to rental operations. This case is also quite different from the situation in *Couture v. TSCC No. 2187*, 2015 ONSC 7596 at para. 35, relied on by the applicant, which dealt with the validity of an administrative fee that was in the nature of a fine, not a user fee. Nor is it like the facts in *York Condominium Plan No. 164 v. Bank of Montreal*, [1998] O.J. No. 5696.

[41] Fourth, although CAC points out that By-law No. 7 charges the Amenity Fee to owners, and the evidence is that SSVRM historically had owners pay the fee, the intention of the Condominium is to charge the fee to renters, which is permitted under By-law No. 1. Accordingly, even if the sections of By-law No. 7 dealing with the Amenity Fee being charged to owners were not valid, the Condominium can charge the Amenity Fee to renters under By-law No. 1, which is not challenged by CAC.

[42] Finally, CAC, which only rents its units, claims the fee is unfair and oppressive to it contrary to s. 134 of the *Act*. But the fee applies to all rentals and has been in place for several years without complaint.[2] In approving the fee the Board was faced with balancing the interests of the entire community of owners – some of whom may not rent at all, while others do but to varying degrees. If the Amenity Fee was removed, owners who do not rent would complain that they are subsidizing those who do. Further, the revenue from the Amenity Fee lowers the common expenses of all owners equally. There is nothing "unfairly prejudicial" to CAC: *Harvey v. Elgin Condominium Corporation No. 3*, 2013 ONSC 1273, at paras. 72-74; *MacDonald v. Wentworth Condominium No. 96*, 2020 ONSC 1048 at paras. 70-71. The By-law reflects a reasonable balancing which is confirmed by the overwhelming vote of the owners in favour of it.

Can the Condominium require tenants to pay a refundable damage deposit?

[43] The applicant's complaint about the damage deposit is that it is not necessary and does not apply to owner-occupiers. Interestingly, however, SSVRM also collected a damage deposit from renters.

[44] In my view this complaint has no merit. The deposit is a reasonable rule applied to renters who are there for short periods of time and will be using the common elements. It may reduce disputes over damage as the Condominium can address damage when it occurs, with the party responsible. No doubt SSVRM obtained the deposit for that purpose as well. If the Condominium were required, as CAC suggests, to instead collect the cost of any repairs from the unit owner, this would cause delays and would likely lead to disputes as unit owners would have no knowledge of the damage caused by the tenant. This is, in short, a reasonable rule regarding rentals authorized by the *Act* and the Declaration.

[2] I observe that one of the Condominium's complaints with SSVRM was a lack of information or transparency over the number of rentals each year and whether SSVRM collected and remitted all amenity fee revenue to the Condominium, which also would have included fees obtained from the rental of CAC-owned units.

Can the Condominium restrict the number of tenants occupying a rented unit?

[45] This complaint also has no merit. Condominium corporations have the authority to pass by-laws that limit occupancy of units for residential purposes: *Act*, s. 57(1). Although there is no restriction on levels of occupants for owners, the decision to impose a limit on the number of tenants was driven by the concern about the strain on infrastructure from tenants and, for this year at least, concerns about overcrowding during the COVID-19 pandemic.

[46] Again, the 6-person limit was a limit imposed by CAC's related company, SSVRM, in previous years, and there has been no complaint that it is unreasonable. Indeed, although not pointed out by either counsel, I note that By-law No. 1 passed in 2011 has contained the same restriction that "[u]nder no circumstances can more than six (6) Renters occupy the Cottage Unit at any one time." This is consistent with the Condominium's authority to limit occupancy for "residential purposes" and to make rules regarding rentals.

Conclusion

[47] In conclusion, the application is allowed in part. I have found that two aspects of Article II(3) should be struck out as being unreasonable: the restriction on advertising contained in the words "or to advertise and/or represent those common elements and assets (including through marketing)"; and the prohibition in the second sentence which states that "no owner is permitted to rent his or her unit through a rental manager, except a manager that is retained by, or approved by, the Corporation." The balance of the application is dismissed.

[48] If the parties cannot agree on costs, they may each deliver brief costs submissions within 3 weeks of the release of these Reasons.

Paul B. Schabas J.

Date: February 17, 2021