CANADA / JUDGMENT

0925470 B.C. Ltd. v. Ucluelet (District)

2025 BCSC 837

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2025 BCSC 837 0985470 B.C. Ltd. v. Ucluelet (District)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0985470 B.C. Ltd. v. Ucluelet (District),

2025 BCSC 837

Date: 20250505

Docket: S246886

Registry: Victoria

Between:

0985470 B.C. Ltd.

Petitioner

And:

The District of Ucluelet

Respondent

Before: The Honourable Madam Justice V. Jackson

Reasons for Judgment

Counsel for the Petitioner:

L.J. Alexander

D. Vlitos

Counsel for the Respondent:

B. Williamson

G. Patterson

Place and Date of Hearing:

Victoria, B.C.

December 11 and 12, 2024

Place and Date of Judgment:

Victoria, B.C.

May 5, 2025

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I. OVERVIEW

[1] These reasons address two proceedings initiated by 0985470 BC Ltd. (the "Developer") which the parties agreed to have heard and determined together.

[2] Under s. 35 of the Property Law Act, R.S.B.C. 1996, c. 377 [PLA], the Developer applies for an order cancelling restrictive covenant CA9460685 (the "Covenant") registered against land it owns (the "Property") legally described as:

PID: 025-812-823

LOT 16 DISTRICT LOT 281 CLAYOQUOT DISTRICT PLAN VIP76214 EXCEPT PART IN PLAN VIP80735, VIP83067 AND VIP86140

[3] In the alternative, the Developer seeks an order modifying the Covenant by removing sections 3(a)(iii), 3(b), 4(a), 4(c), and 4(e) (the "Impugned Provisions[1]").

[4] The Developer argues the Covenant, or at least the Impugned Provisions, is vague, and thus unenforceable, or in the alternative, that the Covenant impedes the reasonable use of the Property without practical benefit. The Developer argues the vague, and therefore unenforceable, Covenant was not a permissible basis for the Approving Officer of the District of Ucluelet (the "District") to reject its subdivision plan.

[5] Under s. 89 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], the Developer also appeals the April 30, 2024 decision of a District Approving Officer to reject the Developer's subdivision plan under s. 85(1) of the LTA (the "Appeal"). The Approving Officer's reasons for rejecting the District's subdivision plan are set out in a letter dated April 30, 2024 (the "Appeal Decision").

[6] For the reasons that follow, I have concluded the Covenant was a proper basis for the Approving Officer to reject the Developer's subdivision plan and that the Covenant is not vague and does not impede reasonable use of the Property without practical benefit. The Developer's appeal and petition are dismissed.

II. FACTS

[7] On February 11, 2014 the Developer purchased the Property, intending to apply to have it rezoned and develop residential units. Over the following years, the Developer worked with the District to devise a development concept. In late 2020, a concept for the development of the property to include a 48 unit purpose built rental apartment building, 39 single-family lots, a parcel for up to 28 townhouses, and an internal road network (the "Initial Concept")

was approved by the District, subject to the Developer obtaining the required approval for re-zoning of the Property.

[8] At its March 23, 2021, meeting, the District considered a Report to Council which recommended the adoption of a zoning amendment bylaw necessary for the Property to be developed as proposed by the Developer and reflected in the Developer's Initial Concept, on certain conditions. The Report outlined the Developer's proposal that the 48 unit rental apartment building would be the first phase of development and that "these apartments would not be permitted for short-term rental for tourist accommodation, nor would they be stratified for individual ownership". The Report noted that "the addition of 48 rental apartments would be a valuable addition to the housing supply in Ucluelet" and that the Developer's "commitment to developing this portion of the site for rental housing [was] significant, and should be considered among the amenities or other community benefits presented" as part of the Initial Concept for which the zoning amendment bylaw was being sought. Although there were minor differences between the Developer's proposed road pattern and that recommended by District staff, the Report noted that the Developer "had expressed that either approach would be acceptable".

[9] At the meeting, District staff once again explained that the Developer's "proposed rental apartment building could be considered a community amenity given local demand", and explained the Property's current zoning as well as "the proposed zoning amendment bylaw and associated Section 219 Covenant". District staff recommended "that the proposed apartment building be subject to a housing agreement intended to limit its use to long-term rental" and reiterated the benefits of making the zoning bylaw amendment approval "subject to registration of a s. 219 restrictive covenant on the title ... to ensure, as a matter of public interest, that [certain] conditions... be satisfied", including that "construction and development of the rental apartment building on proposed Lot "A" (the "Apartment Site") be in the first phase of the development". Council discussed the importance of introducing various housing options to the market and noted that the proposed development would support that goal. The District followed the recommendation of its staff and approved a motion to advise the Developer, and the public, that the adoption of zoning bylaw amendment 1284 ("By-law 1284") would be "subject to registration of a s. 219 restrictive covenant on the title ... to ensure, as a matter of public interest, that [certain] conditions... be satisfied", including that "construction and development of the rental apartment building on proposed Lot "A" (the "Apartment Site") be in the first phase of the development".

[10] On October 19, 2021, the Developer and the District agreed to the Covenant which was registered against the Property on October 27, 2021. The Covenant confirmed the agreement of the Developer and the District that the proposed development of the Property would be generally in accordance with the Initial Concept and the District's commitment not to subdivide or develop the Property except in accordance with the Covenant.

[11] On November 9, 2021, the District's council approved By-law 1284, which provided for the required re-zoning of the Property. After the Covenant had been registered, and the rezoning of the Property approved, further detailed design work was done by the Developer and there was interaction between the Developer and District staff through 2022.

[12] On August 12, 2022, the Developer submitted a preliminary application to the District for the proposed subdivision of the Property (the "Preliminary Application"). Because the Land Title Act, s. 85 requires a final subdivision application to be reviewed and either approved or denied within two months, a final application to the District is almost always preceded by a preliminary application. The preliminary application process allows an applicant and the District's Approving Officer to resolve issues with subdivision layout and other important concerns prior to the submission of a final application which triggers the two-month decision making period.

[13] The Preliminary Application included a Proposed Lot Layout Plan, which aligned with the Initial Concept, By-law 1284, and the Covenant. In its Preliminary Application, the Developer took efforts to include "information regarding proposed compliance with [the] covenant". In particular, the Proposed Lot Layout Plan showed:

a) the proposed lot configuration with dimensions and areas;

b) the proposed building envelopes with imperial dimensions for context;

c) the proposed park dedication areas; and

d) the proposed parcel for the rental Apartment Site.

[14] In the Preliminary Application the Developer noted that the Covenant "had a number of conditions and requirements that directly impact this application", including:

· S. 3(a) [three park dedication areas] - which were "all shown on the enclosed lot layout plan";

· 3(b) [requiring a 10 metre no development area adjacent to Marine Drive] - which the Developer had shown on the enclosed plan and advised it would "provide a covenant against the lots effected at time of final approval";

· 4(b) [transfer of ownership of at least one single-family dwelling unit parcel to the District] - which the Developer proposed be Lot 41;

· also 4(b) [payment of $1000 to the District, either before or when the subdivision plan was deposited, for every other parcel created under the plan retained by the owner] - which the Developer proposed it would provide "at time of final approval of the subdivision";

· 4(c) [registration of a restrictive covenant on title to every single-family dwelling lot except those transferred to the District] - with the Developer advising it would "provide a covenant against the single family lots prohibiting the sale and occupancy of the lots based on the conditions set out in s. 4(c)";

· 4(d) [registration of a restrictive covenant against Lot 1 (referred to as Lot A in the Covenant) and Lot 2 (referred to as Lot B in the Covenant)] - with the Developer advising it would "provide a covenant against [those lots]; and

· 4(e) [dedication of a highway connecting Marine Drive to Victoria Drive in a location and configuration satisfactory to the District] which the proposed layout plan showed on schedule A, and in reference to which the Developer provided "variance comments ... for more detail on this road dedication".

[15] There was no suggestion by the Developer that it did not understand what the Covenant required, or any suggestions that its terms were vague.

[16] In the Preliminary Application the Developer also advised it was "proposing Lot 1 be the proposed apartment parcel for the rental building as per s. 4(a) [of the Covenant]". That aspect of the proposal was confirmed in the site drawings included with the Preliminary Application.

[17] The Developer's Preliminary Application aligned with the Covenant.

[18] Tyler Hansen, a British Columbia land surveyor with Williamson & Associates Professional Surveyors in Nanaimo, was appointed as the Developer's agent for the subdivision project, although I observe that the authorization and appointment of agent document is undated. In November 2022, District staff provided the District's comments on the Preliminary Application to Mr. Hansen (the "District's Preliminary Comments"). In the District's Preliminary Comments, it expressly noted those comments did "not supersede issues or questions that may be raised by the approving officer during his review" and that "the Subdivision Preliminary Layout Assessment review would normally begin only after all municipal approvals (rezoning, variances, etc.) have been completed". Further, the District expressed that these comments were "not informed by a detailed engineering review", which would "occur as more detailed information is submitted". The District's Preliminary Comments were "intended to provide early feedback to enable some of the wrinkles to be ironed out early in the process, with the aim of speeding up the path to final approval". This is consistent with the evidence of the District that because the LTA, s. 85, generally requires that a final subdivision application be reviewed and either approved or denied within two months, in the normal course it "is almost always preceded by a preliminary application".

[19] Several aspects of the District's Preliminary Comments are worthy of particular mention. With respect to the road requirement, the District noted that a 14 metre highway dedication would require a variance to section 1.3 of Schedule "E" to the Ucluelet Subdivision Control Bylaw No. 521, 1989, which had been "anticipated during the rezoning process". The District advised that the "street design will need to demonstrate that all services and public features can adequately fit within the 14 [metre] right-of-way".

[20] With respect to park dedication, the District advised that "the proposed park area between lots 19 and 20 has no sidewalk access", and suggested that the Developer "[c]onsider shifting the proposed park dedication areas to the corner next to Lot 15, where it would be adjacent to the pedestrian path". The District also pointed out that "[a]lternatively, staff may recommend that Council consider a cash-in lieu payment for the proposed park dedication" given that the park "was an amenity proposed by the developer during the rezoning process and is not a required part of park land dedication arising from the subdivision". I would characterize the District's Preliminary Comments as detailed and precise.

[21] The Developer reviewed the District's Preliminary Comments and on February 3, 2023, the Developer's agent sent a letter to Ucluelet providing additional information "based on comments that were provided by the District of Ucluelet planning staff on November 23, 2022". The Developer ended that letter with the following "we trust you will find the information provided will be sufficient for you to complete your staff report and present the application to council in the near future".

[22] Mr. Hansen deposes that "no direct response [to the February 3, 2023 letter of Developer's agent] was received by [him] from the District", and that although "a development permit authorizing the issuance of a building permit for the apartment building on a portion of the land was approved by the [District] on the 9th day of February, 2023 ... the District has refused to issue the permit". That statement is incomplete and if considered alone would be misleading.

[23] In fact, at its meeting on February 9, 2023, the District considered a Report to Council which recommended that Council authorize the issuance of Development Permit DP22-18 for the Property "to allow the construction of a 48-unit rental apartment building and associated driveways, parking, and landscaping". A representative of the Developer attended the February 9, 2023 Council meeting, and described the form and character of the rental apartment building which was intended to be both affordable and efficient.

[24] At that Council Meeting, Council authorized the issuance of the development permit for the property at 449 Matterson Drive to allow the construction of the 48 unit rental apartment building, subject to certain conditions, including "the final registration of the subdivision of the Lot 16 property to create the proposed "lot A" apartment building parcel at 449 Matterson Drive". However, that registration did not occur.

[25] Instead, in May 2023 the Developer sought to "modify" the Covenant. Overall development of the Property was restricted until the rental apartment building was constructed as the first phase. However, from the Developer's perspective, "the current real estate market and financing conditions make the development of the Apartment Site financially unviable at this time". Initially, the Developer proposed removal of the restrictions that guaranteed that the rental apartment building be constructed as the first phase.

[26] The District had significant concerns about such a change to the Covenant. Later the Developer sought approval to modify the Covenant in order to receive "approval for an initial 3 lot subdivision" of the Property "for sale to a third party who wishes to commence construction" on the portion of the Property planned for townhouse development according to the Developer's Initial Concept, and a deferral, and potentially an abandonment, of the commitment to construct the rental apartment. Discussions between the Developer and the District about modifying the Covenant continued and the District considered the Developer's modification request at its meeting on June 27, 2023. However, no agreement to modify the Covenant was achieved.

[27] After the Developer's efforts to persuade the District to modify the Covenant failed, on December 21, 2023, legal counsel for the Developer wrote to the District alleging difficulties, uncertainty, and a lack of enforceability of portions of the Covenant. Mr. Hansen for the Developer deposes that at no time since the December 21, 2023 letter has anyone from the District "provided further direction or requirement with respect to the configuration of any subdivision of the land in question". However, on January 26, 2024, legal counsel for the District did provide a response, which provided:

The District asked us to respond to your letter of December 21st.

The District is not concerned about the validity of the covenant your client offered in connection with its application to rezone Lot 16, which is registered on title under charge number CA9460685. That covenant gives effect to your client's proposal to the District, which was, among other things, to develop 48 units of rental housing as the first phase of any development of its land. I have been asked to convey to your client that the District's council recognizes that market conditions and interest rates have changed since the initial proposal and as such council is open to hearing alternative solutions that provide equal value to the community for the density provided. However, council is not willing to simply overlook your client's commitments to the community, as set out in the covenant. Council's strong view is that any proposal to defer, avoid or revise those commitments must provide similar value to the community as the original proposal, which promised 48-units of market rental housing in phase one of the development.

On the question of the "stop work" order in relation to your client's efforts to improve an undeveloped portion of municipal road that would provide access to the proposed townhouse site, any preliminary authorization staff may have given your client to begin that work was subject to your client's acknowledgment that a development variance permit was still required. While supported by staff, the DVP was of course subject to council's discretion. The DVP was necessary because the servicing drawings provided by your client's engineer anticipated servicing, including road construction, to a standard other than what is required by the District's subdivision servicing bylaw. The DVP was issued subject to conditions your client now objects to, but those conditions were simply giving effect to what, again, your client had proposed in connection with its zoning amendment application. If your client wants to provide site servicing, or at least to provide access to the proposed townhouse site, other than in accordance with the drawings it previously provided, then it can't rely on any interim permission that might have

been granted by District staff because that permission, if it was given, anticipated construction in accordance with a varied standard. Your client cannot now insist it is entitled to construct an access road on District property without providing revised engineering drawings showing what it actually proposes to construct. It also cannot insist it is entitled to construct an access road for a proposed subdivision that is prohibited except in accordance with a covenant your client now says is unenforceable.

Unless your client waives any claim it might make against the covenant, the District cannot allow any further work on District-owned land. That work would be in furtherance of a subdivision and development plan that might be contrary to what was proposed by your client and approved by the District's council after having considered the best interests of the community and being satisfied those interests were protected by the covenant your client offered. If your client waives any claim against the covenant and provides new engineering drawings - or reconsiders its objections to the issued DVP - then the District is prepared to make the processing of that request a priority so that work could re-start within the municipal road allowance as soon as possible.

[28] On March 8, 2024, the Developer submitted "an application for final approval of Plan EPP111824" (the "Final Application"), the purpose of which was "to create a parcel to develop the multiple townhouse units". I find the Final Application did not align with the Initial Concept or the Preliminary Application and was inconsistent with the Covenant.

[29] On April 30, 2024, the District rejected the Final Application.

III. THE LTA APPEAL

A. Standard of Review

[30] Where a legislature has established an avenue of statutory appeal to the court, whether as of right or with leave, it has chosen to subject the administrative regime to appellate oversight by the court and signalled its intention for the court to scrutinize the administrative decision on an appellate basis: Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 at para. 36 [Vavilov]; Bell Canada v. Canada (Attorney General), 2019 SCC 66 at para. 4. A statutory appeal unaccompanied by a statutory standard of review rebuts the blanket presumption of the reasonableness standard of review which is premised on giving effect to a legislature's decision to leave certain issues with the administrative body: Vavilov at para. 36. In such circumstances, the applicable standard is to be determined with reference to the nature of the question or questions raised in the appeal, and the jurisprudence governing appellate standards of review: Vavilov at para. 37. This means questions of law, such as questions of statutory interpretation and the scope of the administrative decision maker's jurisdictional authority, attract a standard of correctness: Vavilov at para. 37 citing Housen v. Nikolaisen, 2002 SCC 33 at para. 8.

[31] Where the scope of the statutory appeal raises questions of fact or questions of mixed fact and law (the application of a legal standard to a set of facts) where the legal principle is not readily extricable, the standard of review is the very deferential standard of palpable and

overriding error: Vavilov at para. 37; Housen, at paras. 10, 19 and 26-37. As Justice Iyer, then of this Court, observed in Skeena Resources Ltd. v. Mill, 2022 BCSC 2032, for an error to be palpable and overriding it "must be obvious and go to the core of the decision in that it may well have altered the outcome": at para. 19, citing Cassiar Jade Contracting Inc. v. Messmer, 2021 BCSC 1963 at para. 44.

[32] The LTA does not establish a standard of review for an appeal under s. 89. Accordingly, the applicable standard of review is to be determined in accordance with the framework articulated in Vavilov and affirmed in Bell. Insofar as the Developer's appeal raises questions of law, such as questions of statutory interpretation and the scope of the administrative decision maker's jurisdictional authority, the standard of review is correctness, and insofar as its appeal raises questions of fact or questions of mixed fact and law where the legal principle is not readily extricable, the standard of review is the very deferential standard of palpable and overriding error.

B. The Developer's Grounds of Appeal

[33] The Appeal Decision rejected the Final Application: 1) because the proposed subdivision was contrary to the Covenant; 2) because of concerns about the adequacy of drainage control; and 3) because of questions / deficiencies in relation to the engineering road design submitted by the Developer which, without additional information from the Developer, which it had not provided, did not enable the District to confirm compliance with all relevant bylaws of the District.

[34] With respect to the Approving Officer's second and third basis for rejecting the Final Application, at the hearing before me the Developer did not dispute there had been deficiencies with the Final Application. However, it argued, as it had framed this ground in its notice of appeal, that it could have provided additional details about drainage and the road had the Approving Officer asked for same, and submitted it had subsequently done so. Nonetheless, an appeal engages the error-reviewing function of the Court, based on a consideration of the material before the decision maker at the time the decision was made, subject to fresh or new evidence as permitted which is not relevant in this case. I would not accede to this ground of appeal.

[35] The other two grounds of appeal articulated in the notice of appeal were that the refusal to approve the Final Application was "incorrect at law, unreasonable, and/or was based on palpable and overriding errors of fact, or on a specious or totally inadequate factual basis" and that the Covenant was unenforceable. In its written argument, the Developer argued the issue was "whether, considering all relevant factors, ...the Approving Officer [was] correct to deny approval of the [Final Application]".

[36] At the hearing, the Developer framed the issues differently, namely as:

a) whether the Approving Officer's reasons as expressed in the Appeal Decision were inadequate; and

b) whether the Approving Officer abdicated their jurisdiction to consider the validity of the Covenant.

1. Inadequacy of reasons is not a stand alone ground of appeal

[37] It is not disputed that reasons were provided in the form of the Appeal Decision. In the context of an application for judicial review governed by the reasonableness standard (and, should it exist, perhaps a statutory appeal where a reasonableness standard of review has been legislated) where reasons are required and provided they "are the primary mechanism by which administrative decision makers show that their decisions are reasonable -- both to the affected parties and to the reviewing courts": Vavilov at para. 81; Rocky Point Metalcraft Ltd. v. Cowichan Valley Regional District, 2012 BCSC 756 at para. 47; Rivi Opportunity Fund LP v. British Columbia (Chief Gold Commissioner), 2024 BCSC 2199 at para. 47.

[38] However, where reasons are required and provided, their adequacy or quality is not a question of law that provides for a free-standing basis for appeal: Ecobase Enterprises Inc. v. Mass Enterprise Inc., 2017 BCCA 29 at paras. 7-8. In the context of an appeal, the adequacy of the reasons is a threshold consideration undertaken by the court in assessing whether the reasons, viewed in the context of the record, are sufficient to enable the court to exercise its appellate function on the substantive issue raised on appeal. On that basis, even though the adequacy of the Approving Officer's reasons was not articulated as a concern in the notice of appeal, in my view it is nonetheless an integral part of the appellate analysis. However, my comments should not be taken as suggesting that a party is not required to give notice where it seeks to advance an argument premised on the inadequacy of reasons.

2. Did the Approving Officer have the jurisdiction to consider the validity of the Covenant?

[39] The reasons as expressed in the Appeal Decision, viewed in the context of the record, are sufficient to allow me to exercise my appellate function with respect to the issue of jurisdiction raised by the Developer on appeal. It is clear from a reading of the Appeal Decision that the Approving Officer did not consider the question of whether the Covenant was valid, but rather proceeded on the basis that it was.

[40] The issue as framed by the Developer presumes the Approving Officer had the jurisdiction to consider the validity of the Covenant. However, to succeed the Developer must establish the Approving Officer's scope of authority included the power to do so.

[41] The question of the Approving Officer's jurisdiction attracts a correctness standard of review: Vavilov at para. 37; Bell at para. 4.

[42] The Developer does not dispute that its Final Application was inconsistent with the Covenant but rather argues, as it does in the context of its PLA petition, that the Covenant is, inter alia, unenforceable.

[43] However, the means by which a charge can be modified or cancelled are limited. Section 35 of the PLA is a comprehensive code for the grounds in which an easement, statutory right of way, or covenant may be cancelled or modified: Worthington v. Webber, 2024 BCCA 147 at paras. 37, 38; Vandenberg v. Olson, 2010 BCCA 204 at para. 23; Lafontaine v. University of British Columbia, 2018 BCCA 307 at para. 51; Watermark Developments Ltd. v. Kelowna (City), 2024 BCSC 2188 at para. 68; Connick v. Owners, Strata Plan VIS7092, 2022 BCCA 52.

[44] The Covenant is valid until it has been declared otherwise. It is not the responsibility of the Approving Officer to look behind the Covenant or examine its validity; it is not a matter within their scope of authority. I was not taken to any statutory provision that bestows on an approving officer the authority to make a ruling about the Covenant's validity, or any case law suggesting the Approving Officer has any such jurisdiction in the absence of such statutory authority.

3. The Approving Officer's Appeal Decision is otherwise to be reviewed applying the very deferential review standard of palpable and overriding error

[45] Returning to the Developer's argument that the issue on appeal is whether, considering all relevant factors, the Approving Officer was "correct" to deny approval of the Final Application, with respect that is not the applicable standard of review. Contractual interpretation raises questions of mixed fact and law which are reviewable on a standard of palpable and overriding error: Zhang v. Davies, 2018 BCCA 99 at para. 32; Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53; Housen v. Nikolaisen, 2002 SCC 33.

[46] Beyond the question of law regarding the Approving Officer's jurisdiction to consider the validity of the Covenant, the Developer did not identify any extricable legal question as a ground for appellate review. The Approving Officer's decision involved applying the legal standards set out in the various bylaws to the set of facts placed before them in the Final Application and should not be overturned absent a palpable and overriding error. No such error within the jurisdiction of the Approving Officer was identified by the Developer.

4. Conclusion on the LTA Appeal

[47] For the reasons I have articulated, the Developer's LTA appeal is dismissed.

IV. THE APPLICATION TO CANCEL OR MODIFY THE COVENANT UNDER S. 35 OF THE PLA

[48] The issue of the validity of the Covenant is the subject of the Developer's PLA petition, to which I now turn.

[49] A person with an interest in land may apply to the Supreme Court for an order modifying or cancelling certain charges or interests against the land, including a restrictive or other covenant burdening the land or the owner: PLA, s. 35(1). As stated above, s. 35 is a comprehensive code for the grounds in which an easement, statutory right of way, or covenant may be cancelled or modified.

[50] A party seeking an order cancelling or modifying a charge against an interest in land under s. 35 bears the onus of establishing the application is not premature, must bring themselves within one of the grounds set out in s. 35(2), and must persuade the court that, considering all of the circumstances, the court should exercise its discretion in favour of granting the application: Worthington at para. 38; Watermark at paras. 69, 71.

[51] The Developer relies on s. 35(2)(b), (d) and (e) of the PLA, which provides:

35(2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that

...

(b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,

...

(d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or

(e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

A. Is the Developer's Application Premature?

[52] The Developer submits the application is not premature. The District did not argue otherwise. I agree the application is not premature. There are no material circumstances which have not yet materialized or any other reason it would be better to defer consideration of whether the Covenant should be struck to a later date: Newco Invt. Corp. v. B.C. Transit (1987), 14 B.C.L.R. (2d) 212 at 222-223, 1987 CanLII 2662 (C.A.) [Newco]. The validity of the Covenant is a direct and current conflict and the uncertainty about its validity has led to a deadlock between the parties regarding subdivision approval. The Developer argues it is entitled to know, before it invests further resources and time, whether or not the use of the Property will remain restricted by the Covenant: Mountain Development Corp. v. McCrodan (1995), 15 B.C.L.R. (3d) 309 at para. 20, 1995 CanLII 780 (S.C.). I see no basis to preclude it from doing so at this time.

B. Has the Developer Established any Ground to Modify or Cancel the Covenant?

1. Interpreting covenants

[53] In interpreting the Covenant I am guided by certain foundational principles. First, to be enforceable, covenants, which run with the land, "must be clearly and distinctly stated so that present and future owners may know with precision what obligations are imposed upon them": Newco at 224; Kent v. Panorama Mountain Village Inc., 2021 BCCA 332 [Kent] at para. 17.

[54] Second, covenants are contracts and are to be interpreted by applying the general principles of contract interpretation: Tessaro v. Langlois, 2019 BCCA 95 at para. 18; Watermark at para. 70. The paramount goal of contractual interpretation is to determine "the intent of the parties and the scope of their understanding": Sattva at para. 47, citing Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada, 2006 SCC 21 at para. 27. The exercise of contractual interpretation involves a careful reading of "the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": Sattva at para. 47; Geoff R. Hall, Canadian Contractual Interpretation Law, 3rd ed (Toronto: LexisNexis, 2016) at 9, cited with approval in Kent at para. 21.

[55] The question of whether parties to a contract reached consensus on sufficiently certain terms, is to be assessed as at the time the agreement was made. The factual context in which the contract was created, and the background and purpose of the document known to the parties at the time, guide the interpretation: Hofer v. Guitonni, 2011 BCCA 393 at para. 14 [Hofer]. However, evidence of surrounding circumstances must not overwhelm the words of the agreement: Sattva at para. 57; Kent at para. 22.

[56] Where the meaning of an agreement is ambiguous, that ambiguity is to be resolved in accordance with the "strict construction approach", which requires a restriction on the use of land to be clearly expressed, and ambiguity to be resolved in favour of the free use of the land: Hofer at para. 19, citing with approval Goodwin v. Ridley, 2006 BCCA 581 at paras. 11-12.

2. The Impugned Provisions

[57] The Developer's submissions focussed on the Impugned Provisions, namely sections 3(a)(iii), 3(b), 4(a), 4(c) and 4(e). The Developer submits the words of the Covenant and the interactions between the parties manifest the vagueness of the Covenant and its unenforceability: Kent at para. 38.

3. Is the Covenant vague and therefore unenforceable, in whole or in part?

[58] The Developer's primary argument is that the Covenant is vague, and therefore unenforceable, and should be cancelled: PLA, s. 35(2)(e).

a) Subsequent conduct is not part of the contextual circumstances that inform the interpretation of the Covenant

[59] First, I wish to address the Developer's position that the interactions between the parties reveal the Covenant's uncertainty. As Justice Voith took care to point out in a later passage of Kent, "I do not say that such practical difficulties informed the interpretation of the covenants": at para. 40. Justice Voith's comments align with the well-established principle that the surrounding circumstances which are capable of informing a contract's interpretation do not include subsequent conduct: Wade v. Duck, 2018 BCCA 176 at para. 29, citing Shewchuk v. Blackmont Capital Inc., 2016 ONCA 912 at paras. 39-50.

[60] The dangers inherent in using subsequent conduct include the risk that it "may reward self-serving conduct", whether intended to favour a particular interpretation, create an ambiguity or, as here, to manufacture a foundation of uncertainty: Wade at paras. 30 and 32, citing Shewchuk..

[61] The Developer points only to its interactions with the District after the February 2023 Council meeting, at which Council authorized the issuance of the development permit subject to the final registration of the subdivision of the Lot 16 property to create the proposed "Lot A" rental apartment building parcel, which the Developer did not do. Instead, the Developer began to engage in efforts to persuade the District to alter the Covenant. The District refused.

[62] The Developer relies on the evidence of Cody Dreger, a realtor and a principal of the Developer, who deposed in his affidavit that he does not know what is required to satisfy the Covenant, and refers to his efforts to have the District provide that information. I give this evidence little weight. I find Mr. Dreger's evidence and communications with the District on this point were a poorly disguised attempt to gather evidence to support the Developer's efforts to establish uncertainty within the Covenant and to create a dispute to support the Developer's petition to cancel or modify the Covenant, rather than a reflection of the actual state of affairs.

b) Contractual discretion does not equate to uncertainty

[63] Section 3(a)(iii) of the Covenant provides:

3. The Land must not be altered and the Owner must not start the construction of any buildings or structures on the Land unless the Owner has first:

(a) Dedicated as Park the following areas of the Land:

(iii) at least 280 square metres for use as a children's play area, the location and configuration of which shall be to the satisfaction of the Manager; and,

[64] Section 4(e) provides:

4. Except to dedicate land as Park under section 2 of this Covenant, the Land must not be subdivided unless:

(e) the subdivision plan dedicates a highway connecting Marine Drive to Victoria Drive, in a location and configuration satisfactory to the Manager in his or her sole discretion, and the Owner constructs a road within that dedicated highway, to the District's standards (unless varied by Development Variance Permit or Development Permit issued by the District).

[65] The Developer argues the requirements to dedicate a park and a highway in ss. 3(a)(iii) and 4(e) of the Covenant, which leave the location and configuration "to the satisfaction of the manager" create unknown, undefined, or unspecified restrictions that are "unenforceable for vagueness": Newco at 223-224.

[66] First, the Covenant must be interpreted as a whole, which includes its Schedule A. Schedule A is a Development Plan, which provides for the location of the road, park, and greenspace covenant area. By its terms, the Developer has the ability to submit written requests for minor deviations from the Development Plan, and the Manager "may, in his or her sole discretion, approve": Covenant, s. 6.

[67] Second, in my view the Developer's position improperly equates contractual discretion with uncertainty. Parties are free to enter into contracts which grant to one or more of the parties a discretionary power to decide matters arising in the course of their contractual arrangement: Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District, 2021 SCC 7 at para. 62. Such contractual discretion is constrained by good faith, which requires a party to exercise their discretion reasonably, in a manner consistent with the purposes for which it was granted in the contract, and prevents it from being exercised capriciously or arbitrarily: Wastech at paras. 62-63. A contractual agreement to leave a matter to the discretion of one of the parties does not render the agreement, in whole or in part, uncertain. A party exercising contractual discretion is "merely doing what the other party agreed it could do in the contract": Wastech at para. 62, citing D. Stack, "The Two Standards of Good Faith in Canadian Contract Law" (1999), 62 Sask. L. Rev. 201, at 208.

[68] Third, the Developer argues this case is analogous to Newco because it tried, without success, to determine what the District believed was required under the Covenant and because, like in Newco, in this case there is no internal dispute mechanism within the Covenant to resolve the dispute. However, the Covenant in this case is not analogous to the one at issue in Newco. In Newco, the Court considered a covenant which by its terms obliged Newco to construct improvements "for the public good" concurrently with the construction of the Main Street Station. The term "improvements for the public good" was not defined in the covenant or the companion agreements. The covenant obliged Transit to specify in writing to Newco what the "improvements for the public good" were. Transit failed to do so. The chambers judge dismissed Newco's application to set aside the Covenant, but Newco succeeded on appeal. The Court held the term "improvements for the public good" was inherently vague and uncertain, and entirely lacked definition and precision, leaving them open to a wide variety of interpretations, especially in the context of a public facility like the Main Street Station, given that "in the most general sense, the whole of the Main Street facilities might be construed as falling within that designation": at para. 30. In Newco, there was no clear standard by which to gauge what was required. The Covenant's use of the term "to the satisfaction of the manager" is of an entirely different nature. The standard is as the District's manager, acting reasonably, determines.

[69] Further, the absence of an arbitration or other dispute resolution mechanism in a covenant is not necessarily fatal to the enforceability of an agreement that contemplates future determinations: Kent at para. 44, citing John D. McCamus, The Law of Contracts, 3rd ed (Toronto: Irwin Law, 2020) at 110. Even in situations in which some ambiguity may exist, the courts are able to assist the parties in its interpretation should that become necessary:

Winmark Capital v. Galiano Island Local Trust, 2004 BCSC 1754 at para. 24; Im v. Sundon Enterprises Inc., 2021 BCSC 2733 at para. 71; Supreme Court Civil Rules, R. 2-1(2)(c) [filing a petition proceeding where the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document].

c) The Covenant is not, in whole or in part, an agreement to agree

[70] Section 3(b) of the Covenant provides:

3. The Land must not be altered and the Owner must not start the construction of any buildings or structures on the land unless the Owner has first:

(b) Registered as a charge on the title to the Land a covenant under s. 219 of the Land Title Act preserving as greenspace a 10-metre wide area of the Land (the "Covenant Area") immediately adjacent to Marine Drive, the terms of which covenant must ensure retention of existing natural vegetation and, without limiting the requirement to retain vegetation, must prohibit any part of the Covenant Area from being used or developed as a driveway or to provide any other form of vehicle access to the Land.

[71] Section 4(a) and (c) provide:

4. Except to dedicate land as Park under section 2 of this Covenant, the Land must not be subdivided unless:

(a) the subdivision creates a parcel having boundaries generally in accordance with, and the Housing Agreement is registered as a notice and, if required by the Manager, a charge on title to Lot A, and a covenant prohibiting any further subdivision of or any building on Lot A is registered as a charge on title;

...

(c) together with the deposit of a subdivision plan that creates any parcel intended for a single-family dwelling unit, the owner registers a covenant on title to every parcel that is not transferred to the District under s. 4(b) of this Agreement;

(i) prohibiting the separate sale of those parcels until the Owner of Lot A has received a building permit for the construction of a Rental Apartment Building on Lot A;

(ii) prohibiting residential use or occupancy of those parcels until the Owner of Lot A has substantially completed construction of a Rental Apartment Building on Lot A;

[72] The Developer argues the requirements for a green space covenant in s. 3(b) and the requirements in s. 4(a) for a Housing Agreement and covenant prohibiting any further subdivision of or any building on Lot A, mean "a successor in title needs to look outside the covenant to determine all the terms related to restricted use". They argue these terms of the Covenant are uncertain and unenforceable because they are nothing more than "an agreement to agree", without a dispute resolution mechanism, and render central aspects of the Covenant uncertain and unenforceable: 585582 B.C. Ltd. v. Anderson, 2015 BCCA 261 at

paras. 28-29 [Anderson]. Further, the Developer notes that a covenant will be too vague and unenforceable where it "requires an owner to enter into an agreement outside the covenant on unknown terms": 1120732 B.C. Ltd. v. Whistler (Resort Municipality), 2020 BCCA 101 [Whistler] at paras. 106-111.

[73] The reason why an agreement to agree is unenforceable is because it lacks the necessary contractual certainty. There is no such uncertainty in this case. The Covenant indicates "to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": Angus v. CDRW Holdings Ltd., 2023 BCCA 330 at para. 38 citing Rudyak v. Bekturova, 2018 BCCA 414 at para. 23.

[74] The Developer's argument on this point does not take into account that the required terms of the Covenant prohibiting any further subdivision of or any building on Lot A and the greenspace covenant are articulated in ss. 4(a) and 3(b) of the Covenant respectively. While s. 3(b) permits the Developer to include additional restrictions if it wishes to do so, the only required constraints are clearly stated. Further, s. 217 of the LTA (referred to in s. 3(b) of the Covenant) permits a greenspace covenant to be registered without the approval of the District as the covenantor: LTA, s. 219(7). Again, no negotiation of terms is required.

[75] Similarly, "Housing Agreement" is a defined term in the Covenant, meaning "an agreement in the form authorized by the District's Housing Agreement Bylaw No. 1297". Schedule A to Housing Agreement Bylaw 1297 is a complete contract, with spaces for the parties' signature. No negotiation of terms is required.

[76] In my view, Anderson does not support the Developer's argument because the greenspace covenant and the Housing Agreement are not analogous to the rental pool agreement at issue in Anderson. The uncertainty of the covenants in Newco and Anderson were patent: Kent at para. 38. Anderson involved a strata building constructed to be operated as a hotel when the condominium units were not occupied by their owners. The covenant at issue in Anderson prohibited the rental of strata units to the public unless it is done in accordance with the "Rental Pool Management Agreement", which the covenant defined as an agreement between the owner of the unit and the rental manager setting out the terms by which the rental manager will manage the unit and make it available for rental use. In Anderson the form of the rental pool agreement was not attached to the covenant, or incorporated by reference, and did not even exist at the time of the creation of the covenant. Instead, it was an agreement that had to be negotiated between each owner of a strata lot and the rental manager, such that the uncertainty was not cured until a successor in title actually entered into a rental pool management agreement with the rental manager, or even afterwards, since the rental manager had the ability to unilaterally change the terms on which the units could be rented to the public: at paras. 26-30.

[77] The Developer relies on Anderson to also argue that because a successor in title needs to look outside the Covenant - specifically to the greenspace covenant and the Housing Agreement - to determine all the terms related to the restricted use, the Covenant is vague

and unenforceable. A similar argument was advanced by the appellants in Whistler, another rental pool agreement case, in which the Court of Appeal had occasion to consider its decision in Anderson. The appellants in Whistler argued Anderson stood "for the proposition that the absence of terms of a rental pool renders a rental pool covenant uncertain": at para. 107. Writing for the Division, Justice Tysoe held the appellants' submission took "an overly broad interpretation of Anderson", and that Anderson "does not stand for the proposition that, unless the covenant sets out all of the terms of a rental pool arrangement, it is vague or uncertain": at para. 108. Rather, Anderson stands for the principle that "a covenant will be unenforceable if it requires an owner of property wishing to rent out their unit to first enter into an agreement with a third party having unknown terms and if there is no mechanism for settling the terms of the agreement": at para. 108.

[78] The Developer also argues s. 4(a) is uncertain because it refers to an "undefined parcel" as a future Lot A and is grammatically nonsensical. It further argues s. 4(c) prohibits the sale or occupancy of a substantial portion of the Property until the construction of the rental apartment on Lot A, which it alleges is not possible because of the uncertainty it alleges with respect s. 4(a) creates a cascading uncertainty that infects s. 4(c).

[79] The District submits that the only term that could potentially be considered ambiguous is s. 4(a), but argues that even where terms of a covenant may be subject to some debate, that does not serve to make the covenant unenforceable: Natura at para. 68 citing Winmark Capital v. Galiano Island Local Trust, 2004 BCSC 1754 at para 24.

[80] In my view there is no ambiguity or uncertainty in s. 4(a) or s. 4(c). Reading the Covenant as a whole, giving the words used (which are not unusual) their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time the Covenant was executed - including their discussions, the Developer's Initial Concept and the District's Report to Council confirming the purpose built rental apartment would be the first phase of development - the meaning of those terms are clear, including what is meant by Lot A and the parameters of its development. As I have already outlined, the Covenant includes the Development Plan as Schedule A. The Covenant defines "Lot A" as meaning "the area labelled 'Lot A (Apartment Site)' on the Development Plan, and includes a separate legal parcel created by subdivision of the Land and having boundaries generally in accordance with that area": Covenant, s. 2(c). The "Lot A (Apartment Site)" is clearly labelled on the Development Plan. It is inescapable that Lot A was to be the rental apartment building. Again, the Developer has the ability to submit written requests for minor deviations from the Development Plan, and the Manager "may, in his or her sole discretion, approve": Covenant, s. 6.

[81] If modification to the Covenant were required to address any ambiguity, which in my view it is not, such modification would be limited to adding punctuation to enhance the clarity of s. 4(a) and make it more user-friendly, along the following lines:

4. Except to dedicate land as Park under section 2 of this Covenant, the Land must not be subdivided unless:

(a) the subdivision creates a parcel having boundaries generally in accordance with, and the Housing Agreement is registered as a notice (and, if required by the Manager, a charge on title) to, Lot A, and a covenant prohibiting any further subdivision of, or any building on, Lot A, is registered as a charge on title;

4. The Covenant does not impede the Developer's reasonable use of the Property and it provides a practical benefit to the District and its residents which would be lost if the Covenant is cancelled or modified

[82] The Developer seeks to have the Covenant cancelled or in the alternative modified, relying on s. 35(2)(b) and (d). In Connick v. Owners of Strata Plan VIS7092, 2019 BCSC 710, aff'd 2022 BCCA 52, Justice Brundrett set out the applicable legal framework for these often inter-related provisions.

[21] Madam Justice Newbury summarized the principles applicable to an application under s. 35(2)(b) in Wallster v. Erschbamer, 2011 BCCA 27 as follows:

19. I am not persuaded that s. 35(2)(b) should be approached as a 'balancing' exercise. As I read the provision, the petitioner Ms. Wallster in this case) must show that the reasonable use of the land (here, the erection of her new house, which in my view is obviously a reasonable use) will be impeded without practical benefit unless the petition is granted - in other words, that the continuation of the covenant or other charge provides no practical benefit. If this burden is not met, the petition should not be granted. It is clear that "practical benefit" can include subjective factors such as "neighbourhood aesthetics" (see 417489 B.C. Ltd. v. Scana Holdings Ltd. [1997] B.C.J. No. 2408, at paras. 72-4), and to that degree s. 35(2) may involve the exercise or some discretion by the court. It may also be the case that a truly "minimal" benefit - for example, the preservation of one inch of the height restriction in this case - could also be disregarded on the principle of de minimis non curat lex .

[Emphasis in original.]

[22] Section 35(2)(b) should not be approached as a balancing exercise. Instead, the petitioner must show that their reasonable use of the land will be impeded without practical benefit to others unless the petition is granted - in other words, that the continuation of the covenant provides no practical benefit: Wallster at paras. 10 and 19.

[23] Additionally, one must look to the object of the restrictive covenant or building scheme at the time of its creation in order to determine the benefits that are protected by s. 35(2)(b): Tri-X Timber Corporation v. Rutherford, 2012 BCCA 71 at paras. 22, 26, and 28.

[24] In most cases, the analysis under s. 35(2)(d) mirrors the analysis under s. 35(2)(b) because the potential injury under clause (d) will often be the removal of practical benefits protected by clause (b): Tri-X Timber Corp. at para. 29.

[83] The Developer argues the Impugned Provisions impede reasonable subdivision and further development of the Property. In particular, the Developer points to the requirement in s. 4(e) to construct the road, and argues that requirement is "impractical" because the single family lots cannot be sold until the rental apartment portion of the project is completed and that "frontloading that kind of [road] infrastructure is simply uneconomic and is an unreasonable restriction with no practice benefit" and that "the District would not be injured by a cancellation of this provision". I disagree.

[84] The Developer submits that the Covenant's impediment is further demonstrated by the combined effect of the rejection of the Final Application and "the refusal or neglect of the District or the Approving Officer even attempting to provide information related to the further dedications, covenants, agreements, or other restrictions". The Developer relies on Rocky Point at para. 47 as support for the proposition that "local government must properly inform a landowner of what is required to comply with applicable guidelines". I reject this argument. Insofar as an owner of land is entitled to know what qualifications they must comply with in order to obtain a development permit, that obligation is to be satisfied by setting out those requirements in the bylaw: 0742848 B.C. Ltd. v. Squamish (District), 2011 BCSC 747, cited at para, 47 of Rocky Point. I was taken to no authority that supports the Developer's proposition that the District was obliged to proactively advise what it viewed as being required before the Developer had proposed a way forward.

[85] In the lead up to the execution of Covenant, the parties agreed to the Initial Concept for the Land's development: a 48 unit purpose built rental apartment building, 39 single-family lots, a parcel for up to 28 townhouses, and an internal road network. The parties were mutually aware that the proposed rental building was an important "community amenity given local demand". The Developer's proposal was that the 48 unit rental apartment building would be the first phase of development, and that they would not be permitted for short-term rental for tourist accommodation, nor would they be stratified for individual ownership. The District followed the recommendation of its staff and approved a motion to advise the Developer, and the public, that the adoption of By-law 1284 would be "subject to registration of a Section 219 restrictive covenant on the title ... to ensure, as a matter of public interest, that [certain] conditions... be satisfied", including that "construction and development of the rental apartment building on proposed Lot "A" (the "Apartment site") be in the first phase of the development". [Emphasis added.]

[86] The Developer is free to sell the entire Property, as a whole. However, it is clear what the Developer now wants to be able to do is to subdivide the Property in such a way as to be able to separately sell off single family lots first, perhaps to allow it to finance the construction of the purpose built rental apartment building. However, any inability the Developer may be experiencing in financing the construction of the road it promised to dedicate and construct as part of any subdivision of the Property, and a requirement that it construct the purpose built rental apartment building first, as it had agreed to do, do not constitute impediments to the reasonable use of the Property and are not grounds to cancel or modify the Covenant.

The courts are not to use s. 35 to "usurp the proper function of municipal councils, or to re-draw eyes-open agreements between property owners and their municipal governments, even when the terms of the agreements turn out to be more onerous on the property owners than was originally contemplated": Parker v. Kamloops (City), 2012 BCSC 61 at para. 66.

[87] As the District points out, the requirement that the road be dedicated and constructed at the outset of the development is entirely consistent with the default scheme for subdividing land under the Land Title Act, and providing works and services in advance of subdivision approval under the Local Government Act: LTA. S. 75(1)(a) and (b); Local Government Act, R.S.B.C. 2015, c. 1, s. 509. That is a statutorily created cost of doing subdivision business in B.C. The Covenant provides a very practical and important benefit to the District and its residents. It can not be said to be of a trifling or de minimis nature. Given local demand, construction of a dedicated rental only apartment building in Ucluelet is needed and the Covenant protects the fulfilment of that need.

[88] Accordingly, I decline to cancel or modify the Covenant under s. 35(2)(b) because I find that it provides practical benefits to the District and its residents, namely a dedicated rental apartment building. I also decline to cancel or modify the Covenant under s. 35(2)(d) because to do so would injure the District by removing that benefit.

5. Conclusion on the PLA Petition

[89] The Developer has not established any of the grounds to modify or cancel the Covenant: PLA, s. 35(2). However, even if it had, I would have concluded it would be inequitable to cancel the Covenant because, like most contracts, the Covenant reflects a compromise agreed to by the Developer and the District; the Developer wanted a change to the zoning bylaw so it could develop the Property and the District granted that request on conditions, inter alia, the purpose built rental apartment building being the first phase of the development.

[90] For the reasons I have articulated, the Developer's PLA Petition is dismissed.

"V. Jackson, J."

[1] At the hearing the Developer abandoned its argument with respect to s. 4(d) of the Covenant.

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