

CANADA / JUDGMENT

## 1530 Foster Street Ltd. v. Newmark Projects Ltd.

2017 BCSC 1763

COURT

Supreme Court of British Columbia

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2017 BCSC 1763 1530 Foster Street Ltd. v. Newmark Projects Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1530 Foster Street Ltd. v. Newmark Projects Ltd.,

2017 BCSC 1763

Date: 20171002

Docket: S168408

Registry: Vancouver

Between:

1530 Foster Street Ltd. and

15160 North Bluff Road Ltd.

Petitioners

And

Newmark Projects Ltd.

Respondent

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

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Vancouver, B.C.

October 2, 2017

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## I. Introduction

- [1] This is an application by the petitioners for a declaration that provisions of a restrictive covenant (the "Parking Covenant") registered against their properties are invalid and unenforceable at law, or alternatively, for an order pursuant to sections 35(2)(a), (b), (c) and (d) of the Property Law Act, R.S.B.C. 1996, c. 377 ("PLA") that the Parking Covenant be cancelled because it is obsolete, because it is an impediment to the use of their property, and because its cancellation would not cause injury to any party including to the respondent.
- [2] In the further alternative, the petitioners argue that the Parking Covenant should be modified under s. 35(2) of the PLA such that the term "units of area for parking" as contained in the Parking Covenant include the aggregate square footage of any underground and above ground levels of parking, and further, an order that the respondent, and its successors in title, are estopped from enforcing the Parking Covenant in such a manner as to preclude the petitioners from proceeding with their currently proposed redevelopment.

## II. Background

- [3] The petitioners are property developers. 1530 Foster Street Ltd. is the owner of property located at 1530 Foster Street in White Rock, BC ("Lot 103"). 15160 North Bluff Road Ltd. is the owner of property located at that address in White Rock, BC ("Lot 33"). The petitioners plan to redevelop Lots 33 and 103, which are adjoining properties, by constructing a mixed use tower and two residential towers with multi- floor parking. The petitioners seek to remove or amend the Parking Covenant in order to enable them to proceed with the planned redevelopment.

### A. The properties involved in this application

- [4] Lots 33 and 103 were formerly part of a larger parcel of land known as Lot B.
- [5] The respondent Newmark Projects Ltd. ("Newmark") is the owner of an adjacent property, Lot A.
- [6] On July 3, 1959, the prior registered owners of Lot B, as grantors, agreed with Canada Safeway Limited, then the owner of Lot A, as grantee, to grant an easement and right-of-way to the grantee (the Parking Covenant) "to enter, use, go, return, pass, repass on or over" a specified strip of land within Lot B. The grantors agreed not to use Lot B "for the purpose of conducting one or more grocery businesses, super-markets, specialty food shops or other good [sic] retail outlets having a floor area in excess of 1000 square feet".
- [7] The Parking Covenant further provided that:

the said Grantor covenants with the said Grantee that no building shall be erected, constructed or maintained on the said Lot "B" of the Grantors herein unless the Grantors set aside two and one-half units of area for parking for every one area used for the erection or construction or

buildings.

IT IS UNDERSTOOD AND AGREED between the parties hereto that these covenants shall enure to the benefit of the said dominant tenement and shall be deemed to run with the land and bind the Grantors, their successors and assigns.

- [8] The Parking Covenant was registered in the Land Title Office on the title of Lot B upon execution.
- [9] While there were changes to Lot B subsequent to the grant of the Parking Covenant, those changes are immaterial to the present application as the Parking Covenant remains registered against the title of Lots 33 and 103.
- [10] The respondent purchased Lot A in August 2000.
- [11] The properties in issue are situated on the north half of a block located on North Bluff Road between Johnston Road and Foster Street in White Rock, a busy intersection on the border between White Rock and Surrey. Lots A and 33 consist of a large paved parking area surrounded by businesses, primarily in three strip mall buildings called "Central Plaza". Lot 33 has a second paved parking area on the southwest corner of the property. Lot 103 has a paved parking area on the west portion of the Lot and an unpaved area of parking on the east side.
- [12] Lot A now contains two buildings which presently house three retail businesses who are tenants of the respondent: a Scotiabank standalone building on the northeast corner of Lot A; a Nature's Fare Market grocery store occupying 10,000 square feet on the south property line; and a Shoppers Home Health Care retail store occupying 6,000 square feet of the building in which the Nature's Fare Market is located.
- [13] The petitioners purchased Lots 33 and 103 in October 2015.

## **B. Affidavits of the respondent's tenants**

- [14] The respondent says convenient and accessible parking is of prime importance to the success of their tenants' businesses, each of which has a long term lease with the respondent, which obliges the respondent to provide parking facilities for use by their customers. A representative of each Newmark tenant filed an affidavit opposing the application to set aside the Parking Covenant on the basis that "[c]onvenient, accessible and proximate parking is of critical importance to the customers" of Nature's Fare Market, Scotiabank and Shoppers Home Health Care and that removal would "result in decreased public surface parking available in the neighbourhood" (paras. 25 and 26 of the respondent's argument).
- [15] The petitioners sought leave to cross-examine deponents of affidavits filed on behalf of the respondent as to the effect of the removal of the Parking Covenant. The respondent objected to leave being granted. I permitted cross-examination after considering the principles

outlined by Pearlman J. in *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2015 BCSC 1995 at paras. 27 - 31. I was also concerned about determining the outcome of this petition based on controverted facts and accordingly, whether the petition should be converted into an action in accordance with the recent comments of the Court of Appeal in *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P.*, 2017 BCCA 247. Counsel assured me they had no desire to assert conflicting facts, which would have the result of converting the petition into an action. In the end, in my view, the cross examination simply confirmed the deposed statements contained in the affidavits.

### III. Issues

[16] The issues to be decided are:

1. Is the Parking Covenant enforceable?
2. If it is, should the court exercise its discretion under s. 35 of the PLA?

1. Is the Parking Covenant Enforceable?

[17] The petitioners submit that the Parking Covenant is (a) void on the grounds that it is vague and uncertain; (b) unenforceable in that it does not meet a technical requirement for validity; and (c) unenforceable because it is unreasonable, contrary to public policy and injurious to the public interest. I will address these issues in order.

a) Are the Terms of the Parking Covenant Vague and Uncertain?

[18] The petitioners say the language of the Parking Covenant, and particularly that which I have underlined below, which provides that "no building shall be erected, constructed or maintained on the said Lot 'B' of the Grantors herein unless the Grantors set aside two and one-half units of area for parking for every one area used for the erection or construction of buildings", is vague and ambiguous and hence is void for uncertainty.

[19] The petitioners rely on *Aquadel Golf Course Limited v. Lindell Beach Holiday Resort Ltd.*, 2009 BCCA 5; *Nylar Foods Ltd. v. Roman Catholic Episcopal Corp. of Prince Rupert* [1988] B.C.J. No. 307, 48 D.L.R. (4th) 175 (BCCA); *Russell v. Ryan*, 2016 ABQB 526 and *Newco Investments Corp. v. British Columbia Transit* [1987] B.C.J. No. 1266, 14 B.C.L.R. (2d) 212 (BCCA).

[20] In *Aquadel*, the court stated at paras. 11 and 12:

[11] A restrictive covenant is to be construed strictly and the parties' intention to create one must be shown in clear and unambiguous language. In *Nylar Foods Ltd. v. Roman Catholic Episcopal Corp. of Prince Rupert* (1988), 48 D.L.R. (4th) 175 (B.C. C.A.), McLachlin J.A. (as she then was) said:

The policy of the courts to favour competition and alienability leads to a strict construction of restrictive covenants: *White v. Lauder Developments Ltd.* (1975), 9 O.R. (2d) 363 (C.A.); *Kemp v. Bird* (1877), 5 Ch.D. 549; *Ashby v. Wilson*, [1990] 1 Ch. 66; *Brigg v. Thornton*, [1904] 1 Ch. 386. This means that the court will not amplify the language which the parties have used. As stated in *Brown, Covenants Running with Land* 1907, p. 126:

A restrictive covenant as to letting or user of property will be construed strictly; the Court will not extend it on the ground of presumed intention.

McLachlin J.A. continued, at p. 177:

In order to create a valid restrictive covenant, clear language is required showing unambiguously that the parties intended to create an interest in land in favour of one of them. If it is not entirely clear from the language that the parties intended to create an equity and correlative burden on the land, the restrictive covenant will be treated merely as a personal covenant between the parties who made it.

[12] It is also settled law that in construing an agreement the intention of the parties must be determined from the words of the contract read as a whole. In *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489, 47 B.C.L.R. (4th) 278, this Court said:

[20] The plain and ordinary meaning must be given to words in a contract unless to do so would result in an absurdity: *Ex parte Walton*. In *re Levy* (1881), 17 Ch.D. 746 (C.A.). Words must be interpreted in light of the whole of the contract and the intention of the parties expressed therein. In construing contracts, the court assumes that the words in the contract are there for a purpose and "reject an interpretation that would render one of [the contract's] terms ineffective" (*National Trust Co. v. Mead* (1990), 71 D.L.R. (4th) 488 at 499).

[21] The petitioners say the Parking Covenant is void for uncertainty for a number of reasons (petitioners' submissions, para. 87):

- a. It is uncertain what "area" of any new construction is "used for the erection or construction of buildings" thereby triggering the calculation thereunder, and in particular, whether "buildings" include underground areas having an area greater than the space above grade.
- b. It is uncertain whether such "area" comprises the building footprint, or some calculation of the floor area, or some other area;
- c. It is uncertain whether the "area" so used would include the "area" of buildings off Lot 33 and Lot 103 but within the original Lot B. This is illustrated by the subdivision of Lot 1, site of a bank, from then lot 33 and its later release from the Parking Covenant although it has virtually no parking attached to it. Does this mean that Lot 1 is included or excluded in the "area" used for buildings - which in turn affects how much parking must in future be "set aside"?

- d. There is no basis for determining what constitutes a "unit of area" being the basis for calculation of the mandated parking requirement, as opposed to an "area" used for erection or construction of buildings. These contrasting terms could have been defined but were left for future owners to guess at.
  - e. It is not specified whether the term "units of area for parking" includes the aggregate square footage of any underground and above-ground levels of parkade. It is submitted that, if anything "units of area" implies multiple levels of above-ground or underground parking otherwise there would be no distinction vs the term "area" for construction of buildings;
  - f. There is no basis for determining what is required for the "setting aside" for parking of such "units of area", and whether such "setting aside" must be on Lot B; and if so, how this requirement would be applied following a future subdivision of Lot B.
- [22] The petitioners also say there is no language in the Parking Covenant which refers to surface parking in determining the ratio set out in the covenant.
- [23] In my view, the Parking Covenant is not vague or uncertain, particularly when the language is considered at the time and in the circumstances under which it was granted. Safeway operated a retail food store on Lot A. While there is no evidence before the court as to why it sought the covenant, the language of the covenant speaks for itself. It is, in my view, self-evident: customer parking was an important element for the successful operation of its retail grocery business, just as it is for the businesses now operating on Lot A.
- [24] I disagree with the petitioners' submission that had the parties intended to refer to surface parking in the Parking Covenant they would have expressly said so. When the Parking Covenant was granted in 1959, there were no multi-story buildings on the properties. The parties were concerned with building surface area parking at the time, not with underground or above ground parking. The fact that Safeway sought a covenant concerning parking speaks to the importance of the issue of parking to its retail business and supports the position taken by the tenants of the respondent that surface parking is important to the ongoing successful conduct of their respective businesses.
- [25] The petitioners refer to Russel, a case applying the principles set out in Aquadel, where a covenant stipulating that the land could not be used in such a way as to "diminish the enhancement in value and enjoyment by the owners" of the lands in question was held to be unenforceable as too vague and uncertain (para. 42). In my view, that case is distinguishable from this case, given that the Parking Covenant's language regarding parking is much more specific and straightforward than the language at issue in Russell.
- b) Does the Covenant Fail to Meet a Technical Requirement for Validity?
- [26] The petitioners rely on the statement by the court in Aquadel at para. 9:
- [9] The law as to what is necessary to create a restrictive covenant is not in dispute, and was correctly stated by the trial judge at para. 30:

[30] In *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268; 42 R.P.R. (3d) 53, the court reviewed the elements of a restrictive covenant at para. 16:

The necessary conditions of covenants which run with land are set out by DeCatri in his text, *Registration of Title to Land* (Carswell 1987). They were stated by Clearwater, J. in *Canada Safeway Ltd. v. Thompson (City)*, [1996] M.J. No. 393, August 15, 1996, at page 8, as follows:

- (a) The covenant must be negative in substance and constitute a burden on the covenantor's land analogous to an easement. No personal or affirmative covenant requiring the expenditure of money or the doing of some act can, apart from statute, be made to run with the land.
- (b) The covenant must be one that touches and concerns the land; i.e., it must be imposed for the benefit or to enhance the value of the beneficial land. Further that land must be capable of being benefited by the covenant at the time it is imposed.
- (c) The benefited as well as the burdened land must be defined with precision the instrument creating the restrictive covenant
- (d) The conveyance or agreement should state the covenant is imposed on the covenantor's land for the protection of specified land of the covenantee
- (e) Unless the contrary is authorized by statute, the titles to both the benefited land and the burdened land are required to be registered
- (f) Apart from statute the covenantee must be a person other than the covenantor.

[27] In particular, the petitioners rely on subparagraph (d) above and say that the covenant does not state that it is imposed for the protection of the specified land of the covenantee. I note that Aquadel uses the word "should" which, in my view, makes this provision a permissive one.

[28] In any event, I am of the view that the language of the Parking Covenant makes it clear the covenant is for the protection of the covenantee's land.

[29] When called upon to interpret a contractual provision, the court is entitled to have regard to the surrounding circumstances at the time the contract was entered into. The surrounding circumstances cannot, of course, be "allowed to overwhelm" the words of the agreement but can be used to "deepen the decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57. *Sattva* further states, at para. 58:

[58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (King, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of

contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (Investors Compensation Scheme, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[30] In my view, the factual matrix in this case establishes that Canada Safeway considered it important to protect then existing surface parking space from encroachment by development on Lots 33 and 103, by providing for the ratio set out in the Parking Covenant. The property consisted of a strip mall. The only parking on the site was surface parking. It defies logic that either party was concerned with underground or above ground parking which would affect customer access to Safeway's retail business.

[31] The law has recognized the importance of surface parking rights to the viability of the business of retail merchants who are located in shopping centres. As noted by the Manitoba Court of Appeal in *Merger Restaurants v. D.M.E. Foods Ltd.*, 71 D.L.R. (4th) 356, 1990 CanLII 7997 (MBCA), at para. 32:

[32] There can be no doubt that the extent and availability of parking spaces in a shopping plaza will directly affect the nature and value of the land. The importance of parking facilities to a shopping centre was recognized in a paper by Lawrence M. Keay in *Shopping Centre Leases* (Canada Law Book, 1976), at p. 533:

The parking facilities included in a shopping centre are an essential element both of the basic concept of a shopping centre and of the economic well-being of the tenant and the landlord.

Jewers J. made the express finding, quoted above, that "parking is essential for the viability" of Merger's restaurant.

[32] The validity of this finding is highlighted by the concern expressed by the deponents of the three affidavits filed by the tenants of the respondent, all of whom express a significant concern about the detrimental effect the loss of surface parking would have on their businesses.

[33] The petitioners say that underground and above ground parking was contemplated by White Rock in 1958 and 1959 as evidenced by Zoning By-Laws 32 and 46, which contemplated these types of parkades. While that is the case, there is no evidence before me that the lands upon which the Parking Covenant was registered at that time were the subject of such development. Lots 33 and 103 were comprised of paved and unpaved surface parking areas upon which Safeway's customers parked.

- [34] The petitioners say the language of the Parking Covenant (the use of the word "units") impliedly includes underground and above ground parking. I disagree with the Petitioner's interpretation of "units". In my view, the plain meaning of the language "units of area for parking" in the context of the Parking Covenant refers to surface area.
- [35] I agree with the respondent that the Parking Covenant is simply a lot coverage covenant, under which the owner of the lot covenants that if it constructs new buildings, of every 3.5 units of property, one can be used for buildings, with the remaining 2.5 units of the property set aside for parking.
- c) Is the Parking Covenant Void as Being Contrary to Public Policy?
- [36] The petitioners submit that the Parking Covenant is injurious to the public interest and contrary to public policy. The basis for the petitioners' argument is similar to their argument under s. 35 of the PLA that the Parking Covenant is obsolete.
- [37] The petitioners rely on *Swan Properties Ltd v. Irving Oil Ltd.*, 2004 NLSCD 206, at para. 31, and *Save the Heritage Simpson Covenant Society v. City of Kelowna*, 2008 BCSC 1084, where Madam Justice Bruce stated at para. 97:
- [97] I find that to insulate a charge registered against land from changes in the law is contrary to public policy. Amendments to the law often reflect changes in society's collective views about particular conventions, morality, and notions of fairness and equity. For example, restrictive covenants should not be insulated from review in 2008 solely on the ground that they were registered in 1946 at a time when the law may have sanctioned discriminatory limitations on the use of private property. Thus even if I am wrong in my conclusion that the Land Registration Act of 1936 accorded a registered charge conclusive validity in law and in equity, I am satisfied that its underlying validity should be reviewed in accordance with the legislation in effect at the date of the application.
- [38] The petitioners' argument is founded on steps taken by the City of White Rock ("the City") in formulating policy and development goals for the neighbourhood in which the properties are situated.
- [39] To understand the position taken by the petitioners, it is necessary to review the evidence before the court concerning the planning steps taken by the City.
- [40] Lots 33 and 103, as well as the respondent's property, fall within the area designated by the City in its planning documents as "Town Centre".
- [41] I recite the following historical account of the "Town Centre" area from the petitioners' submissions summarizing the evidence of Mr. Martin Brückner, the architect for the petitioners (deemphasising portions which had been bolded):

**Evolution of "Town Centre" since 1959**

50. In the late 1950s, the newly incorporated City of White Rock (the "City") began passing bylaws and Official Community Plans ("OCP") for the purpose of municipal planning. In the 1958 OCP, planning goals were identified as essential to ensure the proper development of White Rock while also preserving the unique characteristics of White Rock.

**Brückner #1, para 9**

51. From the early stages of community development planning, parking was identified as a concern. The 1958 OCP directed that provisions for adequate parking should be made, as to avoid traffic and parking problems that were mounting in other municipalities. The City established acceptable minimum amounts of parking for commercial and residential developments through creation of bylaws, including By-Law No. 32, adopted September 16, 1958, and By-Law No. 46, adopted April 19, 1959. Those bylaws imposed off-street parking requirements which were based on the number of residential units, as well as the square footage of retail spaces.

**Brückner #1, para 13**

52. Through the 1960s, 1970s, 1980s., and 1990s, the City of White Rock placed increasing importance on the area called "Town Centre" and including the lands in question herein. Use transitioned from purely commercial with residential use abutting the lots to mixed use with towers allowing for densification.

**Brückner #1, paras 13-16**

53. In 1990, the City began to intensify planning objectives for the Town Centre, including the Petitioners' Lots and the Respondent's Lot (collectively, the "Lands"). In the 1990 OCP, the Lots were part of the "Town Centre Commercial" area, which includes the "Johnson Road Business Area" that was declared "the primary commercial and service centre of White Rock and adjoining South Surrey". Under the terms of the 1990 OCP, buildings over four storeys would be required to provide enclosed or underground parking. Further, parking was to be a vital part of any proposed development plan. The 1990 OCP described the area that includes the Lands as Area 1 - "Upper Town Centre", and provided for a strip of commercial property with high-rise residential towers immediately adjacent thereto. Area 1 included, at all material times, the Lands.

**Brückner #1, para 17**

54. In 1991, the City passed By-Law No. 1591, which was a comprehensive zoning bylaw. Standards for zoning, building dimensions, and parking were enacted, among the numerous other provisions of Bylaw 1591. The Lands were included in an area zoned as "CR-7- Town Centre Medium Density Commercial/Residential Zone." The zoning of the Lands permitted increased density through mixed-use commercial and residential buildings. The stated

intent in 1991 of the CR-7 zoning was to "allow commercial and business uses, together with residential uses, in the Johnston Road/Lower Town Centre Shopping Area". Apartment parking requirements were set at 1.5 spaces per dwelling unit, with an additional requirement of one space per 37 square meters (398 square feet) of commercial floor area. A mixed use building was required to meet the totality of parking requirements for all uses.

**Brückner #1, para 19-21**

55. The 1995 OCP repeated the stipulations from the 1990 OCP for underground parking for buildings over 4 storeys, and for the importance of parking as a component of any development plan. The 1995 OCP also refers to the "Town Centre Commercial" area as the areas encompassing as Upper Town Centre (Area 1) and adjacent "Lower Town Centre".

**Brückner #1, para 22**

56. In 2001, a new OCP was adopted which advocated an urban structure where the tallest buildings are in the Town Centre, with decreasing height and density radiating outward from the Town Centre. The 2001 OCP explicitly provided for mixed-use developments in the Town Centre, including the Lands, describing the Town Centre as "the central core of the community" and "a primarily mixed use, compact urban setting".

**Brückner #1, para 24**

57. The 2001 OCP set out requirements for an interconnected open green space network in the Town Centre running northbound from Bryant Park through the Petitioners' Lots to intersect with trees lining Russell Road to form a "Green Cross". It did not specify the dimensions of the green belt required through Lots 33 and 103. Normally, the nature and extent of such green space as it passes through Lots 33 and 103 would be considered by City planning staff when assessing the merits of a potential development application and finalized when the application is put to Council for approval.

**Brückner #1, para 26**

58. In 2009, White Rock adopted an Economic Development Strategic Plan ("2009 Strategic Plan"). The stated goal of the 2009 Strategic Plan was to set out economic development principles that would direct and affect the achievement of the economic development vision through development initiatives. Those initiatives integrated economic, social, and environmental concerns.

**Brückner #1, para 27**

59. Strategy 10 of the 2009 Strategic Plan addressed the densification of the Town Centre. Increasing density of the area was described as key to the economic development of White Rock the reasons for which included:

- a. Expanding White Rock's population will lead to greater economic development opportunities by expanding the local consumer market and the local labour market, and increased residential densities in the Town Centre are an important part of that process;
- b. The City can encourage the densification of the Town Centre by a variety of means, such as:
  - i. Density bonusing in exchange for community amenities, which could include more commercial floor space;
  - ii. Higher densities outright; and
  - iii. Reduced on-site residential parking requirements given that the Town Centre is a walkable neighbourhood.

**Brückner #1, para 28-29**

60. In August 2011, the City adopted the Town Centre Urban Design Plan ("Town Centre Urban Design Plan") providing that the City implement a series of "Key Ideas" (set out infra). As seen below, implementation of the Urban Design Plan was subsequently mandated under the current Zoning By-law as set out below.

Brückner #1, para. 32.

**Current Zoning By-Law, Mandated Urban Design Plan and Official Community Plan**

63. The 2013 OCP amendments provide that they were drafted to conform with Metro Vancouver's Regional Growth Strategy, adopted in July 2011. This strategy looks out to 2040 and provides a framework on how to accommodate the over 1 million people and 600,000 new jobs expected for the Metro Vancouver area by 2040. The key goals of this strategy include creating a compact urban area, developing complete communities and supporting sustainable transportation.

**Brückner #1, para 38**

64. In conformity with this Metro Vancouver Regional Growth Strategy, the OCP sets out, inter alia, the following principles for development:
- a. The Town Centre was specified as high density and mixed use, primarily residential/commercial;
  - b. Building heights and densities were to be guided by main components of the August 2011 Town Centre Urban Design Plan set out above, including the "Illustrative Plans", "Key Ideas", "Key Policy/Strategic Ideas", and the recommendations and locational considerations for public transit;
  - c. General design of redevelopment projects, built form, and public realm should be consistent with the 2011 Town Centre Design Guidelines;

- d. The City was to encourage street level retail to provide for a vibrant streetscape;
- e. The City was mandated to deliver predictable, high quality development in the Town Centre;
- f. To achieve growth while attaining greater land use efficiencies, the City was mandated to "encourage the redevelopment of vacant lands and under-utilized sites (eg parking lots)";
- g. To facilitate traffic circulation and parking without detracting from the visual quality of the Town Centre, the City was to require the provision of underground parking, use of lanes or statutory rights-of-way for vehicle access, and consider the pooling of parking requirements for mixed use developments.

**Brückner #1, para. 39**

- 66. The current CR-1 zoning for the Town Centre permits the development of mixed-use residential towers, with ground floor commercial retail spaces, and with extensive underground parking requirements to address the needs of residents and visitors.

**Brückner #1, paras. 34, 41, Ex. O, s. 6.16, aff. pg. 208A-209**

- 67. CR-1 zoning, in addition to use limits, has prescribed limits for lot coverage and density. Zoning Bylaw 2000 permits lot coverage of 65%. Base density of 1.75 FSR (floor space ratio) is permitted with density bonusing allowing up to 5.4 FSR with a Community Amenity Agreement.

**Brückner #1, paras. 40, 48, Ex. O, s. 6.16, aff. pg. 208A-209**

- 68. The 2011 Town Centre Urban Design Plan is incorporated into the CR-1 Zoning as the basis for densification (section 6.16, aff pg. 208A-209). This Plan in turn provides that the City implement the following "Key Ideas":
  - a. Create a broad Greenway setback along the south side of North Bluff Road between Foster and George streets: plant a double row of street trees and incorporate a pedestrian/bicycle pathway. This greenway setback is intended to run north-south at the juncture of the Petitioners' lots and the Respondent's lot, parallel to Foster Street;
  - b. Create a "Gateway" arrival space at the intersection of Johnston Road and North Bluff Road, by setting back new development on the either side of Johnston on the south side; design this space as a plaza with public art and/or a Town Centre welcome feature/sign. The south side of North Bluff Road, running west from Johnston Road, comprises the Petitioner's Lot 33 and the Respondent's Lot;
  - c. Consolidate surface parking areas into new developments and restrict future surface parking;

- d. Permit a range of building heights across the study area, with lower heights at the western and southern edges to respond to the surrounding neighbourhood context, and taller buildings located on either side of Johnston Road. The Lands are located in the northern area of the study area;
- e. Create a "Heart of the Community" space at the Johnston Road - Russell Avenue crossroads. The Respondent's Lot is located near this crossroads;
- f. Create a Town Square on the northeast corner of the Johnston Road - Russell Avenue intersection, which should include public art, formal landscaping, and programmed uses. This location is opposite the Respondent's Lot;
- g. Concentrate residential intensification in the northern and western parts of the study area, along North Bluff Road, Foster and Martin streets, with densities and heights reducing towards the western and southern edges of the study area. The Lands are located at or near the intersection of North Bluff Road and Foster Street;
- h. Undertake public realm streetscape improvements with new sidewalks, street trees, landscaping, street furniture, and improved pedestrian crossings on Johnston Road, North Bluff Road, Russell Avenue;
- i. Create more park space and green connections throughout the Town Centre;
- j. Create a high-density residential precinct in the superblock bound by Russell, Foster, North Bluff and Johnston - which includes the Lands - focused on a new neighbourhood park and playground at the centre of the block and surrounded by pedestrian friendly narrow streets;
- k. Create a more walkable Town Centre by pedestrianizing some streets/lanes, introducing new pedestrian routes, and consolidating parking;
- l. Encourage mixed-use projects and higher residential densities in Town Centre.

**Brückner #1, para. 32, 35, Ex. N, aff pp. 162-163**

- 69. Bylaw 2000 also includes parking requirements at section 4.15 which apply to CR-1 zoning. Similar parking requirements were mandated as in Bylaw 1591. In Bylaw 2000, apartment use required 1.2 parking spaces per dwelling unit, plus an additional 0.3 spaces per dwelling unit for visitor parking (section 4.15.1), totalling 1.5 parking spaces for each dwelling unit. The same provision for one space of parking per 37 square meters of commercial space remained (section 4.15.1). Any mixed-use building must include parking satisfying both parking requirements combined (section 4.15.8).

**Brückner #1, para. 36, Ex. N, aff pp. 188-189**

[42] Clearly, the City has put in place developmental goals for the subject properties. The question is whether the Parking Covenant is void as being contrary to public policy, which now favours development of a "Town Centre" in the immediate vicinity with a "high-density residential precinct" encouraging mixed-use projects and consolidated parking.

[43] In my view, the issue before Madam Justice Bruce in *Save the Heritage Simpson Covenant Society* is significantly different from that raised in the present case. Justice Bruce's comments were made in the context of changes to the Land Title Act, R.S.B.C. 1996, c. 250, pertaining to the duties imposed on the registrar to determine whether a restrictive covenant was valid as opposed to the provisions of the Land Registration Act, R.S.B.C. 1936, c. 140, which conclusively presumed the validity of a registered charge. She found that the underlying validity of the restrictive covenant should be determined in accordance with the legislation in effect at the date of the application. This case does not involve the application of legislation but rather of municipal planning.

[44] Municipal plans including Official Community Plans do not mandate that actions be undertaken but rather express objectives as to what is planned in the future.

[45] The Local Government Act, R.S.B.C. 2015, c. 1 ("LGA") provides at s. 471(1):

471(1) An official community plan is a statement of objectives and policies to guide decisions on planning and land use management, within the area covered by the plan, respecting the purposes of local government.

[46] Section 478(1) of the LGA provides:

478(1) An official community plan does not commit or authorize a municipality, regional district or improvement district to proceed with any project that is specified in the plan.

[47] In *Residents and Ratepayers of Central Saanich Society v. Saanich*

(District), 2011 BCCA 484, (leave to appeal ref'd [2012] S.C.C.A. No. 33), the Court of Appeal said at paras. 40 and 42:

[40] an OCP is intended to capture a long-term "vision" and provide "guidance" to municipal councils. Central Saanich's OCP is, like most OCPs, not couched in the terminology of a statute or bylaw; it contains a "long-term vision" or "philosophy" and suggests values that should "provide the foundation for the objectives and values" it describes.

[42] In my respectful view, the Society's argument ignores the rather unusual nature of an OCP as a 'visionary' set of policies and objectives that are for the most part laid out in broad strokes. Very little is actually "prohibited", and the definitions of various terms of art used in the plan leave municipal councils with some latitude in practical application.

[48] In *Lypka v. White Rock (City)*, 2015 BCSC 550, Mr. Justice Butler, relying on *Saanich*, said at para. 41:

[41] Like all such documents, the OCP establishes long-term goals and a vision for the community which are intended to be used as a guide for future development.

[49] I take from the above law as to the effect of municipal planning that such planning documents as relied on by the petitioners cannot per se affect existing property rights. The fact that White Rock's vision for this area of the city is for increased densification cannot, in my respectful view, form the basis for a declaration that the Parking Covenant is void as being against the public interest because it does not fit with the vision of the City for the future development of the area.

2. Discussion of s. 35 of the PLA.

[50] The petitioners rely on all subsections of s. 35(2) of the PLA as grounds for the application to cancel or modify the Parking Covenant.

[51] The relevant portions of ss. 35(1) and (2) of the PLA read:

35 (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:

(a) an easement;

(e) a restrictive or other covenant burdening the land or the owner;

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

(a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,

(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,

(c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being 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.

[52] The authority of the court to make an order under s. 35(1) of the PLA is not a broad one. The court's authority under s. 35 is limited to the specific grounds set out under s. 35(2): *Vandenberg v. Olson*, 2010 BCCA 204, at para. 23:

[23] The respondents argue, correctly in my view, that the court's authority is no more and no less than that conferred by s. 35(2) of the Property Law Act. I also agree with the respondents that s. 35(2) is a comprehensive code (as that phrase is described by Sullivan) which displaces the common law. The authority of the court to cancel an easement is constrained by the specific grounds set out in s. 35(2). In my view, the language of the opening words of s. 35(2) must be interpreted to mean that the Legislature intended to comprehensively describe all the grounds on which an order under s. 35(1)(a) may be made. Consequently, I am of the view that the appellant must bring himself within the s. 35(2) grounds if he is to obtain any relief.

a) Is the Parking Covenant Obsolete?

[53] In Vandenberg at para. 28, the court set out what must be established to determine whether an easement is "obsolete" under s. 35(2)(a) of the PLA:

[28] Obsolescence is to be determined in accordance with its dictionary meaning, as held by Prowse J.A. in *Portrait Homes Ltd. v. Strata Plan LMS 1191*, 2002 BCCA 257, 212 D.L.R. (4th) 295, 167 B.C.A.C. 286 at para. 23:

[23] In determining whether an easement is "obsolete" within the meaning of s. 35(2)(a), this Court has stated that the word "obsolete" should be given its ordinary meaning. For example, in *Collinson v. LaPlante* (1992), 73 B.C.L.R. (2d) 257 (C.A.), Madam Justice Southin, speaking for the Court, stated at para. 19:

No technical meaning is to be given to the word "obsolete" in this provision [s. 31(2)(a)]. It is an ordinary English word which is defined in the *Shorter Oxford Dictionary*, 3d ed., thus:

1. That is no longer practised or used; discarded; out of date. 2. Worn out; effaced through wearing down, atrophy, or degeneration.

[54] The court in Vandenberg also concluded that an easement cannot be found to be obsolete where it has been in regular use. That circumstance prevails in this case. The Parking Covenant has provided practical benefit to the respondent as set out in the respondent's affidavit materials. The original intended benefit of the Parking Covenant provided to Safeway continues to benefit the tenants of the respondent.

[55] I find that the petitioners have not established that the Parking Covenant is obsolete under s. 35(2)(a) of the PLA.

b) Do the Other Subsections of s. 35(2) Apply?

[56] I also conclude that the other subsections of s. 35(2) do not apply to the facts of this case. There is no evidence of any actual or implied intention on the part of the respondent to agree to modify or cancel any part of the Parking Covenant (s. 35(2)(c)). In fact, the converse is the case: the respondent has maintained its rights under the Parking Covenant. In light of the facts set out in the affidavits filed by the respondent from its tenants, it cannot be maintained by the petitioners that modification or cancellation will not injure the person

entitled to the benefit of the Parking Covenant (s. 35(2)(d)); and given my conclusion that the Parking Covenant is not unenforceable or invalid, s. 35(2)(e) does not apply.

[57] I also am of the view s. 35(2)(b) does not apply. For this subsection to apply, the "reasonable use of the land [must] be impeded, without practical benefit to others," if the Parking Covenant is not modified or cancelled. While the petitioners' development fits within White Rock's future plans for the area, there remains practical benefit to others arising from the current use of the surface parking on the land. As already discussed, the evidence established that there are substantial benefits to the tenants and their customers, some of whom are elderly, resulting from the Parking Covenant.

### 3. Estoppel and Acquiescence

[58] Lastly, the petitioners argue that based on the principles of estoppel by acquiescence, the respondent should be estopped from enforcing the Parking Covenant, or alternatively should be found to have acquiesced in a covenant providing less surface parking than the respondent asserts it has under the Parking Covenant.

[59] While the petitioners' submissions on estoppel and acquiescence primarily focused on their argument that they were entitled to relief under s. 35(2)(c) of the PLA, they also made submissions relying on these principles as part of their general argument seeking relief. The petitioners argued that the respondent's interpretation of the Parking Covenant's language would require that 71.4% of the lot surface be set aside for parking, while Lot 33 has had only 54% lot coverage for parking since 1980. The petitioners argue that there is no evidence that the respondent and its predecessors in title ever took exception to the alleged breach of the Parking Covenant. Accepting that the petitioners' percentages are correct, the petitioners would be required to establish that the parties had knowledge of such disparity: that is, that the issue was raised at the time and one or the other failed to address it. There is simply no evidence of any actual or implied intention on the part of the respondent in this case to agree to modify or cancel the Parking Covenant. As stated, the evidence is to the converse. I do not accept the petitioners' argument that the respondent is estopped from enforcing the Parking Covenant or that it or any predecessor grantee has acquiesced in a different interpretation of the Parking Covenant than that presently asserted by the respondent.

[60] This case does not meet the test for estoppel by acquiescence as set out in *Lafontaine v. University of British Columbia*, 2012 BCSC 805, at para 28:

[28] Although the petitioners do not characterize the form of estoppel they rely on, I assume that it is proprietary estoppel. However the estoppel is characterized, it necessarily involves at least two elements. To paraphrase the modern approach to the doctrine as explained in *Halsbury's Laws of England*, 4th ed., vol. 16 and adopted by Newbury J.A. in *Trethewey-Edge Dyking District v. Coniagas Ranches Ltd.*, 2003 BCCA 197 (CanLII) at para. 64, the owner of the legal right (in the matter at hand the respondent) must have done something to encourage the wrongdoer (in this case the petitioners) to believe that the party extending

the encouragement did not intend to rely on its strict legal rights. I digress to observe that I use the word "wrongdoer" only because it is used in the authorities just noted, and not because it describes the petitioners' conduct or behaviour in this case. In any event, that is the first element of the doctrine. The second element is detriment. The wrongdoer must have acted to his or her prejudice in the belief that the owner of the legal right did not intend to enforce those rights.

[61] These elements can be summarized as (1) the owner of the legal right (the respondent) must have done something to encourage the petitioners that it did not intend to rely on the Parking Covenant; (2) the petitioners must have acted on that encouragement to their detriment.

[62] I find that on the facts of this case, neither of these elements has been established.

#### IV. Conclusion

[63] Accordingly, for the reasons expressed above, the application is dismissed.

"Greyell J."

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