

CANADA / JUDGMENT

365089 BC Ltd. v. View Royal (Town)

2014 BCSC 1779

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1779 365089 BC Ltd. v. View Royal (Town)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

365089 BC Ltd. v. View Royal (Town),

2014 BCSC 1779

Date: 20140923

Docket: S132167

Registry: Vancouver

Between:

365089 BC Ltd.

and View Royal Residence Limited Partnership

Petitioners

And

Town of View Royal

Respondent

Before: The Honourable Madam Justice Baker

Reasons for Judgment

Counsel for the Petitioners:

Cameron G. White

& Nathalie J. Baker

Counsel for the Respondent:

Francesca V. Marzari

Place and Date of Hearing:

Vancouver, B.C.

September 25-27, 2013

Place and Date of Judgment:

Vancouver, B.C.

September 23, 2014

INTRODUCTION

- [1] This proceeding arises out of a zoning dispute between the Petitioners, who are the owners of 15 apartments (in these Reasons I use the terms "condominium", apartment, unit, and "strata unit" interchangeably) in a 66-unit seniors' apartment building known as Lions Cove in the Town of View Royal ("the Town"), and the Town, about the use of some of the apartments as "assisted living residence(s)" as that term is defined under the Community Care and Assisted Living Act, S.B.C. 2002, c. 75 (the "CC&AL Act").
- [2] View Royal Residence Limited Partnership ("the Partnership") is a limited partnership. 365089 BC Ltd. is the General Partner ("the General Partner") of the Partnership. The Petitioners are associated with a company called Nova Pacific Care Inc. Nova Pacific Care Inc. provides services described as "independent and supportive living services" to seniors living in four seniors' buildings located on Vancouver Island. For the purposes of these Reasons, I shall refer to the Petitioners collectively as "the owners" of the apartments that are in issue.

RELIEF SOUGHT

- [3] The Amended Petition (I shall refer to it as "the Petition" in these Reasons) states that the Petitioners are seeking the following orders:
1. A declaration that within the Apartment Residential (RM-2) Zone ("the RM-2 Zone") of the Land Use Bylaw, 1990, No. 35 ("the Zoning Bylaw") of the Town, tenants of apartments and/or condominium owners may receive assisted living services under the CC&AL Act, without being in contravention of the Zoning Bylaw.
 2. A declaration that within the (RM-2) Zone, an apartment that is registered as an assisted living residence under the CC&AL Act is a permitted use.

3. A declaration that the Zoning Bylaw does not prohibit persons from occupying units in the RM-2 Zone that are leased by Vancouver Island Health Authority ("VIHA"); and from receiving meals, housekeeping, laundry and other services they require.
 4. A declaration that the Zoning Bylaw does not prohibit any of the strata units owned by the Petitioners from being rented to persons who are provided with meals and housekeeping services (collectively referred to as "assisted living services").
 5. In the alternative, a declaration that the use of the strata lots owned by the Petitioners as "Assisted Living Apartment(s)" as defined in section 2 of the Zoning Bylaw is lawfully non-conforming pursuant to s. 922 of the Local Government Act, R.S.B.C. 1996, c. 323 (the "LG Act").
 6. In the further alternative, a declaration that the definition of "Assisted Living Apartment" in the Zoning Bylaw is void for vagueness and uncertainty.
- [4] The Petition includes a plea for a remedy under the Canadian Charter of Rights and Freedoms ("the Charter") and both counsel included submissions about Charter rights and remedies in their written submissions. However, at the start of the hearing, counsel for the Petitioners advised the court that the Petitioners are not pursuing any relief based on the Charter.
- [5] In the Town's Response to Petition, and in its Written Submissions, the Town states that it opposes the orders sought in paragraphs 1, 2, 3, 5 and 6 of the Amended Petition, but takes no position on the granting of the relief sought in paragraph 4.
- [6] In Part 5, Paragraph 45 of the Town's Response to Petition, and in its Written Submissions, the Town states that it does not oppose the declaration sought by the Petitioners that tenants of buildings or condominium owners generally, may receive meal preparation, laundry services, cleaning services and other services in their homes as part of a permitted residential use. In the Town's Written Submissions, the Town has also stated that it does not oppose the relief sought in Paragraph 1 of the Petition – a declaration that within the (RM-2) zone of the Zoning Bylaw, tenants and/or condominium owners may receive assisted living services under the CC&AL Act without being in contravention of the Zoning Bylaw. The Respondent opposes all other orders sought by the Petitioners.
- [7] In its Written Submissions, the Town stated that it is not seeking an order requiring tenants who are in receipt of assisted living services under the auspices of Vancouver Island Health Authority (VIHA) to leave Lions Cove (no plea for such relief is found in the Response to Petition in any event) and that the Town has agreed (with the Petitioners, I infer) that the Town "will not take any further action" (to require the Petitioners' tenants to be evicted, I infer) pending the outcome of this proceeding. Finally, the Town has stated its understanding that in the event that the Town is successful is opposing the relief sought by the Petitioners, VIHA, (which is not a party to this proceeding), will:

cease placing new assisted living clients in the Lions Cove building without zoning and building approvals.

[8] The Petition does not specify any statute, Rule of Court, or enactment on which the Petitioners rely as authority for the relief sought in the Petition, but the only orders sought in the Petition are declaratory.

[9] Rule 20-4(1) of the Supreme Court Civil Rules provides:

A proceeding is not open to objection on the ground that only a declaratory order is sought, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

[10] In *East Kootenay Realty v. Gestas Inc.* (1986), 12 C.P.C. (2d) 95 (B.C.S.C.), the court cautioned that when declaratory relief is sought in a proceeding commenced by petition, the matter should go to trial if issues of fact are seriously contested.

[11] Counsel did not refer to Rule 20-4(1) in their submissions. However, the Town's Response to Petition does not indicate any opposition to this matter proceeding summarily. At the hearing of the Petition, neither counsel suggested that the matter be converted to an action, or that there are issues of fact that are seriously contested, although the parties are not entirely in agreement about some facts. I am satisfied that any factual disputes can be resolved based on the affidavit material filed. I am of the view that this proceeding can fairly be resolved based on the affidavit material filed and the submissions of counsel.

[12] In *General Security Insurance Co. of Canada v. Warner* (1980), 20 B.C.L.R. 154, [1980] 6 W.W.R. 61 (S.C.), the court cautioned against granting declaratory relief based on hypothetical facts, or a claim or jeopardy that is only "possible" or "contingent". In this case, I am satisfied that the facts are not hypothetical and that the actions of the Town to date do give the Petitioners legitimate grounds to seek declaratory relief.

IS THIS PETITION AN APPLICATION FOR JUDICIAL REVIEW OF A DECISION of the Town?

[13] In the Written Submissions filed by counsel for the parties, both counsel initially characterized this proceeding as an application for judicial review of a decision of the Town.

[14] The first paragraph of the Petitioners' Written Submissions states:

This is an application for judicial review of a decision in 2012 by the Town .

[15] The first sentence of the first paragraph of the Town's Written Submissions states:

The main issue in this judicial review application is whether the Town drew an unreasonable distinction, in its letter and direction of November 2012, between a residential condominium building with a 55+ orientation, and an assisted living facility.

- [16] The Petition itself, however, does not include any reference to "judicial review" or application for judicial review, and there is no reference to the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 (the "JRP Act") in the style of cause of the Petition or the body of the Petition. The Response to Petition also makes no reference to judicial review or the JRP Act.
- [17] In the Petition, the Petitioners have not sought an order setting aside any "decision" of the Town. Paragraph 6 of the "Orders Sought" does put in issue the validity of the Town's Zoning Bylaw based on assertions that the definition of "assisted living apartment" is vague and uncertain. However, the amendment to the Zoning Bylaw that introduced the challenged definition of "assisted living apartment" came into effect in 2007 and is clearly not a "decision in 2012" or the "letter and direction of November 2012" that are referred to by the parties in their written submissions.
- [18] Neither party included a copy of the Judicial Review Procedure Act in its Books of Authorities, although both provided copies of various provincial and municipal enactments. No reference is found in any of the materials to any specific section or sections of the JRP Act on which the parties rely.
- [19] Although the parties have referred to a "November 2012 letter" as a "decision" or "direction" of the Town, that letter does not refer to a "decision" or "direction" of the Town, in the sense of a motion passed at a meeting of the Town Council, or the exercise of a "statutory power of decision" conferred upon a specific "tribunal".
- [20] The JRP Act defines "statutory power of decision" as:
- a power or right conferred by an enactment to make a decision deciding or prescribing
- (a) the legal rights, powers, privileges, immunities, duties or liabilities of person, or
 - (b) the eligibility or a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it.
- [21] The JRP Act defines "tribunal" as:
- one or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred.
- [22] The "November 2012 letter" referred to by the parties was written by Mr. William Buholzer, a lawyer acting for the Town, to a lawyer acting for the Petitioners and is dated November 26, 2012. In the letter, Mr. Buholzer wrote:

Further to our earlier correspondence on this matter, the Town of View Royal has instructed us to notify you that it requires your clients to comply with the Town's land use regulations with respect to the use and occupancy of its strata lots at the captioned address. As we have previously advised, it is the Town's position that the use of these strata lots as assisted living units is not permitted by the land use bylaw. The building was not constructed to accommodate assisted living units and the building does not comply with Building Code requirements for that type of

occupancy, a situation that may expose all residents of the building to risk that the Town cannot ignore. The Council has considered, and rejected, the idea of amending the existing residential zoning on its own initiative to permit this use of the premises. The Town appreciates that terminating the assisted living accommodation use of these units will require that the occupants find alternative accommodation. We are instructed not to take no further action with respect to this matter until June 1, 2013, which gives your clients about six months to relocate these tenants. We would request that you advise the writer as soon as such arrangements have been completed, so that we can advise the Town that no further action will be necessary.

- [23] If it may be said that this letter refers to a "decision" that is subject to judicial review ("decision" is defined as "a determination or order" in the JRP Act), it is not possible to determine, from the letter, what person or body made the decision or determination – in other words, the identity of the "tribunal". The JRP Act contemplates review by the court of a decision made by a "tribunal", on whom a statutory power of decision has been conferred.
- [24] The affidavits filed in support of, or in response to the Petition, do not assist in identifying either the "decision" or the "tribunal". In her first Affidavit, Lindsay Chase, the Director of Development Services for the Town has deposed, in paragraph 34, that the Town anticipated:

that there might be a rezoning application by the owners to permit the use of the Lions Cove building as an assisted living facility with appropriate building upgrades to accommodate that occupancy. Ultimately there was no application made to rezone the property and the Town determined that it would not unilaterally rezone.

- [25] In paragraph 34, Ms. Chase has deposed:

The operator of the building was informed of this decision, and directed to comply with the Town's bylaws.

- [26] It is clear that the Petitioners have not made an application for rezoning, so there is no decision in relation to such an application. In paragraph 56 of the Town's Written Submissions, counsel states that no application has been made for the rezoning of the Lions Cove property. If the Town's determination that it would not unilaterally rezone the zone in which Lions Cove is located could be considered a "decision", the Petitioners are not challenging that determination. I cannot determine from Ms. Chase's affidavit what "tribunal" she is referring to when she refers to "the Town". She has not deposed that it was her decision or determination and has not referred to any statutory power she exercised. Perhaps it was a decision or determination by the Mayor and Councillors, but if so, no record of a motion or vote, or minutes of any Council meeting have been included in the affidavit material. There is no "record" that can be judicially reviewed by this Court.
- [27] The lack of specificity about the "decision" and the "tribunal" is significant because judicial review of a decision of a tribunal requires a determination of the appropriate "standard of review" and that requires the court to consider the provisions of the enactment conferring

the statutory power of decision on the "tribunal"; any privative clause or clauses in the enactment establishing the tribunal, information about the expertise of the tribunal; and the nature and extent of the tribunal's jurisdiction over the subject matter of the decision. The court is also required to determine if the tribunal exceeded its jurisdiction by taking into account irrelevant matters; or failing to take into account relevant matters.

- [28] In this case, perhaps because the nature of the decision under review is not pleaded or clearly identified, stated, the parties do not agree, in their written submissions, on the applicable standard of review. The Petitioners say that the review involves a question of law – the interpretation of a municipal bylaw in the context of provincial legislation – and that the standard of review is therefore "correctness". The Town says that the standard of review is "reasonableness" as the review focuses on municipal decision making regarding the interpretation of bylaws and the exercise of powers by the Town's Fire Prevention Officer.
- [29] In response to this submission by the Town, it is important to note that the Petition does not seek any relief in respect of the exercise of any powers by the Town's Fire Prevention Officer or Fire Chief.
- [30] On June 22, 2012, a lawyer acting for the Town wrote to VIHA stating, among other things, that the Local Assistant to the Fire Commissioner was of the opinion that evacuation of Lions Cove in the event of fire would pose serious risks to occupants and firefighting personnel, in view of the impaired mobility of a high percentage of the building's occupants. The letter stated:

This aspect of the matter must be addressed regardless of whether there is a zoning contravention.

I do not believe that an "opinion" is a "decision", even if the pleadings included a plea for judicial review of a decision of the Local Assistant to the Fire Commissioner.

- [31] The Town has included references to the National Building Code and fire safety issues in the Response to Petition and has made submissions about those matters in its Written Submissions. The first sentence of Paragraph 52 of the Town's Written Submissions states:

This petition requires the Court to judicially review the decisions and determinations of Fire Department officials and planners with expertise in the area of Code and bylaw interpretation.

- [32] Paragraph 53 of the Town's Written Submissions states:

In this context, the Town's Fire Chief and Fire Prevention Officer have expertise in the interpretation and application of the Code requirements, the exercise of which is entitled to deference by the Court.

- [33] The question of deference to the Town's Fire Chief and Fire Prevention Officer does not arise in this proceeding. Neither the Petition nor the Response to Petition asks this Court to judicially review "the interpretation and application of the Code requirements" or any other determination or decision by the Town's Fire Chief or Fire Prevention Officer.
- [34] For the purposes of these Reasons, without deciding, I will assume that in the event of a fire, there may be safety issues associated with residents living in the building who have mobility problems, visual impairment, or cognitive impairment. There is evidence that some, but not all, of the tenants of apartments owned by the Petitioners have mobility problems, are visually impaired, or cognitively challenged. There is also evidence, however, that some residents of apartments in Lions Cove that are not owned by the Petitioners also have mobility problems and other disabilities that pose safety concerns. The Town's Fire Chief and Fire Prevention Officer have statutory powers and duties to address those concerns.
- [35] Neither the Petition nor the Response to Petition asks this Court to set aside, prohibit, enjoin, affirm or enforce any decision made by the Town's Fire Chief or Fire Prevention Officer. The Petitioners have not asked this Court to prohibit those officials from the exercise of any powers delegated to them. No declaratory relief is sought by any party to this Petition in relation to any decision made by the Town's Fire Chief or Fire Prevention Officer.
- [36] This Court is also not reviewing any decision or exercise of powers in relation to the 1992 National Building Code, or any subsequent version of the National Building Code. Both parties have included discussion of various versions of the National Building Code in their written submissions and those submissions are relevant to the interpretation of the Town's Zoning Bylaw. Mr. Buholzer's November 16, 2012 letter asserts that the Lions Cove buildings do not comply with Building Code requirements "for that type of occupancy", but no exercise of statutory authority in relation to the National Building Code has been put in issue by the Petition and the Town has not sought any declaration or other form of relief in relation to the National Building Code.
- [37] For the reasons given, I have concluded that the Petition does not include an application for judicial review of a decision or direction made in November 2012 by the Town and is not an application for judicial review of any decision made by the Town's Fire Prevention Officer or the Town's Fire Chief.

OBJECTIONS BY OTHER OWNERS

- [38] There are references in the affidavit material to complaints that have been made to the Town or VIHA by other owners of apartments at Lions Cove about activities being carried on by the Petitioners at Lions Cove; and disputes between the Lions Cove Strata Corporation, or at least the Strata Council, and the Petitioners, about the Petitioners' use of common areas to provide services to tenants living in the Petitioners' apartments; and some other residents of Lions Cove. One of the disputes referred to is whether the Petitioners' "business activities" are permitted by the bylaws of the Strata Corporation and whether Lions Cove has

effectively been converted into a commercial building, or an institutional facility. Ms. Chase refers to some of these complaints in her affidavit; and the Town filed the affidavit of Frank Wright, an owner and resident of an apartment at Lions Cove, in which he outlined the nature of concerns some owners have about the activities going on at Lions Cove.

- [39] I do not intend to attempt to resolve any factual disputes or issues raised by Mr. Wright's affidavit, or the complaints referred to by Ms. Chase in her affidavit. The Strata Corporation is not a party to this proceeding and no relief is sought or can be granted in this proceeding in relation to any dispute between the Strata Corporation and the Petitioners; or between individual owners of other strata units, and the Petitioners.
- [40] In summary, this Decision and Reasons will deal only with the claims for declaratory orders that are pleaded in the Petition.

FACTS

- [41] In the mid to late 1990's, Royal View Housing Society, a non-profit organization; and Harlo Homes Ltd. ("the developers") decided to build an apartment building in the Town to provide housing for older adults and senior citizens - specifically, persons 55 years of age and older. The impetus for the development came from the South Van Isle Lions Club, who wanted to provide comfortable, safe and affordable retirement housing modelled after successful life-lease projects developed by non-profit groups in Saskatchewan, Alberta and Manitoba.
- [42] On May 13, 1997, the Town issued a development permit for the project known as "Lions Cove Seniors Housing". At the time the building was constructed, and at present, Lions Cove is located in an area of the Town that is zoned "Apartment Residential (RM-2)" under the Town's Zoning Bylaw.
- [43] At the time the development permit was issued and Lions Cove was constructed, Permitted Uses in the RM-2 Zone included "Residential Apartment". "Residential Apartment" was defined then as:

means a building divided into not less than three dwelling units other than Attached Residential; specifically excludes a building used for a Hotel or Motel.

- [44] At the time the development permit was issued and the Lions Cove building constructed, the Town's Zoning Bylaw did not include any reference to "assisted living" as a concept or use, and did not contain a definition of "assisted living apartment", "assisted living building", "assisted living residence", or "assisted living use". A definition of "assisted living apartment" was not added to the Zoning Bylaw until 2007 when the Zoning Bylaw was amended by Amendment Bylaw, 2006, No. 646.
- [45] The definition of "Assisted Living Apartment" introduced into the Zoning Bylaw by Amendment Bylaw No. 646 reads as follows:

means an apartment use where food, housekeeping, personal service and/or nursing care are provided in addition to the residential use.

It is this definition that the Petitioners allege is void for vagueness and uncertainty.

- [46] A description of Lions Cove is found in a report dated August 2, 2013 written by Robert G. Marshall, the Town's Fire Prevention Officer. According to Mr. Marshall, Lions Cove is actually two separate buildings (the East Building and the West Building) with a total of 66 dwelling units. A firewall divides the East Building from the West Building. The firewall was necessary because under Part 3 of the 1992 Building Code (the "Code"), the maximum allowable floor area for a three-storey building facing two streets, with a sprinkler system, was 1,500 square metres. The proposed design for Lions Cove had a floor area of 2,700 square metres. The design solution was to divide the building into two through the use of a firewall, resulting in two buildings of 1,500 and 1,200 square metres respectively.
- [47] Both of the buildings are three stories high, wood frame construction. According to Mr. Marshall, the West Building includes a lobby and "Amenities block" and a lower level parking garage. The buildings are located on a sloped lot and part of the parking garage is below ground and part is above ground.
- [48] There is evidence that the "amenities" located on the ground floor of the West Building include a lounge, a kitchen with a fridge, and multiple ovens, sinks and dishwashers; and a dining/meeting room that is presently configured with nine tables capable of accommodating up to 45 diners at a time.
- [49] There are sprinklers in the buildings. Mr. Marshall says that the sprinkler system complies with the National Building Code's "NFPA 13R residential standard" but that this is a lesser standard than would be required if the buildings had been considered to be a "care and detention occupancy" at the time they were constructed. The only difference, as I understand it, is that Lions Cove has sprinklers in the bedrooms, kitchens and living rooms of the apartments; and in the common areas and hallways; but there are no sprinklers in the bathrooms, closets or "pantries". There is no direct evidence about what "pantries" are, or where they are located, but I infer that pantries are small storage rooms located in the individual apartments. There are no sprinklers on the apartment balconies.
- [50] Conflicting opinions about whether Lions Cove complies with various Building Code provisions are in evidence, and I shall refer to these opinions later in these Reasons, but the Petition does not ask this Court to determine whether Lions Cove should be considered to have been a "residential occupancy" or a "care or detention occupancy" under the National Building Code; or the classification into which the buildings would fall under the most recent version of the National Building Code..
- [51] It is clear that the Town was aware from early on that the building would include the "amenities" that are located in the West building. When the developers applied for a development permit and during construction of Lions Cove, there was some disagreement

between the Town's Building Inspector and the architects retained by the developers about some of the proposed elements of construction. For example, the exit from the "Amenities block" in the West building is by a ramp to a path, but there are stairs from the path to the nearest public street, which is Island Highway. The Building Inspector wanted a ramp to replace the proposed stairs from the path to the Island Highway.

- [52] The architect agreed to modify the handrails and widen the ramp, but in correspondence reminded the Building Inspector that the building was not required to meet the requirements of Section 3.7 of the 1992 Code ("Building Requirements for Persons with Disabilities") as "The only major occupancy/classification of the building is Group C: Residential".
- [53] The architect noted that the only required "accessible" routes were the main entrance and entry from the parking garage, and the buildings complied with those requirements. The Town's Building Inspector ultimately accepted the architect's proposed design and did not require the proposed stairs from the path to Island Highway to be replaced with a ramp.
- [54] I am also satisfied that when Lions Cove was being constructed, the Town was aware that the building was intended for occupancy by older adults. I noted above that the architect's position was that the only major occupancy group (underlining added) was residential, but in response to a query by the Building Inspector about the potential risk posed to young visitors by the "guard arrangement in exit facilities", the architect replied that:
- the building has a very specific, advanced age user group." (underlining added)
- [55] Realtor Karen Jensen, who was involved in marketing the apartments in Lions Cove even before construction was completed, and has continued to be involved in the sale of apartments in Lions Cove, has deposed that at public information meetings held to market the apartments, prospective purchasers were told that it was intended that residents would be able to "age in place".
- [56] I infer from the foregoing that both the developers and the Town must have anticipated that some residents moving into the building could be elderly and by reason of age, could have mobility problems or other physical or mental disabilities or conditions; or that able-bodied residents who moved into the building could or would develop mobility problems and other disabilities as they aged.
- [57] Construction of Lions Cove was completed in 1998 and a strata plan was filed in the Land Title Office on May 29, 1998. The Town issued a final occupancy permit on June 29, 1998. After completion, Lions Cove was operated on a non-profit basis by the Royal View Housing Society ("the Society").

- [58] The marketing material used by realtors involved in the marketing and sale of the apartments both before and after Lions Cove was built stated that amenities offered to Lions Cove residents would include "Meal service as required" and "Housekeeping, laundry, activities and other services as required". Karen Jensen has deposed that prospective purchasers were told about the services that would be offered and that the availability of those services was a significant selling feature.
- [59] Initially, the apartments were marketed as "life leases". The "life lease" concept ultimately proved insufficiently popular, and the Society began selling the apartments outright. However, the building continued to be restricted to residents aged 55 or older.
- [60] The Petitioners have established that on February 21, 2002, the Society agreed to lease 10 apartments in Lions Cove to Vancouver Island Health Authority ("VIHA"). The initial term of the agreement was March 1, 2002 until February 29, 2004.
- [61] VIHA's objective, I conclude, was to have the apartments available as homes for seniors who by reason of age or physical disability required some support – meals, housekeeping, laundry and/or transportation services - in order to continue living independently and avoid going into "care". The required services were to be provided to the residents living in VIHA's apartments by the Society.
- [62] The initial contract provided for rent of \$1,750 per month to be paid for each unit, with each tenant paying part of the rent for his or her apartment, and the balance paid by VIHA. Although the contract provided for 10 units to be leased, it also included a provision allowing for additional units to be rented privately with the permission of VIHA.
- [63] Under the contract, eligible clients were persons aged 55 or older (or couples, one of whom was 55 or older); eligible for long term care case management services; assessed by VIHA staff as being "Supportive Living Eligible"; with "minimal to moderate mobility limitations (may use cane, walker, wheelchairs or scooters)"; requiring regular assistance with activities of daily living and/or supervision of diet or medications; having managed health issues such as incontinence, mental health issues, or dementia; assessed as being able to function well in a supportive setting; and able to "direct their own care".
- [64] The contract provided that persons would not be eligible if they could not independently reach the ground floor dining room from their apartment; had unstable health issues or any condition requiring 24 hour nursing care; had loud, aggressive outbursts or other disruptive behaviours; exhibited dangerous smoking behaviours; or exhibited unsafe use of kitchen stoves.
- [65] In addition to the services to be available to residents from the Society, VIHA made arrangements with an agency called Juan de Fuca Home Support to provide personal services for those residents requiring it, including assistance with bathing and dressing; and/or the administration or monitoring of medications.

- [66] I am satisfied that the services that were provided to or available to residents occupying units leased to VIHA are the same services that are currently included in the definition of "assisted living residence" in the CC&AL Act. The CC&AL Act differentiates between hospitality services – food, laundry, housekeeping, activities and transportation; and "prescribed services" – help with bathing and administration and monitoring of medication, for example; but I shall refer to hospitality and prescribed services collectively as "assisted living services" in these Reasons.
- [67] The Society arranged for meals to be brought into Lions Cove from a nearby restaurant. The meals were served from the ground floor kitchen and eaten in the ground floor dining room. Meal service was not limited to residents living in apartments leased to VIHA and any other resident of Lions Cove who wished to purchase the meals and eat in the dining room could also do so.
- [68] In paragraph 27 of its Written Submission, the Town asserts that there is no direct evidence of Lions Cove being used as an "assisted living facility" prior to the purchase of the units by the Petitioners. Not unreasonably, the Petitioners take issue with the description of Lions Cove, or the Petitioners' apartments within Lions Cove as a "facility" or "facilities".
- [69] In any event, there is no evidence before me as to when the descriptor "assisted living" came to be associated with any particular type of apartment, building, residence, "facility", or residential setting in British Columbia. I am satisfied, however, that as early as February 2002, apartments in Lions Cove were being used in a manner consistent with the definition of "assisted living residence" that is now included in the CC&AL Act.
- [70] As stated earlier in these Reasons, in 1998 and in 2002 the Town's Zoning Bylaw did not contain any reference to "assisted living apartment" or "assisted living residence" or "assisted living facility". I am satisfied, however, that commencing February 2002, the apartments leased to VIHA were being used or occupied in a manner consistent with the meaning the Town attributes to the definition of "assisted living apartment" that was added to the Zoning Bylaw in 2007.
- [71] In 2002, the Community Care and Assisted Living Act, S.B.C. 2002, c. 75 (I have earlier defined this enactment as the "CC&AL Act") was passed. The current version of the Act indicates it received Royal Assent on November 26, 2002.
- [72] From my review of previous community care facility licensing legislation, it appears that the CC&AL Act introduced the definition and concept of "assisted living" into the statute. Previously, the statute had governed only the licensing and regulation of "community care facilities" in British Columbia. The definition of "assisted living residence", from s. 1 of the CC&AL Act, is as follows:

means a premise or part of a premises, other than a community care facility,

(a) in which housing, hospitality services and at least one but not more than 2 prescribed services are provided by or through the operator to 3 or more adults who are not related by blood or marriage to the operator of the premises, or

(b) designated by the Lieutenant Governor in Council to be an assisted living residence.

[73] In enacting the CC&AL Act, the Legislature clearly differentiated between assisted living residences and the types of accommodation that are required to be licensed as community care facilities. The Act does not require assisted living residences to be licensed. Instead it created a separate scheme for "registration" of this type of accommodation, and created the position "assisted living registrar" to whom responsibility was delegated for the registration and oversight of such residences.

[74] Printed materials published by the Government of British Columbia state that assisted living is considered to be a "middle option" between home support on one end of the continuum, and residential care or complex care in an institution or facility at the other end of the continuum. "Assisted living", the publication states "promotes the privacy and self-reliance of people who require help with some day-to-day tasks but can otherwise live independently".

[75] Attached as an exhibit to Affidavit 3 of James Norman, the Petitioners' general manager, is an e-mail from the Director of Assisted Living Services for the B.C. Ministry of Health. Ms. McMillan stated in her e-mail:

We definitely do not consider people living in AL (assisted living) as being in care.

[76] This is Ms. McMillan's statement of the position of her Ministry, and not determinative of any issue before me, but it is some indication that an assisted living residence is a unique type of living situation. In my view, assisted living services are not "medical treatment" and residences where assisted living services are provided or available are not hospitals or care facilities.

[77] Persons choose to live in a location where assisted living services are provided; they are not compelled to do so. Residents are free to come and go as they please; and to stop receiving some or all of the services if they so choose. Their movements are not restricted. They are not "detained". In general, they control and have the right to control access and entry by other persons, including service providers, to their home.

[78] There is no evidence before me about when the first Assisted Living Registrar was appointed, or when the registration scheme actually came into effect, except that s. 24 of the CC&AL Act, the section that provides that the Minister must designate a person to be the Assisted Living Registrar, did not come into effect until October 3, 2003 and I conclude from that that the registration scheme became operational sometime after October 3, 2003.

[79] The regulation that defined the "prescribed services" referred to in the definition of "assisted living residence" in s. 1 of the CC&AL Act was not passed until 2004. B.C. Reg. 217/2004 defined "prescribed services" as:

means the following:

- (a) regular assistance with activities of daily living, including eating, mobility, dressing, grooming, bathing or personal hygiene;
- (b) central storage of medication, distribution of medication, administering medication or monitoring the taking of medication;
- (c) maintenance or management of the cash resources or other property of a resident or person in care;
- (d) monitoring of food intake or of adherence to therapeutic diets;
- (e) structured behaviour management and intervention;
- (f) psychosocial rehabilitative therapy or intensive physical rehabilitative therapy.

[80] There is evidence that the prescribed services most commonly received by persons living in apartments leased by VIHA at Lions Cove are the first two – assistance with activities of daily living; and assistance with medications.

[81] In 2003, Royal View Housing Society's mortgage lender, MCAP, began foreclosure proceedings in relation to strata units in Lions Cove that were still owned by the Society, including the apartments that were leased by the Society to VIHA. The Petitioners purchased 15 strata units from MCAP in the foreclosure proceedings. At the time, 12 of those 15 strata units were already leased to VIHA and occupied by residents who were receiving services from the Society and from Juan de Fuca Home Support.

[82] The purchase of the 15 strata units from MCAP by the Limited Partnership closed on December 23, 2003. Legal title was registered in the name of the Petitioner 365089 BC Ltd. (the "General Partner") which holds legal title as a trustee on behalf of the Limited Partnership. Ten or eleven of the apartments have continued to be leased to VIHA and occupied by persons who are also receiving assisted living services.

[83] In contemplation of purchasing the Lions Cove apartments, the Petitioners' lawyer wrote to the Town on December 16, 2003 requesting confirmation that the "present use and development of the Property" fully complied with applicable bylaws and regulations of the Town. No reply had been received from the Town by the time the Petitioners completed the purchase of the 15 apartments in December 2003.

[84] However, on August 10, 2004, the Town's Director of Planning sent a letter to the Petitioners' lawyer that included an apology for the delay in responding to the Petitioners' lawyer's request and provided confirmation in writing that:

Land use and all buildings or structures for which permits have been issued are in compliance with Municipal bylaws and Development Permit No. 06-96.

- [85] The Director also confirmed in the letter that there were no outstanding complaint issues, orders or notices, and no ongoing Municipal investigations pertinent to the Lions Cove property.
- [86] The Petitioners' lawyer also wrote to the Town's Fire Chief on December 16, 2003 asking whether there were any outstanding work orders against the 15 strata units listed; whether there were any outstanding fees relating to the property, and the date the property was last inspected. On June 30, 2004, the Assistant Fire Commissioner sent back a copy of the letter with a handwritten notation indicating:

This Dept. has no record of outstanding infractions or deficiencies.

- [87] The Town's position is that the letter the Town provided to the Petitioners in August 2004 makes it clear that the Town's response is based only on a review of its own records. I do not agree. The letter specified that the Town had relied on its own records in relation to the existence of outstanding complaints, orders and notices. It did not attach any limitation to its assertion that Lions Cove's "land use" was in compliance with all municipal bylaws.
- [88] The Town's position is also that the letter provided to the Petitioners in 2004 does not establish that the Town "approved" the activities that were being conducted in Lions Cove by the Royal View Housing Society. With that I agree, and in any event no issue of "estoppel" is raised by the pleadings. I consider it likely however, that at least some elected Town officials, and/or employees of the Town, knew about the arrangements in place at Lions Cove for some residents to receive assisted living services.
- [89] Lindsay Chase, the Town's Director of Development Services has deposed that the Town first became aware that some apartments in Lions Cove were being occupied by persons receiving assisted living services in 2012. If by "the Town", Ms. Chase is referring only to herself in her capacity of Director of Development Services, there is no reason, on the evidence, to doubt her assertion. If, however, she uses "the Town" in the sense of all elected officials, officers and employees of the Town, I am satisfied that she is mistaken.
- [90] Realtor Karen Jensen has deposed that at the grand opening of Lions Cove, a number of Town officials were present, and that it was well known in the View Royal community that Lions Cove would provide meals, laundry and housekeeping services to its residents. I infer from Ms. Jensen's evidence that it is unlikely that no Town official, officer or employee was aware of the services being provided to some residents at Lions Cove until 2012.
- [91] Judy Hanstead is employed by the Petitioners as the "Assisted Living House Manager" responsible for the overall operation of the Petitioners' apartments at Lions Cove that are registered as assisted living residences. She has held this position since 2008. She lives at Lions Cove in one of the apartments owned by the Petitioners.

- [92] Ms. Hanstead deposed in an affidavit sworn September 9, 2013 that she first met with Rob Marshall, the Town's Fire Prevention Officer, in the fall of 2009 to make arrangements for an afternoon presentation by Mr. Marshall to the "assisted living clients" at Lions Cove. Ms. Hanstead has deposed that Mr. Marshall came to Lions Cove on three occasions, usually accompanied by Troy Mullin, the Town Fire Department Emergency Program Assistant, to make presentations to the residents who live in the Petitioners' apartments about fire safety, evacuation procedures, emergency preparedness and related topics. The first of these presentations by Mr. Marshall was November 26, 2009; the second and third were May 17, 2011 and May 23, 2012.
- [93] Mr. Marshall deposed in an affidavit sworn August 6, 2013 that he first became aware that Lions Cove was "being used, in part, as an assisted living residence" in January 2012 when he was copied with a letter of complaint sent to the Town. He filed a second affidavit sworn September 20, 2013 in response to three affidavits filed by the Petitioners, including Ms. Hanstead's September 9, 2013 affidavit. Mr. Marshall did not contradict Ms. Hanstead's evidence about the interactions he had with her and residents of apartments belonging to the Petitioners, in 2009 and 2011. He stated only that he would have expected a formal permit application to be made for what he now considers to have been a "change in use".
- [94] In addition to her contacts with Mr. Marshall and Mr. Mullin, Ms. Hanstead has deposed that the employees of the Town's fire department are the "first responders" when a Lions Cove resident calls 911. She has deposed that on occasions when a resident in one of the apartments owned by the Petitioners called 911, Ms. Hanstead was usually there and that if she was in the building she had gone to the resident's unit and had always introduced herself to first responders as the "Assisted Living House Manager".
- [95] I conclude that it is more probable than not that Mr. Marshall was aware before January 2012 that apartments in Lions Cove were occupied by persons who were receiving assisted living services from the Petitioners or others; and that Ms. Hanstead was employed as the Petitioners' Assisted Living House Manager at Lions Cove.
- [96] It is not necessary for me to finally resolve this conflict in the evidence, however, as no issue of estoppel or laches arises on the pleadings, and the Town's failure to act on any knowledge it may have had prior to 2012 cannot affect the outcome of the issues that are raised by the pleadings.
- [97] On October 1, 2004, the Petitioners submitted an Application to the Office of the Assisted Living Registrar to register 12 of the 15 apartments the Petitioners own in Lions Cove as "assisted living residences" under the CC&AL Act. On August 12, 2005, the Assisted Living Registrar granted registration under s. 25(1) of the Act to the Petitioners. The letter accompanying the certificate of registration stated that the Partnership had been registered as an operator of 12 assisted living units at Lions Cove. The registration was said to be effective until March 31, 2006. The registration has been periodically renewed and at time of hearing of the Petition, the Petitioners had a valid certificate of registration.

- [98] From documents attached to the affidavit of Ms. Chase, I infer that after purchasing the apartments in Lions Cove in 2003, the Petitioners assumed the rights and obligations of the Society that had been put in place under the March 1, 2002 agreement between the Society and VIHA. On December 4, 2004, an agreement titled "Amendment Agreement for the Vancouver Island Health Authority" was signed by a representative of VIHA and by Mr. Norman, the Petitioners' general manager, on behalf of an entity simply described in the document as "Lion's Cove Management". The Amendment Agreement stated that it extended the term of the March 1, 2002 agreement to March 31, 2005.
- [99] On September 9, 2005, the Petitioners and VIHA entered into a contract titled "Contract for Services Supportive Living Agency Agreement Template" ("the 2005 Contract"). I infer that in the period between March 31, 2005 and September 9, 2005 VIHA and the Petitioners had continued their arrangements as if the Amendment Agreement was still in effect. There is no evidence of any period of time during which residents living in apartments owned by the Petitioners were not receiving assisted living services.
- [100] The 2005 Contract stated that the Petitioners are "in the business of providing Assisted Living Services". The purpose of the agreement is stated as:
- to provide the framework for the co-operative working relationship between the VIHA and the (Petitioners) in the provision of Supportive Living services for the residents of Lions Cove
- [101] The 2005 Contract stated that the services were intended for seniors and persons with disabilities:
- who can live independently but require regular help with day to day activities. The Services are intended to prevent or delay admission to residential facility care, and to enable people to age in place, to the degree possible, within this setting.
- [102] By the terms of the 2005 Contract, the Petitioners agreed to provide services described as "hospitality services" to the residents of Lions Cove placed by VIHA. Hospitality services are referred to in the definition of "assisted living residence" in the CC&AL Act. The hospitality services are set out in a Schedule attached to the 2005 Contract, and include meals/snacks; cleaning and tidying common areas and cleaning of residents' apartments; weekly laundry of residents' sheets and towels; social and recreational activities organized by an activities coordinator; support for residents to participate in community activities or to attend appointments; and "24 hour on-call emergency response capacity".
- [103] The 2005 Contract obliged the Petitioners to provide the listed "hospitality services" but not the "prescribed services" as set out in B.C. Reg. 217/2004.

- [104] The 2005 Contract included a term that VIHA would provide other services directly, or through an agency contracted by VIHA. These services – described in the contract as "personal care services", but clearly synonymous with the "prescribed services" in B.C. Reg. 217/2004, are excluded from the services to be provided by the Petitioners under the contract.
- [105] VIHA contracted with an agency called Beacon Care Services Ltd. to provide the personal care ("prescribed") services of "activities of daily living" and medication management and administration. Beacon Care Services Ltd. continued to provide those services to residents of Lions Cove (both in apartments owned by the Petitioners and otherwise) at time of hearing of the Petition.
- [106] The original term of the 2005 Contract was extended until January 31, 2009, following which there were new agreements in 2009 and 2012 that essentially obligated the Petitioners to provide the same hospitality services as set out in the 2005 Contract.
- [107] The 2009 "Service Provider Contract" ("the 2009 Contract") between the Petitioners and VIHA added a specific term requiring the Petitioners to register the apartments as "assisted living residences" with the Office of the Assisted Living Registrar. The term of the current 2012 Service Provider Contract between the Petitioners and VIHA will expire, unless renewed, on January 31, 2017.

THE CHANGE TO THE ZONING BYLAW IN 2007

- [108] In 2007, the Town amended its Zoning Bylaw to introduce the concept of "assisted living apartment". The incentive to create a new category or definition of residential use came from an application made to the Town by a developer (not the Petitioners) who wanted to use (or develop) a building in the Town to offer assisted living services to residents of the building. According to Ms. Chase, the Town has only ever received this one request "to zone a property for assisted living use".
- [109] Ms. Chase has deposed that it was in response to this request that the Town amended section 2 - the "Definitions" section of the Zoning Bylaw - to add "Assisted Living Apartment" as a defined term. Land Use Bylaw, 1990, No. 35, Amendment Bylaw No. 646, 2006 was adopted on January 16, 2007. I have set out the definition earlier in these Reasons, but for convenience I reproduce it here:

means an apartment use where food, housekeeping, personal service and/or nursing care are provided in addition to the residential use.

- [110] To accommodate the applicant who had approached the Town about developing an assisted living building, the Town created a new zone, called "Burnside Corner Comprehensive Development Zone CD-10. Permitted uses in Sub-Zone CD-10A included "assisted living apartment" and "community care facility".

- [111] According to Ms. Chase's affidavit, the Town later amended its Zoning Bylaw again. Land Use Bylaw, 1990, No. 35, Amendment Bylaw No. 844, 2012 was adopted on January 15, 2013 and created a new Zone called "Mixed Residential (RM-3)". "Assisted living" is one of the listed permitted uses in RM-3 and is not listed as a permitted use in other zones. The only property currently zoned RM-3 is located at 280 Island Highway. That is the address of a property owned by the Town on which the building housing the Town's Fire Department is currently located. The Fire Department is next door to Lions Cove.
- [112] In her affidavit, Ms. Chase has given a detailed explanation of the Town's reasons for the decision to amend the Zoning Bylaw in 2006. She has deposed that the objective was:
- to treat assisted living apartments and operations as a distinct use from residential apartments in its Land Use Bylaw
- [113] Although Ms. Chase may not have intended the implication, her statement suggests that before 2006, the Town's objective was not to treat assisted living apartments and operations as a distinct use from residential apartments.
- [114] Although the evidence is not entirely clear on this point, it appears that early in 2012 the Town and the Assisted Living Registrar received complaints – from the owners of other apartments at Lions Cove, I infer – about the assisted living services being provided to some residents at Lions Cove. The evidence does not establish whether concerns were expressed only about the services being provided to residents living in apartments owned by the Petitioners, as the evidence indicates that services are provided by Beacon Care Services Ltd. to Lions Cove residents living in apartments that are not owned by the Petitioners.
- [115] In response to these complaints, I infer, the Assisted Living Registrar convened a meeting on April 12, 2012 to discuss the operations at Lions Cove. Lindsay Chase attended the meeting as a representative of the Town. Rob Marshall, the Town's Fire Prevention Officer, also attended the meeting, as well as Mr. Norman, who represented the Petitioners at the meeting; other Lions Cove residents and members of the Lions Cove Strata Council; and representatives of VIHA. Minutes of the meeting indicate that various viewpoints were expressed and discussed; that there was no "definite decision" made, but that the participants agreed to continue to meet. It appears that there was also agreement to "Stop any expansion of (assisted living) suites in the building for now".
- [116] On May 31, 2012, a lawyer apparently retained by 25 owners at Lions Cove wrote to the Town. Reference was made in the letter to the minutes of the April 12, 2012 meeting. The lawyer's letter purported to put the Town on notice that her clients intend to hold the Town liable for any personal injury or damage that occurs to either the common property of the building, or any of the strata lots owned by the lawyer's clients. The same lawyer wrote to the Assisted Living Registrar and to the Lions Cove Strata Corporation on June 1, 2012.

- [117] As discussed earlier in these Reasons, a lawyer for the Town wrote to the Petitioners on June 22, 2012. That letter is not in evidence. On the same date, the lawyer for the Town wrote to VIHA stating that "the Town" considers the use of units leased to VIHA at Lions Cove to be "outside the scope of its current zoning regulations". The letter referred to concerns expressed by the Local Assistant to the Fire Commissioner that evacuation of Lions Cove in the event of fire would pose serious risks to the occupants due to the "impaired mobility of a high percentage of the occupants".
- [118] I referred earlier in these Reasons to the letter sent to the Petitioners by the Town's lawyer on November 16, 2012, and I shall not reproduce the letter a second time here.
- [119] At time of hearing of the Petition, 11 of the Petitioners' 15 units continued to be leased to VIHA and occupied by seniors who receive meals, laundry and housekeeping services from the Petitioners, and, I infer, "prescribed services" from Beacon Care Services Ltd. Three of the Petitioners' apartments were leased privately to other seniors who required similar services and the remaining unit was occupied by Ms. Hanstead. Eight of the units owned by the Petitioners are on the first floor, six are on the second floor, and Ms. Hanstead's apartment is on the third floor. James Norman, the Petitioners' general manager, has deposed that in 2013, the Petitioners made arrangements to move residents who have mobility issues to apartments owned by the Petitioners on the ground floor of Lions Cove.
- [120] As stated earlier, the evidence establishes that the residents living in apartments owned by the Petitioners are not the only residents of Lions Cove who are receiving assisted living services. Ms. Hanstead prepared a chart based on her knowledge of the residents in the building and the services they are receiving. Some residents have contracted privately with Beacon Care Services Ltd. One has a live-in caregiver.
- [121] Ms. Hanstead's chart also indicates that there are residents in the building, who are not occupying apartments owned by the Petitioners, who have disabilities including two residents who are legally blind; several residents who use a cane, walker or electric chair; and residents who "need direction" – which I infer means the resident has some cognitive impairment.

ANALYSIS AND DECISION

- [122] I have already said that the Town does not oppose the order in paragraph 1 of the "Orders Sought" in the Petition. Paragraph 1 asks for a declaration that within the Apartment Residential (RM-2) Zone, tenants and/or condominium owners may receive assisted living services under the CC&AL Act, without being in contravention of the Town's Zoning Bylaw. As the order is not opposed, I make that declaration.
- [123] In the Written Submissions filed by counsel for the Town, at paragraph 45 on page 24, the Town has also indicated that it does not oppose the order sought in paragraph 4 of the Petition. Paragraph 4 asks for a declaration:

that the Apartment Residential (RM-2) Zone does not prohibit any of the Strata Lots from being rented to persons who are provided with meals and housekeeping services (collectively referred to as "assisted living").

[124] "Strata Lots" is a term specifically defined in paragraph 16 of Part 2 of the Petition as the 15 strata lots in Lions Cove that were purchased by the Petitioners in 2003.

[125] Paragraph 45 of the Town's Written Submission reads:

The Town of View Royal does not oppose the declaration sought at paragraph 4 of the petition that tenants of buildings or condominium owners generally, may receive meal preparation, laundry services, cleaning services, etc. in their homes as part of a permitted residential use.

[126] Paragraph 4 of the relief sought in the Petition asks for a declaration specifically referring to the apartments the Petitioners own in Lions Cove and paragraph 45 of the Town's Written Submissions refers to "tenants of buildings, or condominium owners generally". I note also that Paragraph 4 of the Petition refers to persons "who are provided with" services; while Paragraph 45 of the Town's Written Submission refers to persons who "receive services". I conclude that the concession apparently made in paragraph 45 of the Town's Written Submission in relation to the declaration sought by the Petitioners at paragraph 4 of the relief sought in the Petition was likely inadvertent and I shall not treat the Town as bound by that concession.

[127] For the reasons that follow, I am of the view that that the Town's Zoning Bylaw did permit buildings (or parts of buildings) in the RM-2 Zone to be used as residences for persons receiving assisted living services at the time Lions Cove was built and at the time the Royal View Housing Society entered into the first contract with VIHA to lease apartments to persons who were also receiving assisted living services in their homes, and in common areas at Lions Cove.

[128] I do not agree that there was a "change in use" when the Society began leasing apartments to persons referred by VIHA or to persons who were also receiving hospitality services from the Society and personal services from Juan de Fuca Home Support.

[129] I am of the view that the Town's Zoning Bylaw did permit buildings (or parts of buildings) in the RM-2 Zone to be used as residences for persons receiving assisted living services in December 2003 when the Petitioners purchased 15 apartments in Lions Cove and continued the arrangements previously in place between the Society and VIHA. It follows that I do not agree that there was a "change of use" at the time the Petitioners purchased the apartments.

[130] I am also of the view that there was no "change of use" when the Petitioners registered 12 of the apartments with the Registrar of Assisted Living in 2005.

[131] I am of the view that the definition of "assisted living apartment" in the Zoning Bylaw is not sufficiently ambiguous or uncertain as to render the Bylaw void.

[132] I am of the view that the Petitioners' use of the apartments it owns in Lions Cove as rental accommodation for persons who are receiving assisted living services is a lawful non-conforming use.

[133] Section 11 of the Town's Land Use Bylaw, 1990, No. 35 reads:

No land, the surface of water, buildings or structure in any zone shall be used by the owner, occupier, or other person for any uses except those specifically permitted in Part 6 of this Bylaw for the zone in which it is located.

[134] Each case must be considered in light of the language used in the particular bylaw under consideration; and in the context of the bylaw as a whole.

[135] In *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494, the Court noted that the principal purpose of zoning regulations is to preserve property values by prohibiting uses that are deleterious to neighbourhoods that are mainly residential in character. (para.14). The Court noted the examples of industrial uses in residential neighbourhoods and residential uses in industrial districts. The Court agreed with the judge below that the issue of whether the use of property is a permitted use is a question of law, reviewable on a standard of correctness. The Court also agreed with the court below that:

the words of an [enactment] are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the [enactment], the object of the [enactment], and the intention of [the legislative body that passed the enactment]. (para. 13).

[136] In *North Pender Island Local Trust Committee v. Conconi*, the question was whether Mr. Conconi's use of buildings on his land as guest cabins as part of a commercial resort was a permitted use. The Court looked at the zoning bylaw as a whole. One of the reasons for rejecting Mr. Conconi's interpretation of the bylaw was the fact that the Trust had expressly permitted "commercial guest accommodation" in another zone.

[137] In *Whistler (Resort Municipality) v. Miller*, 2001 BCSC 100, Justice Drost concluded that the defendant homeowners' use of a vacation home they owned in a residential area for rental accommodation for tourists for a few weeks each year was not permitted. Justice Drost took into account, in interpreting the permitted use in the zone in which the defendants' home was located, the "context of the Bylaw", which included the fact that residential/tourist accommodation zones had been established elsewhere in the Municipality in which detached dwelling and tourist accommodation uses were expressly permitted. (para. 23).

[138] In *Okanagan-Similkameen (Regional District) v. Leach*, 2012 BCSC 63, the defendant owned a home in an area zoned "Residential Single Family One Zone". The only permitted principal use in the zone was "single detached dwelling". Permitted secondary uses included "home occupations" and "private visitor accommodation". The defendant used the home as a vacation property but also rented it out as a weekly vacation rental for about five weeks each year when they were not present.

[139] Justice Dardi declined to accept the proposition advanced by the defendant that:

as a corollary to the principle of implied exclusion, the Court, in finding that a particular use is prohibited in a zone, must find that the particular use falls clearly within some other class of use in another zone. (para. 61).

[140] Justice Dardi did not say this was an irrelevant consideration but said she was not persuaded that the general prohibitive clause in the bylaw was engaged only where the challenged use fit into another zone. She stated:

the appropriate inquiry is to examine what is permitted in a given zone; any other uses are prohibited. (para. 63).

[141] Justice Dardi distinguished the decision in *Whistler (Resort Municipality) v. Miller*, 2001 BCSC 100, however, because the bylaw in issue in that case expressly excluded "any temporary accommodation"; and the Whistler bylaw had established zones in which tourist accommodation uses were expressly permitted. She noted that the Okanagan-Similkameen bylaw did not contain an express provision "to oust temporary accommodation as a permissible use". (para. 70). Justice Dardi concluded that the defendant's use of his vacation property for short term vacation rentals was permissible as a secondary use as it fell within the definition of "private visitor accommodation".

[142] The Town relies on the decision of Justice Owen-Flood in *Whistler (Resort Municipality) v. Wright*, 2003 BCSC 1192. In my view, that decision is entitled to some weight, but it was an application by the Municipality for an interlocutory injunction and Justice Owen-Flood was required only to determine whether there was a *prima facie* case that the defendants' use of the property was prohibited by the zoning bylaw.

[143] Justice Owen-Flood concluded the Municipality had established a strong *prima facie* case that the defendants were using the two homes they owned (one in an area zoned "single-family residential" and a second in an area zoned "two-family residential"), primarily for tourist rental accommodation. Justice Owen-Flood held that he was obliged to follow the decision of Justice Drost in *Whistler (Resort Municipality) v. Miller*, particularly as the Wright defendants were primarily using their properties for tourist rental accommodation.

[144] Justice Owen-Flood rejected a submission that Justice Drost's decision rested on the conclusion that the later introduction of an expressly permitted use in another zone meant the same use must be prohibited in a zone where it was not "expressly" mentioned. Justice Owen-Flood said Justice Drost's comments had only pointed out the "internal coherence" that his interpretation created. (para. 29).

[145] In *S.R.V. Developments Ltd. v. Courtenay (City)*, [1992] B.C.J. No. 2068, 12 M.P.L.R. (2d) 154, the petitioners sought a declaration that a zoning bylaw permitted the establishment and operation of a liquor store in certain premises owned by the petitioner. The premises were located in a zone designated as "Commercial Two" in which "retail and wholesale outlets" were permitted uses. The petitioners argued that a liquor store was a "retail or wholesale outlet" and therefore a permitted use.

[146] The City conceded that a liquor store could come within the expression "retail or wholesale use" but argued that by specifically designating "liquor store" as a permitted use in a different zone, it had excluded that use from the more general one.

[147] Justice Fraser noted his task was to look to the zoning bylaw itself and to find intention from the written word. He characterized the central issue in the case as follows:

The issue in this case boils down to whether the inclusion of "liquor store" in the permitted uses in C-1 zones precludes the establishment of a liquor store in a C-2 zone. (p. 4).

[148] Justice Fraser cited and applied the decision of the Supreme Court of Canada in *Thomas C. Watkins v. Cambridge Leaseholds Ltd.* (no citation given), a case in which the zoning bylaw had established five different commercial zones. All five listed "retail stores" as a permitted use, but only one listed "department store" as a permitted use. The issue was whether the expression "retail store" included department store. The Court endorsed the reasons of the dissenting justice in the Ontario Court of Appeal who had concluded that although the generic term "retail store" included "department store", by expressly permitting department stores in one zone, the Municipality was drawing a distinction and department store was a permitted use only in the zone in which it was expressly listed.

[149] Justice Fraser declined to make the declaration sought by the petitioner, and stated:

I conclude that it is open to a municipality to limit the ordinary definition of words. By using "liquor store" in C-1, this is what the City has done. It has hived off "liquor store" from the more generic classification of "retail and wholesale outlets". Thus, a liquor store is not a permitted use in a C-2 zone. (pg. 4).

[150] The Town relies most heavily on a decision of the Appeals Court of Massachusetts in *Apt Asset Management, Inc. v. Board of Appeals of Melrose*, 2000 Mass App. Lexis 792. In that case, the plaintiff sought to convert an apartment house to an "assisted living facility". A law in Massachusetts required "assisted living facilities" to be licensed and to provide a broad range of services to residents. The Appeals Court concluded that the services an assisted living facility was required by law to provide took it out of the definitions of any uses permitted under the zoning ordinance in issue.

[151] Although this decision is not binding upon me, I have carefully considered it. In my view, however, the circumstances are sufficiently different from the case at bar that I have concluded that I should not follow or apply the decision in *Apt Asset Management, Inc. v. Board of Appeals of Melrose*.

[152] I note that in that case, the proposed facility would contain 80 units, all of which would be occupied by persons receiving assisted living services. The laws and regulations in Massachusetts required that such facilities be constructed to a different standard than regular apartment buildings. The facility would provide "health care services" and would house two nursing stations, plus a "wellness center" that would occupy 6% of the total interior space in the building. This was considered to be significant. The Appeals Court adopted the conclusion of the court below that:

The 'wellness center' and other medical and quasi-medical services are analogous to uses sometimes found in a dormitory, in that they are provided in communal form for the benefit of residents of the facility, but they are not similar to the characteristics of the kind of communal services typically associated with multifamily dwellings, dormitories, fraternities, or sororities.

[153] The Legislature had specifically provided that assisted living residences were to be considered residential uses for the purposes of the state building code. The court said that since the Legislature had not done the same in relation to local zoning regulations, the Legislature did not intend assisted living residences to be considered residential uses for the purposes of local zoning regulations. The Appeals Court considered other arguments and authorities not applicable to the case before me. I decline to follow the decision.

[154] At all relevant times prior to the amendment to the Town's Zoning Bylaw in January 2007, the Town's Zoning Bylaw permitted, among other uses, the use of buildings in Zone RM-2 as "Residential Apartment". The Town's Zoning Bylaw defined (and continues to define) "Residential Apartment" as:

means a building divided into not less than three dwelling units other than Attached Residential; specifically excludes a building used for a Hotel or Motel.

[155] It can be seen that the definition is broad and general – so general that the Town thought it necessary to expressly state that hotel or motel use was excluded, presumably because otherwise those uses would fit within the definition.

[156] Until 2007, there was no reference in the Town's Zoning Bylaw to assisted living residence, assisted living apartment, or any similar wording. The Town does not argue that it had designated some other zone where residents requiring or being provided with assisted living services were permitted to reside; the Town's position is that that accommodation was prohibited everywhere in the Town of View Royal until 2007.

- [157] Nothing in the definition of "residential apartment" in the Town's Zoning Bylaw indicates that any type of residential apartment use was not intended to be included, except use of the apartment or apartment building as a hotel or motel.
- [158] The Town has not pointed to any other part of the Zoning Bylaw, as it read prior to the amendment in 2007, that would lead to the necessary implication that apartments occupied by persons who are provided with, or receive assisted living services are excluded from the definition of "residential apartment". Prior to 2007, the Town's Zoning Bylaw did not include a definition of "assisted living apartment" or list "assisted living apartment" as a permitted use in any other zone. This is not a case like *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494.
- [159] In *Dragonwood Enterprises Ltd. v. Burnaby (City)*, 2009 BCSC 1236, the City of Burnaby refused to issue business licenses to tenants of an industrial park after concluding that use of the industrial park no longer complied with "preliminary plan approval". Justice Willcock concluded that the City could not require the tenants to obtain preliminary plan approval before considering their applications for business licenses because the City's Zoning Bylaw only required persons to obtain preliminary plan approval if they were seeking a building permit.
- [160] At para. 71, Justice Willcock said:
- The City can only impose an obstacle on businesses and upon the use of and by doing so in plain language. In *Prince George (City) v. Payne* (1977), [1978] 1 S.C.R. 458 (S.C.C.), the Supreme Court of Canada held that the discretionary power to refuse a business license must be exercised judicially and that the power must be exercised within the limits imposed by the legislation. Chief Justice Dickson held at 463:
- The common law right of the individual to freely carry on his own business and use his property can be taken away only by statute in plain language or by necessary implication.
- [161] In my view, there is no reason to "read into" the Zoning Bylaw words that would exclude residential apartments in which some occupants are receiving, or being provided with, services of the type I have referred to in these Reasons as "assisted living services".
- [162] The primary use of an apartment in Lions Cove by a person in receipt of assisted living services is the same as that of any other resident – a residential use. The apartments are being used as dwelling places.
- [163] The Town concedes, in its Response to Petition, and in its Written Submissions, that tenants or buildings or condominium owners generally, may receive meal preparation, laundry services, cleaning services, et cetera, in their homes as part of a permitted residential use.
- [164] From this, I infer that if the 11 residents of Lions Cove currently renting apartments from the Petitioners owned or purchased the apartments, and continued to receive all of the same services they currently receive, the Town would take no steps to attempt to evict

them.

- [165] The Town submits, however, that it opposes the use of the apartments as "assisted living residences" as that term is defined under the CC&AL Act because the units are "part of a commercial assisted living residence under (the Act)".
- [166] I note, however, that the definition of "residential apartment" in the Zoning Bylaw does not distinguish between personal and commercial uses. The Town could have drawn a distinction, but did not. Both condominium buildings and rental apartments are permitted in the RM-2 Zone. The fact that the owner of a rental building is engaged in "commercial" activity – renting out apartments to earn a profit; or that the owner of a condominium may choose to rent out his or her unit to a tenant and thereby use it "commercially", does not alter the essential use as a "residential use".
- [167] I note also that the Petitioners do not provide all of the services that comprise "assisted living services". The Petitioners do not supply "prescribed services". Those services are provided by a separate agency.
- [168] The Town submits that no building permit was applied for or issued in relation to an "assisted living use or occupancy of the Lions Cove building". The Petitioners respond that no building permit was required, as at the time Lions Cove was constructed, and until 2012 when the National Building Code was amended, an "assisted living residence" was treated as a Class C: residential occupancy under the National Building Code.
- [169] The parties have agreed that for purposes of this Petition, the requirements of the National Building Code and the British Columbia Building Code are essentially the same.
- [170] I stated at the start of these Reasons that the correct classification of assisted living residences under the current National Building Code is not before me. To the extent, however, that the parties rely on the Code in support of their arguments about zoning, I am of the view that the Petitioners are correct in their assertion that prior to the enactment of the 2012 Building Code, an "assisted living residence" was treated as a Class C: residential occupancy, rather than a Class B: Division 2 Care & Detention occupancy. The Town admits that Lions Cove meets the BC Building & Fire Code requirements for a Group C: Residential Occupancy.
- [171] In 2012, amendments to the National Building Code included the creation of a new classification for assisted living residences that falls somewhere between the two previous classifications. I am of the view, however, that at least until the 2012 amendments to the Code, residents of Lions Cove, including residents occupying units owned by the Petitioners, were not considered to be "harboured or detained to receive medical care or treatment", as required by the Code's definition of a "Care & Detention" occupancy. The Petitioners admit that Lions Cove does not meet the requirements under the 2012 Code, but point out the 2012 Code does not have retroactive effect and provisions in the Code protect pre-existing buildings from the application of changes in the Code requirements, unless a

building is renovated or there is a post-amendment change in occupancy.

- [172] The Petitioners have pointed to a Report titled "Assisted Living and Residential Care, Fire and Life Safety" ("the Report") prepared in 2008 by the Community Care and Assisted Living Fire and Life Safety Provisions Advisory Committee. According to the Report, the Committee members represented a broad cross-section of key government and industry stakeholders, including the Manager of Building and Safety Policy Branch of the Ministry of Housing and Social Development (responsible for the B.C. Building Code, which is essentially the same as the National Code), B.C. Housing, the Architectural Institute of B.C., the Building Officials Association of B.C., the Office of the Fire Commissioner, and the Fire Prevention Officers Association of B.C.
- [173] The Report clearly stated that assisted living residences fell (in 2008) within the Class C: Residential Occupancy classification of the National Building Code. Mr. Marshall, the Town's Fire Prevention Officer, has deposed that he considers the Report to be outdated, but offers no evidence his view is the prevailing opinion. The Report continues to be available on the website of the B.C. Ministry of Health.
- [174] Mr. Marshall and the Petitioners' expert – Murray Johnson, a professional engineer who "provides certified professional expertise for building plan reviews with respect to Building Code and Fire Code conformance issues" – disagree about the correct classification for Lions Cove. Mr. Johnson's opinion is that prior to December 20, 2012 Lions Cove was considered to be Group C: Residential Occupancy. On December 20, 2012, the new edition of the British Columbia Building Code was adopted and after that date, assisted living residences fell into a new classification called "Group B Division 3 Care Occupancy.
- [175] Although the Petitioners admit that Lions Cove does meet all of the requirements of the new classification, Mr. Johnson has opined that:

there is a strong argument that the buildings comply with the current requirements and, even if an Appeal ruled to the contrary, would have features which would meet the requirements for an Alternative Solution since the level of fire and life safety exceeds the minimum requirements of the Code for a Group B Division 3 Occupancy.

- [176] As noted earlier, the question of Lions' Cove classification under the National Building Code is not squarely before me, and it is not necessary for me to resolve this dispute except to say that on the evidence before me, the Town has failed to persuade me that Lions Cove was required to comply with National Building Code requirements for a "care or detention occupancy" at any relevant time. In particular, I am satisfied that in 2002 when the Society began leasing apartments to VIHA for occupancy by residents who were receiving assisted living services; in 2003 when the Petitioners purchased the apartments; and in 2005 when the Petitioners registered the apartments as "assisted living residences", the building and the apartments were in conformity with the requirements of the National Building Code.

[177] Accordingly, I am of the view, based on the evidence before me, that neither the Society nor the Petitioners required a permit for a "change of occupancy" in connection with the use of the apartments by residents who were receiving, or being provided with, assisted living services.

[178] Having considered all of the foregoing, I am of the view that until the Town amended its Zoning Bylaw in 2007 to add a definition of "assisted living apartment" and to create a zone in which "assisted living apartment" is expressly stated to be a permitted use, the apartments owned by the Petitioners and occupied by residents who were receiving or being provided with assisted living services, were permitted uses in the RM-2 Zone, as "residential apartments". In other words, I am of the view that the Town's Zoning Bylaw did not prohibit the Petitioners' use of the apartments.

[179] I turn now to the 2007 Amendment to the Bylaw. Effective January 2007, the Town added a definition of "assisted living apartment" to the definition section of the Zoning Bylaw and created a new zone - CD-10 in which assisted living apartment was listed as a permitted use. Again, for ease of reference, I reproduce the definition of "assisted living apartment" here:

means an apartment use where food, housekeeping, personal service and/or nursing care are provided in addition to the residential use.

[180] Based on the authorities discussed earlier in these Reasons, I am of the view that the addition of the new definition, particularly considered in the context of the CC&AL Act, effectively created an "exception" or carved out a sub-category of residential apartments – those apartments where assisted living services are provided – from the general residential apartment use previously permitted in the RM-2 Zone.

[181] Given that conclusion, the use by the Petitioners and their tenants of apartments in Lions Cove as "assisted living residences" are no longer permitted in the RM-2 Zone unless the 2007 Bylaw Amendment is invalid due to vagueness or uncertainty; or the Petitioners' continuing use is a lawful non-conforming use.

[182] In *Okanagan Land Development Corp. v. Vernon (City)*, 2012 BCCA 332, the Court granted the appeal from the determination of the trial judge that the bylaw in issue was void for uncertainty. At para. 48 of the Reasons, the Court adopted the test articulated in *Dhillon v. Richmond (Municipality)* (1987), 16 B.C.L.R. (2d) 80 (B.C.S.C.), as follows:

The general approach to examining a municipal by-law whose validity is challenged on the grounds of uncertainty or vagueness is that the vagueness must be so pronounced that a reasonably intelligent person would be unable to determine the meaning of the by-law and govern his actions accordingly. A mere difficulty in interpretation will not be sufficient.

[183] At para. 50, the Court stated:

Thus, municipal bylaws are to be interpreted "benevolently" and supported if possible. What is required is that a reasonably intelligent person be able to determine the meaning of the bylaw and govern his or her actions accordingly.

[184] The Petitioners submit that the definition is uncertain because:

1. the phrase " where food, housekeeping, personal service and/or nursing care are provided " is unclear and leaves open the question of whether the provision of only one of these services, for example, housekeeping, to a resident would mean that the resident's apartment would be "an assisted living apartment";
2. the definition does not specify how often a service must be provided before the use becomes unlawful;
3. the definition is so broad that anyone living in an apartment who receives the listed services is in breach of the Zoning Bylaw unless they live in the RM-3 zone;
4. no definition of "personal services" is included in the bylaw.

[185] In the Town's Written Submission, there is what I would regard as a "concession" that the bylaw could have been worded more narrowly and more precisely. At paragraph 119 of the Written Submission, counsel concedes that the definition of assisted living apartment " can be read broadly"; but she asserts that it " can also be read to give a meaning that is consistent with its intent". She also states that while the definition is written " in the passive voice" ", the definition "...clearly anticipates that there will be a 'provider' of the services listed in the definition".

[186] The Town submits that by reference to the CC&AL Act, the 2007 Amendment to the Bylaw can be given a reasonable interpretation as permitting "assisted living residences" as that term is defined under the CC&AL Act. The Town submits that the definition, and listing "assisted living apartment" as a permitted use in only the RM-3 zone, does not prohibit tenants of buildings, apartments, or condominium owners generally from receiving meal preparation, laundry services, or cleaning services in their homes. The Town submits that the Bylaw is directed at the commercial operators of apartment buildings who also provide the services referred to in the definition. The Town submits that the Bylaw is directed at assisted living residences that are required to be registered under the CC&AL Act.

[187] Clearly, the Town could have done have a much better job of drafting the Bylaw to state clearly the specific use it is permitting in the RM-3 Zone. They could have done so by incorporating a direct reference to residences licensed under the CC&AL Act as "assisted living residences" for example; or by adopting the same or a similar definition to the definition found in that Act. They could have included a reference to a "commercial" use, as counsel for the Town contends that it was the Town's intent to direct the bylaw at that type of operation. They could have used the active, rather than passive voice to make it clear that the definition is directed at land use by the "providers" of assisted living services; and not the "receivers" of services.

- [188] Nevertheless, I agree with counsel for the Town that in the context of the Zoning Bylaw as a whole; and the broader context created by the passage of the CC&AL Act in 2002 and the requirement to register assisted living residences under the Act in 2004, the definition of "assisted living apartment" can be given a meaning, and that is sufficient to save the bylaw from a declaration of invalidity.
- [189] The final issue to be addressed is whether the Petitioners' current use of the Lions Cove apartments is a lawful non-conforming use. I am of the view that it is.
- [190] Section 911 of the Local Government Act, R.S.B.C. 1996, c. 323 provides:
- (1) If, at the time a bylaw under this Division is adopted, land, or a building or other structure, is lawfully used, and
 - (b) the use does not conform to the bylaw, the use may be continued as a non-conforming use, but if the non-conforming use is discontinued for a continuous period of 6 months, any subsequent use of the land, building or other structure becomes subject to the bylaw.
 - (7) For the purposes of this section, a change of owners, tenants or occupants of any land, or of a building or other structure, does not, by reason only of the change, affect the use of the land or building or any other structure.
- [191] Earlier in these Reasons, I stated my conclusion that at the time the 2007 Amendment to the Bylaw was adopted, up to 12 of the Petitioners' Lions Cove apartments were "lawfully used" as residential apartments in Zone RM-2. Assisted living services had been provided to residents as early as 2002 by the Society and Juan de Fuca Home Support, and after December 2003 by the Petitioners and Beacon Care Services Inc. The evidence indicates that at the time the Bylaw was amended in 2007, 12 of the Petitioners' 15 apartments were registered and in use as assisted living residences.
- [192] There is no evidence suggesting that the use, which I have concluded was lawful but became "non-conforming" after the 2007 Amendment to the Zoning Bylaw, was ever discontinued.
- [193] I conclude, therefore, that the use of the apartments as assisted living apartments as defined in section 2 of the Zoning Bylaw is lawfully non-conforming pursuant to s. 911 of the Local Government Act.

DECLARATIONS MADE

- [194] The Petitioners are entitled to the following declarations:
1. A declaration that within the Apartment Residential (RM-2) Zone of the Town's Land Use Bylaw, 1990, No. 35, tenants and/or condominium owners may receive assisted living services under the Community Care and Assisted Living Act without being in contravention of the zoning bylaw.

2. A declaration that the Petitioners' use of the 12 Lions Cove apartments located as "assisted living apartments" as defined in section 2 of the Zoning Bylaw is lawfully non-conforming pursuant to s. 911 of the Local Government Act.

COSTS

[195] The Petitioners are entitled to one set of costs, to be assessed on Scale B.

"W.G. Baker J."

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