

CANADA / JUDGMENT

Columbia Shuswap (Regional District) v. Jones

2018 BCSC 1776

COURT

Supreme Court of British Columbia

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2018 BCSC 1776 Columbia Shuswap (Regional District) v. Jones

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Columbia Shuswap (Regional District) v. Jones,

2018 BCSC 1776

Date: 20181016

Docket: 52552

Registry: Kamloops

Between:

Columbia Shuswap Regional District

Plaintiff

And

Devon Peter Jones and

R. Jones Contracting Ltd.

Defendants

Before: The Honourable Mr. Justice Marchand

Reasons for Judgment

Counsel for the Plaintiff:

J.J. Krusell

Counsel for The Defendants:

R.A. Lundberg

Place and Date of Trial/Hearing:

Kamloops, B.C.

June 26, 2018

Place and Date of Judgment:

Kamloops, B.C.

October 16, 2018

Introduction

- [1] The defendant, Devon Jones, owns a parcel of land close to two hectares in size located at 2136B Clough Road in the Begbie Bench area of Revelstoke (the "Property"). There is a rather large two-storey building on the Property (the "Residence"). The main floor of the Residence is approximately 5,000 square feet. The second floor of the Residence is approximately 3,000 square feet.
- [2] Devon Jones lives on the second floor of the Residence. Devon Jones' father, Roy Jones, and his father's partner, Karen Jones, also live on the second floor but in separate quarters. The main floor is largely an open space containing tools and equipment.
- [3] Devon Jones, his brother, Jeremy Jones, and Roy Jones, are business partners and operate the corporate defendant, R. Jones Contracting Ltd. (the "Company"). The Company performs construction work from April to November and snow removal work from November to April each year in and around Revelstoke. The Company conducts some of its operations on the Property.
- [4] The plaintiff, Columbia Shuswap Regional District ("CSRD") is the local government that has zoning and land use regulatory authority over the Property. Under the CSRD's Zoning Bylaw 851 (the "current zoning bylaw"), the Property is zoned "Small Holdings" (or "SH"). The SH zone in the current zoning bylaw permits a number of "principal uses", including "single family dwelling", and a number of "secondary uses", including "home occupation" and "secondary dwelling unit".
- [5] The CSRD alleges that the defendants are in violation of the current zoning bylaw, as follows:
 - 1. The defendants' commercial activities on the Property are not a permitted "home occupation" use; and
 - 2. There are two "dwelling units" on the Property and one of them does not have the required independent and direct access to the outside.

- [6] On this summary trial application, the CSRD seeks declarations that the defendants are in contravention of the current zoning bylaw, as well as permanent and mandatory injunctions to prevent continued breaches by the defendants of the current zoning bylaw.
- [7] The defendants raise many defences but primarily assert that their commercial activities on the Property are permitted as a "home occupation" and further, that the Property contains only one dwelling unit. If the current use of the Property is not permitted under the current zoning bylaw, the defendants submit that the current use is a lawful non-conforming use under the previous zoning bylaw, namely Land Use Bylaw 2200 (the "previous zoning bylaw"). Finally, the defendants submit that the CSRD's prosecution of this case amounts to an abuse of process and should not be permitted in any event.

Issues

- [8] I agree with the parties that the issues are suitable for disposition by way of summary trial. Few facts are in dispute and I can easily resolve any factual discrepancies on the affidavit and other evidence before me.
- [9] The issues are:
1. Does the "home occupation" use of the Property offend the current zoning bylaw?
 2. If so, did the "home occupation" use of the Property conform with the previous zoning bylaw such that its ongoing use amounts to a lawful non-conforming use?
 3. Does the Property contain only one dwelling unit as defined by the current zoning bylaw?
 4. If the Property has two dwelling units, do they both have independent and direct access to the outdoors as required by the current zoning bylaw?
 5. If not, did the Property contain only one dwelling unit as defined by previous zoning bylaw, such that its ongoing use amounts to a lawful non-conforming use?
 6. Is this action an abuse of process?
 7. What is the appropriate remedy?

Overview of the CSRD's Bylaws

- [10] Devon Jones purchased the Property in June 2012 and completed the construction of the Residence in October 2013. There is no dispute that the following official community plan and zoning bylaws were in place at the relevant times: :
1. Official Community Plan Bylaw 850 ("OCP Bylaw 850"), which came into force on October 16, 2008;
 2. Official Community Plan Amendment Bylaw 850-1 ("OCP Amendment Bylaw 850-1"), which came into force on July 17, 2014;

3. The previous zoning bylaw, which was last amended in October 2009 and was repealed on August 20, 2014; and
 4. The current zoning bylaw, which came into force on August 21, 2014.
- [11] OCP Bylaw 850 and OCP Amendment Bylaw 850-1 contain statements of the CSRD's objectives and policies to guide decisions on planning and land use management within the area covered by the plan, including the Begbie Bench area of Revelstoke.
- [12] The current and previous zoning bylaws contain detailed land use regulations. The two zoning bylaws are structured somewhat differently but achieve the same goal of establishing the permissible uses of land within different areas of the CSRD. Both zoning bylaws contain important definitions and general regulations. Both cover administrative matters. Both prohibit all uses of land and buildings except as permitted on a zone by zone basis.
- [13] Given the timing of the construction of the Residence, its current use must be assessed under both the current and the previous zoning bylaws. If the current use of the Property conforms with the present zoning bylaw, that is the end of the inquiry. If not, then I must determine whether the current use of the Property conformed with the previous zoning bylaw at the time the present zoning bylaw was adopted such that the current use may continue under s. 528 of the Local Government Act, R.S.B.C 2015, C.1 [LGA 2015] as a lawful non-conforming use.

The Defendants' Use of the Property

- [14] Beyond the residential use of the Property, the defendants conduct some of the Company's business on the Property.
- [15] The Company was incorporated on February 25, 2008. Devon, Jeremy and Roy Jones are all shareholders of the Company. Roy Jones is its President and CEO.
- [16] The Company moved some of its operations onto the Property in the spring of 2014. According to the defendants, the Company conducts 90% of its work offsite on properties owned by its customers. The Company conducts the remainder of its work on the Property.
- [17] The Company has a number of employees, including Roy, Devon, Jeremy and Karen Jones, each of whom works on the Property, at least from time to time. The Company has and/or had other employees, including a part-time bookkeeper named Kathryn Horkley. Ms. Horkley works on the Property. According to the defendants, these are the only employees who work on the Property. Other employees report to work at job sites.
- [18] Besides management and bookkeeping functions, the Company conducts the following operations on the Property:
1. The Company stores and uses wood carpentry tools, a table saw, a band saw, a sander, a planer, an air compressor and an extraction system on the main floor of the Residence;

2. The Company stores other construction-related tools and equipment on the Property, including a generator, scissor lift, concrete saws, and a jackhammer;
3. During the construction season, the Company uses a 14-foot construction cargo trailer to deliver tools and other construction-related equipment from the Property to construction sites;
4. The Company has constructed a structure on the Property, which consists of five courses of concrete lock blocks approximately 12.5 feet high covered by a plywood roof. The structure is open on one side and is used to store sand associated with the Company's snow removal operations;
5. When not in use, the Company stores a number of vehicles and other pieces of equipment on the Property, including a dump truck, a flat bed trailer, the 14-foot construction cargo trailer, two skid steers, three loaders, an excavator, a one-ton sand truck and a pickup truck;
6. Much of the equipment used for snow removal is stored and used at or near work locations off the Property throughout the winter. This equipment is on the Property only during the off-season;
7. Some of the equipment used for snow removal is used on the Property during the winter. For example, sand is loaded from the sand shed onto the sand truck to be taken to work locations throughout the winter;
8. The Company has conducted some construction-related activities on the Property, such as cutting plywood, cutting and painting trim, constructing a staircase and constructing a shed; and
9. The Company completes routine service and maintenance work on some of its vehicles and equipment in the large open space on the main floor of the Residence.

Analysis

Interpretive Approach to Local Government Legislation

- [19] As the analysis of each issue turns on an interpretation of the CSRD's zoning bylaws, I consider it appropriate to begin my analysis with a few words regarding the proper approach to the interpretation of local government legislation.
- [20] In *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014 BCCA 271 at paras. 11-18, Bauman CJBC, on behalf of the Court, had the following to say regarding the correct approach to interpreting local government legislation:
- [11] (I)t is always salutary to remind oneself of the basic principles of statutory interpretation applicable in construing this species of delegated legislative authority.

[12] Counsel, of course, cited the Supreme Court of Canada's decision in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, and then noted Tysoe J.A.'s reformulation of the direction in the context of a municipal law case in *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494 at para. 13:

... 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].

[13] Again, in the context of municipal empowering legislation and bylaws enacted pursuant thereto, this Court said in *Neilson v. Langley (Township)* (1982), 134 D.L.R. (3d) 550 (B.C.C.A.) (at 554 per Hinkson J.A.):

In the present case, in my opinion, it is necessary to interpret the provisions of the zoning by-law not on a restrictive nor on a liberal approach but rather with a view to giving effect to the intention of the Municipal Council as expressed in the by-law upon a reasonable basis that will accomplish that purpose.

[14] In *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, Mr. Justice Bastarache stated for the Court (at paras. 6 and 8):

6 The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. ... The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced...

...

8 A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. ...

[15] These common law rules must be married with the expressions of intent by the Legislative Assembly.

[16] Generally, in s. 8 of the Interpretation Act, R.S.B.C. 1996, c. 238 we are told that:

8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[17] Specifically, under s. 4(1) of the Community Charter, S.B.C. 2003, c. 26, we are directed so:

4(1) The powers conferred on municipalities and their councils under this Act or the Local Government Act must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.

- [18] Frankly, the Court can take the hint - municipal legislation should be approached in the spirit of searching for the purpose broadly targeted by the enabling legislation and the elected council, and in the words of the Court in Neilson, "with a view to giving effect to the intention of the Municipal Council as expressed in the bylaw upon a reasonable basis that will accomplish that purpose".
- [21] In the context of interpreting zoning bylaws, a presumption of implied exclusion may arise. This presumption was explained by Dardi J. in *Okanagan-Similkameen (Regional District) v. Leach*, 2012 BCSC 63 at para. 55, as follows:
- [55] As a result of the presumption of implied exclusion, in cases where a permitted use is expressly listed in one zone, but not another, the courts have found that the municipality intended to exclude that specific use from the more general provision: *Regional District of Kootenay Boundary v. McKay*, 2008 BCSC 174.
- [22] With this guidance in mind, I turn to the issues.

Issue 1: Does the "home occupation" use of the Property offend the current zoning bylaw?

The relevant provisions of the current OCP and zoning bylaws

- [23] The current zoning bylaw contains many terms related to the use of property, including principal, secondary, accessory and home occupation uses. The parties focussed their submissions on whether the defendants' commercial use of the Property did or did not fit various definitions and regulations within the bylaw. Before assessing the parties' submissions, I will first highlight the relevant provisions in the CSRD's current OCP and zoning bylaws.
- [24] OCP Amendment Bylaw 850-1 sets out a number of policies regarding the future use of land:
- the principal uses within the SH zone are to be "residential" or "agricultural";
 - "home occupation" uses are to be permitted in all residential and agricultural zones "as a means of accommodating independent employment and encouraging entrepreneurship and small business incubation opportunities"; and
 - "home occupation" uses are to be "accessory to residential use and the residential character of the property" and "shall not generate waste, vibration, glare, fumes, odours, illumination or electrical interference beyond that generated normally by a single residence."
- [25] Specific to the Begbie Bench area, OCP Amendment Bylaw 850-1 recognizes "the strong community interest in maintaining the rural character of the area" and the need to "support community participation in the woodlot licencing process".
- [26] The current zoning bylaw lines up with the vision of OCP Amendment Bylaw 850-1.

[27] The current zoning bylaw permits a number of "principal uses" in the SH zone, including: "agriculture"; "horticulture"; "single family dwelling"; and "timber harvesting". The current zoning bylaw also permits a number of "secondary uses" in the SH zone, including "home occupation" and "small-scale sawmill". Home occupations are limited to a maximum gross floor area of 100 m² (which is 1,076.4 ft²).

[28] The current zoning bylaw contains the following definitions:

1.0 DEFINITIONS

ACCESSORY USE is the use of land, buildings and structures that is customarily ancillary to and exclusively devoted to a principal use or single family dwelling.

HOME OCCUPATION is any occupation, profession or craft carried out by a resident that property [sic] where such occupation, profession or craft is accessory to the use of the dwelling for residential purposes and which does not alter the residential character of the premises and the character of the residential or rural district where the premises are situated.

PRINCIPAL USE is the main purpose that land, buildings or structures on a parcel are ordinarily used.

SECONDARY USE is a use which is permitted only in conjunction with an existing principal use.

USE is purpose or function to which land, buildings and structures are put to and if not in use, then the purpose they are designed or intended to be put to.

VEHICLE REPAIR is the use of land, buildings and structures for the repair of automobiles, boats, or other vehicles but does not include vehicle wrecking or the sale of vehicles;

[Italics in original.]

[29] The current zoning bylaw contains the following regulations for home occupations:

3.17 HOME OCCUPATION

- (1) A home occupation must comply with the following regulations:
 - (a) a home occupation must be on the same parcel as the single family dwelling with which it relates;
 - (b) all home occupations on a parcel, in total, must be accessory to the single family dwelling and the maximum size will be determined in Part 5 of this Bylaw;
 - (c) a home occupation shall not produce, discharge or emit: smoke (except smoke produced from the heating of the home occupation space), dust, litter, vibrations; odorous, toxic or noxious matter or vapours; heat; glare; radiation; electrical or television interference; or sufficient noise, congestion or traffic to constitute a nuisance offensive to the community;

- (d) a home occupation must be compatible with the character of the area and not present a potential conflict with surrounding properties;
- (g) a home occupation must be operated by a permanent resident of the single family dwelling with which the home occupation relates;
- (h) a maximum of two persons who are not residents of the single family dwelling may assist a resident in the operation of all the home occupations on the parcel;
- (l) a home occupation does not include:
 - (vii) vehicle repair or maintenance of any kind;

[Italics in original.]

[30] The current zoning bylaw also defines 19 other zones, including Highway Commercial ("HC") and General Industrial ("ID1"). The HC zone has 22 permitted principal uses and four secondary uses. The ID1 zone has 17 principal uses and two secondary uses. Some of the principal uses in the HC and ID1 zones are defined in the current zoning bylaw while others are not. Amongst the undefined but permitted principal uses in the HC and ID1 zones is "general trade contracting office and works yard".

Overview of the CSRD's submissions regarding the defendants' commercial use of the Property

[31] I turn now to consider the CSRD's specific submissions regarding how the defendants' commercial use of the Property is in breach of the current zoning bylaw.

[32] The CSRD submits that the defendants' commercial use of the Property offends the current zoning bylaw by:

1. Not being primarily on the Property, not being a permitted secondary use, not being "accessory" to the primary use of the Property as a single family dwelling, and not being carried out by a resident;
2. Altering "the residential character of the premises and the residential character of the residential or rural district where the premises are situated";
3. Emitting dust or producing noise, congestion or traffic sufficient to constitute a nuisance offensive to the community;
4. Being incompatible with the character of the area and presenting a potential conflict with surrounding properties;
5. Using more than 100 m² (1,076.4 ft²) of gross floor area;
6. Exceeding the limit on the number of non-residents who may assist in the operation of a home occupation on the Property; and/or

7. Conducting "vehicle repair or maintenance of any kind" on the Property.

[33] For the reasons that follow, I agree with the CSRD that the defendants' commercial use of the Property: is, by implied exclusion, not a permitted use within the SH zone; alters the residential character of the premises; and exceeds 100 m² of gross floor area.

Must the home occupation be primarily on the Property?

[34] The CSRD submits that the defendants' commercial use of the Property must be primarily on the Property. The current zoning bylaw, however, does not say that.

[35] The current zoning bylaw has a typographical error in the definition of "Home Occupation". It says that a home occupation must be "carried out by a resident that property" [sic]. The CSRD's written submission reads in the word "at" before the word "that" such that the definition would read "must be carried out by a resident [at] that property". In my respectful view, the intention of the bylaw drafters (the "drafters") is not that clear. Given the policy expressed by the CSRD in OCP Amendment Bylaw 850-1 that home occupations are intended to be "a means of accommodating independent employment and encouraging entrepreneurship and small business incubation opportunities", the word "of" could just as easily be read in such that the definition would read "must be carried out by a resident [of] that property".

[36] While the regulations in the current zoning bylaw require that a home occupation be on the same parcel as the single family dwelling to which it relates, the current zoning bylaw is not so restrictive as to require that services associated with a home occupation be carried out "exclusively at" or even "primarily at" that property. This can be contrasted with the regulations related to home occupations in the previous zoning bylaw, which provided "the home occupation shall be carried out wholly within a dwelling or permitted accessory building". Had it been the intention of the drafters to be as highly restrictive as submitted, they could have maintained its previous restrictive wording or otherwise clearly stated this intention. It is telling that they did not.

[37] I am unable to accede to the CSRD's submission that the current zoning bylaw requires that a home occupation be primarily on the Property. As a result, I must reject the CSRD's submission that the defendants' commercial use of the Property violates the current zoning bylaw on the basis that the defendants' business activities are primarily offsite.

Is the home occupation carried out by a non-resident?

[38] The CSRD submits that the defendants' commercial use of the Property does not comply with the current zoning bylaw because the defendants' business is "carried out" by a non-resident, namely R. Jones Contracting Ltd.

[39] In my respectful view, this is an unreasonable interpretation of the current zoning bylaw. More specifically, this interpretation is at odds with the objectives stated in OCP Amendment Bylaw 850-1 to accommodate and encourage independent employment,

entrepreneurship and small business. The interpretation advanced by the CSRD would effectively prohibit residents from incorporating a home occupation. Surely, it was not the intention of the drafters to stifle residents from organizing their business affairs in a manner they consider the most commercially advantageous. Further, surely, the drafters were aware that incorporated businesses are run by individuals and only intended for those individuals to be residents.

[40] In my view, the defendants' commercial use of the Property complies with the requirement in the current zoning bylaw that it be "carried out" by a resident, namely Roy Jones.

Is the defendants' home occupation "accessory"?

[41] The CSRD submits that the defendants' business is not "accessory" to the primary use of the Property as a single family dwelling. The CSRD further submits that home occupations are intended to be limited to occupations such as bookkeeping or cabinet making.

[42] I must confess that it is hard to discern the drafters' intentions based on the definition of "accessory use" in the current zoning bylaw.

[43] In my respectful view, the definition of "accessory use" in the current zoning bylaw is nonsensical. How can an accessory use be both "customarily ancillary to" and at the same time "exclusively devoted to" a principal use or single family dwelling?

[44] The point is best made by the CSRD's own example of bookkeeping and cabinet making.

[45] The Concise Oxford English Dictionary defines "accessory" as "a thing which can be added to something else in order to make it more useful, versatile or attractive". The Concise Oxford English Dictionary defines "ancillary" to mean "subordinate, subservient". To be sure, bookkeeping and cabinet making would fit the ordinary definition of "accessory" as well as the first part ("ancillary to") of the current zoning bylaw's definition of "accessory use". Both occupations could be added to a single family dwelling to make the property more useful while at the same time remaining subservient to the primary use. On the other hand, bookkeeping and cabinet making do not fit the second part ("exclusively devoted to") of the current zoning bylaw's definition of "accessory use". Neither of these occupations could be said to be exclusively devoted to the primary use of a property as a single family dwelling.

[46] In my view, it is also hard to reconcile the objectives stated in OCP Amendment Bylaw 850-1 with the second part of the definition of "accessory use" in the current zoning bylaw.

[47] The second part of the current zoning bylaw's definition of "accessory use" would preclude many typical home-based businesses, including those that are similar in some ways to the Company's commercial operations. For example, a home-based direct sales business that stored inventory on a property zoned SH and primarily conducted its business at customers' homes could not be said to be exclusively devoted to the principal use of the property as a single family dwelling.

- [48] In my respectful view, if the drafters intended to preclude typical home occupations such as direct sales businesses and limit home occupations to occupations like bookkeeping or cabinet making, they could have, should have and would have found a clear way of expressing their intention.
- [49] Given the troublesome definition of "accessory use" in the current zoning bylaw, I am unable to conclude on the evidence that the defendants' commercial use of the Property is not an accessory use. While the defendants passively use the Property "24/7" for commercial purposes, their evidence is clear that their active use of the Property for commercial purposes makes the Property more useful while remaining subordinate to the principal use of the Property as a single family dwelling.

Is the defendants' commercial use of the Property a permitted secondary use?

- [50] While the definition of "accessory use" in the current zoning bylaw is unclear, in my respectful view, the issue of whether the defendants' commercial use of the Property complies with the current zoning bylaw as a permitted secondary use does not turn on that definition. Rather, the issue turns on questions that are one level higher. Specifically, the issue turns on the proper characterization of the defendants' commercial use of the Property and whether that use is permitted as secondary use on the Property.
- [51] On the totality of the evidence, it is readily apparent that Devon Jones permits Roy Jones to operate R. Jones Contracting Ltd. from the Property. It is also readily apparent that one of the Company's primary lines of business is general construction contracting.
- [52] The Property is clearly the central hub for the Company's operations. It is where vehicles and equipment are stored when not in use. It is where the sand truck picks up sand and the construction cargo trailer is loaded with construction tools. It is where some vehicles and equipment are serviced and/or maintained. It is where minor construction work is completed for offsite jobs. It is where the bookkeeping is done. There is no evidence that the Company has office space in any other location.
- [53] In my view, the defendants' commercial use of the Property is properly characterized as a "general trade contracting office and works yard". Though not a defined term in the current zoning bylaw, "general trade contracting office and works yard" is a use which is specifically permitted as a "principal use" in the HC and ID1 zones. It is not identified as a permitted principal or secondary use in the SH zone. That omission engages the presumption of implied exclusion, meaning that it can be presumed that "general trade contracting office and works use" was deliberately excluded from the list of permitted uses within the SH zone. Thus, the defendants' commercial use of the Property cannot be a permitted secondary use as a "home occupation" - because it is a "general trade contracting office and works yard". Given this finding, there is no need to conduct an analysis into whether the defendants' commercial use of the Property is "accessory".
- [54] Though unnecessary to do so, I will go on to address the balance of the CSRD's submissions.

Does the defendants' commercial use of the Property alter its residential character, constitute a nuisance, or create an incompatibility or potential conflict?

- [55] The CSRD submits that the defendants' commercial use of the Property alters its residential character, constitutes a nuisance, creates a potential conflict with surrounding properties and is incompatible with the character of the area.
- [56] I have reviewed aerial photographs of the Begbie Bench area, photographs of the Property and a significant number of affidavits sworn by members of the Jones family and many of their nearest neighbours. Based on this review, I have concluded that the Begbie Bench area is a largely forested rural area which contains large lots hosting a wide variety of commercial activities. These commercial activities include a timber harvesting operation, a saw mill, a rock quarry and a heavy duty mechanic shop all within the SH zone. There is also a machine shop, excavation company, portable sawmill and another rock quarry in the vicinity. The Property is directly across the valley from the Revelstoke airport and is in the flight path of several local heli-ski operations. The Property is just below Highway 23 South, which is a busy route for logging, chip and fuel trucks and is serviced by a fleet of snow removal equipment in the winter.
- [57] Given the nature and amount of commercial activity near the Property, it is not surprising that all but one neighbour of Devon Jones says that the defendants' commercial use of the Property is consistent with the neighbourhood and does not constitute a nuisance. The one neighbour who says otherwise lives directly across the road from the Property. That one neighbour complains only about noise.
- [58] The Property is surrounded by old growth forest and a recently planted cedar hedge. There is a great deal of commercial and other activity in the area, which generates noise. Given the barrier that surrounds the Property and the level of noise that is intrinsic to the area, I am unable to conclude that the defendants' commercial use of the Property constitutes a nuisance or is incompatible with the character of the neighbourhood. I do not doubt that there is some additional noise associated with the defendants' commercial use of the Property but, on all of the evidence, I cannot conclude that this amounts to an unreasonable interference with the use and enjoyment of the neighbouring properties.
- [59] With regard to the prohibition against there being a "potential conflict" with surrounding properties, I consider this prohibition too vague to be enforceable.
- [60] The test for holding a provision within a bylaw void for vagueness is well established. In *Service Corp. International (Canada) Ltd. v. Burnaby (City)*, 2001 BCCA 708, the Court at para. 24 adopted the following formulation of the test from *Sundher v. Surrey* (1995), 30 M.P.L.R. (2d) 250 (B.C.S.C.) at para. 37:

Thus, the test for vagueness is whether the provision in the by-law is so uncertain that it does not provide an adequate basis for reaching a conclusion about its meaning by reasoned analysis applying legal criteria and taking into account the context of the legislative enactment.

- [61] In this case, there is simply no objective way to discern what amounts to a "potential conflict" with surrounding properties. Is a subjective complaint made by only one of many neighbours sufficient given that it rises from a "potential" to an "actual" conflict? Can a staff member of the CSRD conclude there is a "potential" for conflict even if no neighbour has complained? Is a little bit of extra noise enough or does it have to be quite a bit, or perhaps a lot, of extra noise? What would constitute "quite a bit" or "a lot"?
- [62] In any event, in my respectful view, the restriction against "potential conflict" is largely redundant. There are other provisions within the bylaw that are directed towards the same goal that can be objectively assessed, such as whether the use of a property constitutes a nuisance or is incompatible with the character of the area.
- [63] While the defendants' commercial use of the Property does not alter and is not incompatible with the neighbourhood, I have to conclude that the use of the Property as a general trade contracting office and works yard alters its residential character.
- [64] The defendants' assert that the Residence has a "toy box" design, meaning that it is a residence with a large area to use, store and/or work on the occupants' "toys". While "toy box" may describe the original intention of the design of the Residence, the Property is now the central hub for the defendants' general contracting and snow removal businesses. The activities associated with the defendants' commercial use of the Property, in my view, have altered the residential character of the Property to a much more commercial character.
- [65] As the defendants' commercial use of the Property alters its residential character, that use does not comply with the definition of "home occupation" in the current zoning bylaw.

Does the defendants' commercial use of the Property exceed 100 m²?

- [66] In submitting that the defendants' commercial use of the Property exceeds 100 m² (1,076.4 ft²) of gross floor area, the CSRD primarily relies on photographs of the main floor of the Residence coupled with admissions made during examinations for discovery. Even though no party has offered a specific measurement, I agree that the defendants' commercial use of the Property is indeed over 100 m². In reaching this conclusion, I specifically reject the estimates of Devon and Roy Jones that the defendants' commercial use of the Property occupies only 500 to 1,000 ft² of gross floor area.
- [67] The photographs of the main floor show a very large area occupied exclusively by Company equipment. Using what appears to be a standard sized single garage door and various pieces of equipment to provide scale, it is quite obvious that the defendants' commercial use of the Property greatly exceeds 1,000 ft². I conservatively estimate the area exclusively occupied by Company equipment to be at least 1,500 ft² of gross floor area. In addition, the photographs clearly show other areas being used to store Company materials and supplies.

- [68] Based on the photographs, discovery testimony and my findings, I need not resolve interpretive issues raised by the defendants regarding concurrent uses and the need for areas to be contiguous. These issues simply do not arise. The main area I have described is contiguous and occupied exclusively by Company equipment.
- [69] Further, I reject the defendants' submission that, because the Company's equipment can be moved, it is not "permanently dedicated" to a home occupation and, therefore, is not in breach of the current zoning bylaw. The term "permanently dedicated" is not used in the bylaw and no intention to limit the gross floor area to space "permanently dedicated" to the home occupation is evident from the bylaw.
- [70] Given that the defendants' commercial use of the Property exceeds 100 m², that use does not comply with the restrictions on home occupations within the SH zone in the current zoning bylaw.

Can a home occupation have more than two non-resident employees?

- [71] Though the Company has more than two employees who are non-residents, I cannot accede to the CSRD's submissions that the defendants' commercial use of the Property exceeds the number of non-residents who may assist in the operation of a home occupation.
- [72] The previous zoning bylaw prohibited the employment of any person "in a home occupation who is not a resident of the dwelling in which the home occupation is taking place." The current zoning bylaw is much less restrictive. It provides that "a maximum of two persons who are not residents of the single family dwelling may assist a resident in the operation of all the home occupations on the parcel." [Italics in original].
- [73] While the intention of the drafters to be less restrictive is easy to discern, it is more difficult to discern how far they intended to loosen up the prohibition against the employment of non-residents in a home occupation. The issue is whether the words "on the parcel" modify the words "home occupations" or the words "may assist a resident". In the former case, no more than two non-residents could assist in the operation of all home occupations no matter where those non-residents offered assistance. In the latter case, no more than two non-residents could be on the property to assist in the operation of all home occupations but with no restriction on the number of non-residents who could assist elsewhere.
- [74] In my respectful view, the latter interpretation is more in keeping with the overall intention of the drafters to facilitate home occupations while at the same time limiting the level of activity on a parcel to ensure that home occupations remain compatible with the primary use of a parcel. Accordingly, in my view, the words "on the parcel" restrict where non-residents may assist a resident in the operation of a home occupation, but do not prevent home-based businesses from employing people offsite.

[75] In this case, the evidence establishes that the only non-residents who assist in the operation of the defendants' commercial use of the Property on the Property itself are Jeremy Jones and Kathryn Horkley. The employment of two non-residents "on the parcel" is consistent with the current zoning bylaw. The fact that the Company employs others elsewhere does not offend the bylaw.

May the defendants service their own vehicles on the Property?

[76] Finally, I cannot accede to the CSRD's submission that the defendants' commercial use of the Property does not comply with the current zoning bylaw because the defendants complete servicing and maintenance of some of their vehicles and equipment on the Property.

[77] The current zoning bylaw provides that "a home occupation does not include vehicle repair or maintenance of any kind". It also provides that a home occupation does not include "asphalt batch plant", "bed and breakfast", "kennel", "medical marihuana production facility", "restaurant or similar use involving the serving of prepared food or drink", "sand and gravel processing" and "vehicle wrecking yard". Based on this list, it is my view that the relevant provisions of the bylaw are directed at restricting activities that generate business income. These provisions are, after all, directed at "occupations". [Italics in original.]

[78] In my view, the current zoning bylaw does not prevent home-based businesses from servicing, repairing or maintaining their own vehicles. Rather, the bylaw excludes businesses that generate business income through "vehicle repair or maintenance of any kind". This interpretation is consistent with the interpretation of a similarly worded bylaw by Neilson J. (as she then was) in *North Vancouver (City of) v. Cullen*, 2003 BCSC 679 at para. 38.

Summary

[79] To summarize, the CSRD has established that the defendants' commercial use of the Property does not comply with the current zoning bylaw. The defendants' commercial use of the Property is properly characterized as a "general trade contracting office and works yard". This is not a permitted use. Furthermore, even if the defendants' commercial use of the Property was properly characterized as a "home occupation", that use does not comply with the current zoning bylaw because it alters the residential character of the Property and occupies more than 100 m² of gross floor area within the Residence.

Issue 2: Did the "home occupation" use of the Property conform with the previous zoning bylaw such that its ongoing use amounts to a lawful non-conforming use?

[80] The defendants submit that if their commercial use offends the current zoning bylaw, that use is nevertheless permitted as a lawful non-conforming use.

Legal principles

[81] Sections 528 and 530 of the LGA provide, in part, as follows:

Non-conforming uses: authority to continue use

528 (1) Subject to this section, if, at the time a land use regulation bylaw is adopted,

- (a) land, or a building or other structure, to which that bylaw applies is lawfully used, and
- (b) the use does not conform to the bylaw,

the use may be continued as a non-conforming use.

Restrictions on increasing non-conforming use of land

530 In relation to land, section 528 [non-conforming uses] does not authorize the non-conforming use of land to be continued on a scale or to an extent or degree greater than that at the time of the adoption of the land use regulation bylaw. [Italics in original.]

[82] The onus is on the property owner claiming a lawful non-conforming use to establish that their property was used in a manner that was lawfully permitted on the date the new zoning bylaw was enacted. In *Saunders v. Langley (Township)*, 2010 BCSC 1543, Wedge J. put it this way at para. 33:

[33] One significant difference between the two provisions is that "use" is not a defined term under the Local Government Act. The judicial interpretation of "use" under that enactment is as follows: where a property owner can demonstrate that at the time of a new zoning bylaw his or her property was actually used in a manner that was a lawfully permitted use but for the new bylaw, the property owner is entitled to continue that formerly lawful, but now non-conforming use. The property owner must establish the actual use of the property on the exact date of the adoption of the new bylaw (*City of North Vancouver v. Vanneck* (1997), 39 M.P.L.R. (2d) 249 (B.C.S.C.) and cases cited therein). [Italics in original.]

[83] Further, s. 530 of the LGA prohibits material increases in the scale, scope, intensity and/or length of use of a lawful non-conforming use: *Osoyoos (Town) v. Nobbs*, 2004 BCCA 431 at para. 23.[1]

The previous zoning bylaw

[84] The previous zoning bylaw regulated "home occupations". Specifically, s. 2.3.10 provided, in part, as follows:

2.3.10 Home occupations shall comply with the following regulations:

- .1 no outdoor storage shall be permitted;
- .2 the home occupation shall be carried out wholly within a dwelling or accessory building;
- .4 no person shall be employed in a home occupation who is not a resident of the dwelling in which the home occupation is taking place.

Is the defendant's commercial use of the Property a lawful non-conforming use?

[85] In the circumstances of this case, it is readily evident that the previous zoning bylaw was considerably more restrictive than the current zoning bylaw and that the defendants' commercial use of the Property is not a lawful non-conforming use.

Outdoor storage

[86] While the defendants submit that they merely "park" rather than "store" vehicles and equipment on the Property, I cannot agree. There is no definition of "outdoor storage" in the previous bylaw. Giving the words their plain and ordinary meaning, the outside parking of vehicles and equipment for half a year when not in use, in my respectful view, amounts to "outdoor storage". The fact that these vehicles and pieces of equipment may be licenced and operable does not alter the fact that they are being "stored" in the plain and ordinary sense of that word. In fact, on discovery, Roy Jones used the word "store" to describe the Company's keeping of snow removal equipment on the Property in the off-season.

Home occupation not wholly within dwelling or accessory building

[87] The defendants submit that, "other than sand storage, no part of the Business was undertaken on the Property anywhere outside the [Residence] prior to August 2014, as is still the case today." Respectfully, this submission does not relate to the plain and ordinary meaning of the words in the previous zoning bylaw. The previous zoning bylaw requires a home occupation to be "carried out wholly within a dwelling or a permitted accessory building". While the defendants' commercial activities on the Property may have been largely inside the Residence, the vast majority of their commercial activities have always been off the Property. In other words, the vast majority of the defendants' commercial activities have never been "carried out wholly within a dwelling or accessory building".

Non-resident employees

[88] The defendants submit that, "prior to August of 2014, no employee worked on site who was not a resident of the Property". Respectfully, this submission also does not relate to the plain and ordinary meaning of the words in the previous zoning bylaw. In my view, the previous zoning bylaw clearly required that only residents be employed in a home occupation, regardless of where they discharged their duties. There is simply no indication in the previous zoning bylaw that non-residents could be employed by a home occupation as long as they did not discharge their duties "on the parcel", as is now permitted under the current zoning bylaw.

[89] Even if the Company only employed residents of the Property in August 2014, the current employment of non-residents both on and off the Property would, in my view, represent an impermissible change in the scope and scale of the defendants' prior use.

Issue 3: Does the Property contain only one dwelling unit as defined by the current zoning bylaw?

The relevant provisions of the current zoning bylaw

[90] As set out above, the current zoning permits a number of principal uses in the SH zone, including "single family dwelling". In addition to the secondary uses listed above, the permitted secondary uses within the SH zone include "secondary dwelling unit".

[91] The current zoning bylaw defines a "single family dwelling" as:

"...the use of land, structures and one detached building used exclusively for one dwelling unit, except where additional uses are specifically permitted by this Bylaw as a part of a single family dwelling." [Italics in original.]

[92] A "dwelling unit" is defined as:

"...the use of one or more habitable rooms in a building that constitute a single self-contained unit with a separate entrance, and used together for living and sleeping purposes for not more than one family, and containing a bathroom with a toilet, wash basin, and a bath or shower and only one room which due to its design, plumbing, equipment and furnishings may be used primarily as a kitchen." [Italics in original.]

[93] A "kitchen" is defined as "facilities used or designed to be used for the cooking or preparation of food."

The configuration of the living quarters

[94] The main entry to the Residence leads into a room. That room contains another door that provides access to the bottom floor and a staircase that leads to the second floor.

[95] At the top of the staircase is a landing with two doors. The door that is straight ahead leads to living quarters, which include a living room, full kitchen, washroom, two bedrooms, and a washer and dryer. The parties referred to these quarters as "Suite A". The door to the right leads to living quarters, which include a living room, an area with what I would describe as typical kitchen cabinetry, a washroom and a bedroom. The parties referred to these quarters as "Suite B".

[96] Roy and Karen Jones live in Suite A and Devon Jones lives in Suite B. The living quarters within Suite A and Suite B are both 1,400 square feet. Suite B is not equipped with nor wired to accommodate an oven or stove. It is, however, equipped with a sink, island with chairs, dishwasher, toaster, coffee maker and dining table.

[97] Without adducing any evidence on the point, the defendants submitted that a second staircase to access the second floor of Suite B has been constructed. Following the hearing, I addressed a memo to the parties to ask whether this was the case. The parties were unable to agree. I am, therefore, limited to the evidence before me, which is that there is only one staircase to the second floor.

Number of dwelling units

- [98] Under the current zoning bylaw, the use of a "single family dwelling" is not limited to a single family. Rather, it must be "used exclusively for one dwelling unit". Amongst other restrictions, a "dwelling unit" must have "only one room [that] may be used primarily as a kitchen". The defendants submit that this restriction is "unforgivably vague".
- [99] The defendants note that the current zoning bylaw defines "kitchen" to include facilities used for the preparation of food and submit that any room may be so used. I do not agree.
- [100] The wording of the current zoning bylaw is clear and its intention apparent. The intention is to ensure that areas designed to function as a kitchen are captured by the bylaw regardless of how they are used. The intention is not to capture areas that could, with modification, be used primarily as a kitchen.
- [101] In this case, the photos of Suite B tell the story. Suite B has an area that is obviously designed, plumbed, equipped and furnished to be used primarily for the preparation of food. Even though Suite B is not currently wired to accommodate a full oven or stove, the addition of a hot plate and microwave would readily make the "kitchen" area in Suite B an area designed, plumbed, equipped and furnished to be used primarily for the cooking of food as well.
- [102] During his examination for discovery, Devon Jones was asked whether the area at issue is a kitchen. He replied, "Well, it's not a full kitchen, but yes." Respectfully, that answer says it all. The Residence has two dwelling units.

Issue 4: If the Property has two dwelling units, do they both have independent and direct access to the outdoors?

The Relevant Provisions of the Current Zoning Bylaw

- [103] Under s. 3.15 of the current zoning bylaw, a secondary dwelling unit must, amongst other things:
- (a) have a floor area not more than 60% of the habitable floor area of the principal dwelling unit unless otherwise specified by this Bylaw;
 - (c) have a door direct to the outdoors without passing through any part of the principal dwelling unit

[Italics in original.]

Habitable floor areas

[104] While the living quarters in Suite A and Suite B are both 1,400 ft², the total area of the primary dwelling unit must also account for the 5,000 ft² of floor area on the main floor. The habitable floor area of Suite A is, therefore, 6,400 ft² while the habitable floor area of Suite B remains 1,400 ft². Accordingly, the habitable floor area of Suite B is less than 60 per cent of the habitable floor area of Suite A, as required by the current zoning bylaw.

Independent and direct access

[105] On the evidence before me, there is only one access to Suite B. That access uses the main door to the Residence and a common staircase to both sets of living quarters on the second floor. Accordingly, the access to Suite B runs through areas which comprise part of Suite A. As a result, the CSRD has established that the Property does not comply with the requirement in the current zoning bylaw that the secondary dwelling unit identified as Suite B have independent and direct access to the outdoors.

Issue 5: Did the Property contain only one dwelling unit as defined by previous zoning bylaw, such that its ongoing use amounts to a lawful non-conforming use?

The relevant provisions of the previous zoning bylaw

- [106] The previous zoning bylaw was in force when the Residence was first occupied. Section 2.5.2.1 of the previous zoning bylaw permitted a maximum of "1 single family dwelling" in the SH zone.
- [107] Section 2.1 of the previous zoning bylaw defined a "single family dwelling" to mean "any building consisting of one dwelling which is occupied or intended to be occupied as a permanent home or residence of not more than one family."
- [108] Section 2.1 of the previous zoning bylaw defined "dwelling" to mean "a self-contained set of habitable rooms containing not more than one set of cooking facilities and located in a building."

Number of dwelling units

[109] While the previous zoning bylaw did not define "self-contained", "habitable rooms" or "cooking facilities", the meaning of these terms and the intention of the previous bylaw is not complicated. The intention of the previous zoning bylaw was to ensure that there were no secondary dwelling units in the SH zone. The previous zoning bylaw aimed to achieve its goal through its requirement that a dwelling unit was to be occupied or intended to be occupied by no more than one family, and through its limits on the number of sets of self-contained habitable rooms and the number of cooking facilities within a dwelling unit.

- [110] In this case, the defendants' use of the Property complies with the restrictions in the previous zoning bylaw on the number of families. Though I have found that there is a kitchen, it is true that on a plain reading there is only one "cooking facility".
- [111] The defendants' use of the Property runs afoul, however, of the restriction in the previous zoning bylaw that there be only one set of self-contained habitable rooms.
- [112] The Concise Oxford English Dictionary defines "self-contained" to mean "complete, or having all that is needed in itself". Further, with reference to self-contained accommodations in particular, it is defined as "having its own kitchen and bathroom, and typically its own private entrance."
- [113] The Concise Oxford English Dictionary defines "habitable" to mean "suitable to live in."
- [114] Even though Suite B is not wired for and is not equipped with an oven or stove, it is clearly "self-contained" and "habitable". It is separated from Suite A by a door that locks. It contains an area that Devon Jones described as a kitchen, not a "full kitchen" but a kitchen nonetheless. It also has heat, electricity, running water, bedrooms, and a washroom. While an oven and stove would add to the comfort and convenience of an occupant, they are not required for an occupant to comfortably live in Suite B. Suite B contains everything that is required for it to be suitable to live in.
- [115] The defendants' use of the Property did not conform with the previous zoning bylaw in that it had two dwelling units. The defendants' ongoing use of the Property, therefore, does not amount to a lawful non-conforming use.

Issue 6: Is this action an abuse of process?

- [116] The defendants submit that the CSRD "has unfairly targeted the defendants, and has continued to persecute them unreasonably." The defendants submit this is evident from the CSRD making "multiple and successive attempts, each with little or no merit, to combat the Defendants and their activities." The defendants rely on the CSRD raising but then dropping allegations related to: the disturbance of a riparian area; the primary use of the Property; road maintenance work; and conversion of a truck into a dump truck. The defendants also imply that the CSRD drafted the current zoning bylaw in an effort to "shut down the otherwise innocuous Business of the Defendants."
- [117] Respectfully, there is simply no evidence that would remotely lead me to believe that the conduct of the CSRD has been "abusive" or, worse, that the CSRD has deliberately set out to "persecute" the defendants.
- [118] The fact that certain allegations were made then dropped by the CSRD is evidence that the litigation process worked as it should in this case. The parties went through a process of discovery and narrowed the issues. This was entirely appropriate.

[119] I consider it unnecessary to further address the defendants' submissions on abuse of process. They are completely without merit.

Issue 7: What is the appropriate remedy?

[120] There is no dispute that the CSRD may bring a proceeding before this court to enforce its bylaws: Community Charter, S.B.C. 2003, c. 26, s. 274 and LGA, s. 420.

[121] There is also no dispute that the CSRD is entitled to a statutory injunction to restrain a continuing breach of its bylaws unless there are exceptional circumstances: Vancouver (City) v. Maurice, 2005 BCCA 37 at para. 34.

[122] In this case, there are no exceptional circumstances and the CSRD is entitled to the declarations and injunctions it seeks.

[123] That said, in my view, it would create a hardship for the defendants and their customers to make an injunction regarding their commercial operations immediately enforceable. Accordingly, I will stay the operation of the injunction regarding their commercial operations for twelve months to give the defendants time to bring their operations into compliance with the current zoning bylaw, which may require them to move their operations or apply to re-zone the Property.

[124] It will be much easier for the defendants to bring their current use of the Property into compliance with the requirement that each dwelling unit have independent and direct access. They may choose to do so by completing the construction of the second set of stairs to the second floor, which must of course also comply with any applicable bylaws. The defendants will need some time to bring their secondary dwelling unit into compliance with the current zoning bylaw. I will stay the operation of the injunction regarding the secondary dwelling unit for three months.

Order

[125] I make the following declarations and orders:

1. The defendants are using the Property in a manner that is non-compliant with CSRD Zoning Bylaw 851 in that they are carrying out commercial activities that do not meet the criteria of a home occupation under CSRD Zoning Bylaw 851.
2. The defendants' commercial use of the Property is not a lawful non-conforming use.
3. The defendants are using the Property in a manner that is non-compliant with CSRD Zoning Bylaw 851 in that there is a secondary dwelling unit on the Property, which does not have independent and direct access to the outdoors.
4. The secondary dwelling unit on the Property is not a lawful non-conforming use.
5. The defendants are enjoined from using the Property in a manner contrary to the provisions of CSRD Zoning Bylaw 851, and, without limiting the generality of the foregoing,

- a. from using the Property for any commercial business enterprise which:
 - i. is properly characterized as a general trade contracting office and works yard;
 - ii. alters the residential character of the premises; and/or
 - iii. uses more than 100 m2 of gross floor area of the Residence; and
 - b. from having a secondary dwelling unit, which does not have independent and direct access to the outdoors, on the Property.
6. The operation of paragraph 5(a) of this order is stayed for a period of twelve months to give the defendants an opportunity to bring their commercial operations into compliance with CSRD Zoning Bylaw 851.
 7. The operation of paragraph 5(b) of this order is stayed for a period of three months to give the defendants an opportunity to bring their secondary dwelling unit into compliance with CSRD Zoning Bylaw 851.
 8. I seize myself of any applications to extend the stays outlined in paragraph 6 and 7 of this order.

[126] Unless the parties take steps within the next 30 days to schedule a hearing on costs, the CSRD shall have its costs on Scale B.

"L.S. Marchand J."

MARCHAND J.

[1] Though decided under its predecessor section, s. 911, of the Local Government Act, R.S.B.C. 1996, c. 323, the principal remains the same.

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