

CANADA / JUDGMENT

DBKS Homes Ltd. v. Taylor

2025 BCSC 1202

COURT

Supreme Court of British Columbia

DECIDED

26 June 2025

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2025 BCSC 1202 DBKS Homes Ltd. v. Taylor

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

DBKS Homes Ltd. v. Taylor,

2025 BCSC 1202

Date: 20250626

Docket: S100385

Registry: Nanaimo

Between:

DBKS Homes Ltd.

Petitioner

And

Ronald Granger Guild, Patricia Gay Grey, William Frederick Benson, Julie Diane Benson, Christina Stafford, Kyla Dione Hartnell, Kim Louise Keyowski, Stanley Peter Keyowski, Janet Patricia Peters, Leslie Margaret Lippert, Ian Peter Lippert, Lucy Linda Frank, Ralph Francis Frank, Wendy Lynn Traynor, Gurdev Singh Pabla, Jit Kaur Pabla, Andrew Joseph McNaughton, Gina Jacinto McNaughton, Alannah Rachel McPhail, Kyle Michael Osswald Cooper-Twine, Bonnie Evelyn Palfy, Christina Visona, Robert Todd Hanna, Harb Shahi, David Peter Dillman, Deborah Michelle Dillman, Glenn Christian Tideman Jensen, Diane Louise Gilmour, Michael Shaun Klassen, Shannon Maureen Klassen, Eloi Manuel Pereira, Stephanie Colleen Pereira, Baldev Singh Manhas, Manmohan Kaur Manhas, Paul Gerard Barron, Sharon Elaine Barron, Rosemary Nora Taylor, Stephen Cosmo Beale, and Susan Marie Vellutini

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraph 17 on July 3, 2025.

Before: The Honourable Justice Thompson

Reasons for Judgment

Counsel for the Petitioner:

T. Hawthornthwaite

The Respondent, Rosemary Nora Taylor, appearing in person:

R. Taylor

Place and Date of Hearing:

Nanaimo, B.C.

May 14, 2025

Place and Date of Judgment:

Nanaimo, B.C.

June 26, 2025

- [1] The petitioner DBKS Homes Ltd. owns a property in a residential subdivision in Nanaimo, and it plans to build a fourplex on its property. In this connection, it seeks cancellation or modification of a covenant in a building scheme registered on all properties in the subdivision, pursuant to s. 35 of the Property Law Act, R.S.B.C. 1996, c. 377.
- [2] The respondents are the other property owners in the subdivision. Three of these respondents have filed responses to petition, one of whom - Rosemary Taylor - appeared at the hearing and made submissions opposing the petition. A retired member of the Law Society of British Columbia assisted Ms. Taylor at the hearing without objection from counsel for the petitioner.
- [3] The building scheme was registered against the properties in 1977. Its preamble reads as follows:

If any covenant of this Building Scheme is declared void, illegal, unenforceable, or against public policy, by any court of competent jurisdiction or by any legislative authority, then such covenant shall thereupon be void ab initio, and the remainder of this Building Scheme shall continue to be valid and enforceable.

And, the particularly relevant portion of the building scheme reads as follows, with the impugned covenant underscored:

No building shall be erected on any of the said lands other than one private dwelling house together with a garage and/or other suitable outbuildings appurtenant to the said dwelling per lot as the same is now defined which dwelling house shall be not less than 1400 square feet in area (exclusive of garage or other outbuildings) subject to proviso set out in Section 3 hereof, and the owner of such dwelling house shall use same only as a private dwelling for not more than one family.

[4] On 27 May 2024, the City of Nanaimo passed zoning bylaw amendments that increased the density allowance on R5-zoned properties. In the result, the zoning on the petitioner's property allows for four dwelling units. Needless to say, the density terms of a zoning bylaw do not override covenants in a building scheme that restrict density.

[5] The petitioner has submitted building plans to the City for one residential structure containing four dwelling units, i.e. a fourplex. My task is not to rule on whether a fourplex meets the definition of "one private dwelling house" in the building scheme. Rather, the question raised by the petitioner's pleadings is whether s. 35 of the Property Law Act authorizes the modification or cancellation of that part of the covenant that restricts the use of the dwelling house to not more than one family.

[6] Section 35 of the Property Law Act provides:

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

- (a) an easement;
 - (b) a land use contract;
 - (c) a statutory right of way;
 - (d) a statutory building or statutory letting scheme;
 - (e) a restrictive or other covenant burdening the land or the owner;
 - (f) a right to take the produce of or part of the soil;
 - (g) an instrument by which minerals or timber or minerals and timber, being part of the land, are granted, transferred, reserved or excepted.
- (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
- (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
 - (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,

- (c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,
 - (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
 - (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.
- (3) The court may make the order subject to payment by the applicant of compensation to a person suffering damage in consequence of it but compensation is not payable solely for an advantage accruing by the order to the owner of the land burdened by the registered instrument.
- (4) The court must, as it believes advisable and before making an order under subsection (2), direct
- (a) inquiries to a municipality or other public authority, and
 - (b) notices, by way of advertisement or otherwise, to the persons who appear entitled to the benefit of the charge or interest to be modified or cancelled.
- (5) An order binds all persons, whether or not parties to the proceedings or served with notice.
- (6) The registrar, on application and the production of an order made or a certified copy of it must amend the registrar's records accordingly.
- [7] The petitioner has served all but two respondents. The male respondent Dillman has died and the female respondent Dillman is in a care home suffering from dementia. Their son is living on the property and was served, and I find that nothing would be gained by providing further notice by advertisement or otherwise. I am satisfied that all persons who appear to be entitled to the benefit of the impugned portion of the building scheme have been provided with sufficient notice.
- [8] A precondition to granting relief under s. 35(2) is that the application is not premature. No respondent argues that the application is premature, and I foresee no events that will bring further clarity to the picture. I see no reason to defer consideration of the issues raised by the petitioner. See *Newco Investments Corporation v. British Columbia Transit* (1987), 14 B.C.L.R. (2d) 212 at 222-223 (C.A.) [*Newco Investments*].
- [9] This same paragraph in the building scheme was the subject of two related proceedings in which Justice R.D. Wilson pronounced oral reasons for judgment: *Taylor v. Manhas*; *Manhas v. Taylor* (8 July 2009), Nanaimo S50564 and S56619 (B.C.S.C.), but that litigation and those reasons had a different focus. The Manhases had rented space in their house to "non-family tenants," and the Court granted an injunction restraining use of the secondary suite on their premises as a rental dwelling unit. In doing so, however, the judge rejected extension of that relief to a mandatory injunction compelling the removal of the secondary suite, because the

covenant relates to use of the premises and not what is constructed on the lot (provided it is one private dwelling house).

- [10] The Court dismissed the application of the Manhases for a s. 35 Property Law Act order modifying or cancelling the building scheme, rejecting their argument that the City of Nanaimo had declared building scheme provisions which restrict or proscribe secondary suites void, illegal, or unenforceable as contrary to public policy. The judge was unpersuaded that the City had made any such declaration. It followed that s. 35(2)(e) was not available to the applicants as a foundation for s. 35 relief.
- [11] In *Cole v. Paterson*, 2019 BCSC 45, Justice Donegan, then of this Court, outlined the approach to interpretation of restrictive covenants:
- [27] Restrictive covenants are to be construed according to the ordinary rules of contractual interpretation. The words used must be viewed in the context of the factual matrix at the time the document was created, taking into account the background and purpose of the document as guides to interpretation: *Hofer v. Guitonni*, 2011 BCCA 393 at para. 14.
- [28] While the surrounding circumstances are to be considered, they must never be allowed to overwhelm the words of the agreement. In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Supreme Court of Canada explained this at para. 57:
- [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and *Hall*, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (*Hall*, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).
- [12] A restriction on use of land must be clearly expressed. This principle and its implications were addressed in *Goodwin v. Ridley*, 2006 BCCA 581:
- [11] I consider that, quite apart from what view might be taken of the preferred interpretation, there are two plausible meanings that can be given to the restriction. It can be properly read either way. The wording is not free of ambiguity.
- [12] It is not a matter of resolving the ambiguity. A restriction on the use of land must be clearly expressed. . . .

See also *Newco Investments*, at 223-224; 585582 B.C. Ltd. v. *Anderson*, 2015 BCCA 261 at paras. 21-24.

- [13] Another consideration when interpreting covenants in building schemes was outlined in *Gubbels v. Anderson* (1994), 91 B.C.L.R. (2d) 379 at paras. 16-22 (S.C.). Justice Dorgan held that the purpose of building schemes is to create a community of interests, and this is an important surrounding circumstance to be considered when interpreting an arguably ambiguous covenant in a building scheme.
- [14] That said, if a covenant has more than one plausible meaning when considered in light of its purpose and the surrounding circumstances, then the analysis ends. As Lowry J.A. said in *Goodwin v. Ridley*, it is "not a matter of resolving the ambiguity." In *Cole v. Paterson*, at para. 54, Donegan J. put it this way:

That I am able, through a purposive analysis, to resolve the interpretation issue does not, however, resolve the matter. I find the Restrictive Covenant is still ambiguous, and, therefore, unenforceable.

- [15] The petitioner submits that the covenant restricting use of a dwelling to "not more than one family" is too vague to be enforceable. The word "family" is not defined in the building scheme. In its pleading, the petitioner submits:

The term "family" is too broad to be enforceable without any definitions. Extended family, foster family, unofficially adopted family, and non-traditional structures such as unrelated individuals cohabiting and functioning as a family unit, whether they are friends, partners, or otherwise, can fall under this definition. There are no mechanisms that set out how to make such determination nor how to resolve any disputes within the Building Scheme.

In his written argument, counsel for the petitioner poses a series of rhetorical questions to bolster this vagueness point:

Does it mean that people must be within a direct lineage? Or does it allow extended relatives? Does it permit families by law? What of those not bound by law, like a couple not yet common law or a stepparent with unadopted children? Does it consider families once bound by law, such as a married couple now separated? Does it permit one or more of these things? If there must be some connection, how much, and who decides? How would one verify this? What mechanisms resolve such disputes?

- [16] The arguments advanced by the respondent Taylor do not squarely address the petitioner's uncertainty and vagueness argument. In her response to petition, Ms. Taylor submits that "single-family dwelling" is not difficult to understand. However, the phrase "single-family dwelling" appears nowhere in the building scheme. As I understand the submission, it is that this covenant, which states restrictions on the improvements that may be erected on the lands and the use to which they may be put, should be interpreted as a covenant limiting construction to single-family dwellings (and appurtenant structures) in furtherance of a purpose to maintain the neighbourhood character; and, whatever ambiguity might surround the word "family" standing alone, there is no doubting the meaning of "single-family dwelling."

- [17] This postulated interpretation suffers from the fact that the text of the covenant separately addresses the improvements that may be constructed and the use to which the improvement may be put, and the fact that it does not use the phrase "single-family dwelling." However, granting that it may be a plausible interpretation, it is not the only plausible interpretation. That is, this part of the building scheme may mean that only one private dwelling of the stated minimum size and specified appurtenant structures may be erected, and that there is a restriction on who may use the dwelling (which use is attacked as impermissibly vague). I find that there is an ambiguity, and it renders the impugned part of the covenant uncertain and unenforceable for vagueness.
- [18] I agree with the petitioner's submission that the restriction on use to "not more than one family" is inherently vague and uncertain. The word "family" is not defined in the building scheme, and it is open to a wide variety of interpretations. There is no mechanism for resolving disputes about the meaning of the restriction to one family, and this adds to the case against this uncertain language: *Newco Investments*, at 224; 585582 B.C. Ltd. v. *Anderson*, at para. 23.
- [19] The petitioner makes alternative arguments invoking s. 35(2)(b) and (e) of the Property Law Act in order to support modification or cancellation of this family restriction on use of the property, but there is no need to address these submissions given my conclusion that the impugned portion of the building scheme is unenforceable.
- [20] Section 35(2) provides that the Court "may" make a modification or cancellation order if one of the criteria is met. This indicates a discretion. In *Cole v. Paterson*, at para. 64, Donegan J. indicated that an examination of all of the circumstances is required including the consequences of the order sought. In *Paterson v. Burgess*, 2017 BCCA 298 at para. 29, the Court cautioned: "Particularly where a judge is considering cancelling a covenant rather than modifying it, consideration must be given to all of the consequences of cancelling the covenant, not just those that arise in one particular situation."
- [21] The *Paterson v. Burgess* case was not a case about a covenant's uncertainty or vagueness. In a case where a covenant or part of a covenant is too vague to be enforceable, it is difficult to conceive of circumstances in which the consequences of cancellation would stand in the way of the remedy. If the unenforceable part of this covenant is not cancelled, prospective purchasers would be deceived by the remaining presence of the unenforceable restriction. As Justice Taggart said in his reasons for the Court in *Newco Investments*, at 224: "Covenants such as these which run with the land must be clearly and distinctly stated so that present and future owners may know with precision what obligations are imposed upon them."
- [22] Even if there is a possibility that the character of the neighbourhood might change if the restriction against use of private dwellings to "no more than one family" is removed, I would not exercise my discretion to withhold cancellation and leave in place this uncertain and unenforceable covenant. In all the circumstances, this is a proper case for granting the remedy sought.

[23] The uncertain portion of the building scheme, i.e. the underscored part of the paragraph quoted at the outset of these reasons, is cancelled. In the result, it will now read as follows:

No buildings shall be erected on any of the said lands other than one private dwelling house together with a garage and/or other suitable outbuildings appurtenant to the said dwelling per lot as the same is now defined which dwelling house shall be not less than 1400 square feet in area (exclusive of garage or other outbuildings) subject to proviso set out in Section 3 hereof.

[24] My preliminary view is that this is an appropriate case to order no costs. If the petitioner or Ms. Taylor seeks a different order, they have leave to apply.

"Thompson J."

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Prepared on 26 October 2026 · Esheria