

CANADA / JUDGMENT

Kelowna (City) v. Watermark Developments Ltd.

2025 BCCA 382

COURT

British Columbia Court of Appeal

DECIDED

6 November 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCCA 382 Kelowna (City) v. Watermark Developments Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kelowna (City) v. Watermark Developments Ltd.,

2025 BCCA 382

Date: 20251106

Docket: CA50313

Between:

The City of Kelowna

Appellant

(Respondent)

And

Watermark Developments Ltd.

Respondent

(Petitioner)

Before:

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

The Honourable Justice Gomery

On appeal from: An order of the Supreme Court for British Columbia, dated December 3, 2024
(Watermark Developments Ltd. v. Kelowna (City),

2024 BCSC 2188, Kelowna Docket S140333).

Counsel for the Appellant:

B. Williamson

Counsel for the Respondent:

A. Memory

E.J. Hatcher

Place and Date of Hearing:

Kelowna, British Columbia

May 29, 2025

Place and Date of Judgment:

Vancouver, British Columbia

November 6, 2025

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Mr. Justice Abrioux

The Honourable Justice Gomery

Summary:

In 2009, the appellant City of Kelowna approved rezoning and subdivision of the respondent's property. As a condition of this approval, two restrictive covenants were registered against the property. These prohibited the respondent from developing the portion of its property that fell within a corridor Kelowna wished to protect for a future roadway. The relevant segment of the planned road has yet to be built, and Kelowna's 2040 Transportation Master Plan makes no provision for its construction. The respondent applied for an order cancelling the covenants under section 35(1) of the Property Law Act [PLA]. The judge below granted this, finding that the covenants were obsolete and that cancelling them would not injure Kelowna.

Kelowna appeals on the grounds that the judge erred: (1) in her application of the legal test for obsolescence, and (2) in concluding that, despite the covenants continuing to have a practical benefit to Kelowna, their cancellation would not injure Kelowna.

Held: appeal allowed. The order cancelling the covenants under sections 35(2)(a) and (d) of the PLA is set aside.

The judge erred in finding that plans for the road were abandoned and in applying the legal test for obsolescence. So long as the road remains realistically in contemplation, protection of its corridor is not obsolete within the meaning of the PLA. The judge also erred in concluding that cancelling the covenants would not injure Kelowna. The balancing of parties' interests is not permitted in determining whether cancellation of a charge would cause injury under section 35(2)(d) of the PLA.

Table of Contents

Paragraph Range

1. INTRODUCTION

[1] - [12]

2. BACKGROUND

[13] - [25]

3. DISCUSSION

[26] - [106]

3.1 Overview and standard of review

[26] - [30]

3.2 Obsolete? Section 35(2)(a)

[31] - [84]

3.2.1 The judgment below

[31] - [39]

3.2.2 The authorities

[40] - [67]

Maple Ridge Projects

[40] - [47]

Skene

[48] - [54]

Emil Anderson

[55] - [58]

Shannon Woods

[59] - [63]

Vida

[64] - [67]

3.2.3 Conclusion

[68] - [84]

3.3 No injury to Kelowna? Section 35(2)(d)

[85] - [106]

3.3.1 The judgment below

[85] - [86]

3.3.2 The authorities

[87] - [98]

3.3.3 Interpreting the statute

[99] - [105]

3.3.4 Conclusion

[106] - [106]

4. DISPOSITION

[107] - [107]

Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

- [1] In the court below, Watermark Developments Ltd obtained an order cancelling two restrictive covenants registered against its property in favour of the City of Kelowna. Kelowna appeals.
- [2] The restrictive covenants were registered pursuant to section 219 of the Land Title Act, RSBC 1996, c 250 [LTA], more than 16 years ago, on title to a section of land on Academy Way in Kelowna owned by Watermark (the "Property"). Watermark purchased lands (the "original property") that included the Property with the intention of eventually subdividing and developing the lands. Kelowna required registration of the restrictive covenants as a condition of approving the required re-zoning and subdivision.

- [3] The covenants prohibited the construction or erection of buildings within the covenanted area. Kelowna's purpose in requiring the covenants was to protect a corridor for a planned future roadway project (the "Project"). The Project was intended to provide, among other things, highway access to the Okanagan campus of the University of British Columbia ("UBCO") and Kelowna International Airport ("YLW") that avoided Highway 97 with all of its traffic congestion.
- [4] As I will review in more detail below, the design and content of the Project evolved considerably over the years. From Watermark's perspective, it evolved to the point where the restrictive covenants had become obsolete and were no longer of any practical use. The protected corridor, it maintained, was no longer needed.
- [5] Accordingly, Watermark applied under section 35(1) of the Property Law Act, RSBC 1996, c 377 [PLA], for an order cancelling the covenants. By section 35(2),
- (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.
- [Emphasis added.]
- [6] After a summary trial, the judge granted Watermark's application. Her reasons for judgment are indexed at 2024 BCSC 2188.
- [7] After finding that the application was not premature, the judge concluded that the covenants should be cancelled because, first, they were obsolete (ground (a)); and second, cancelling them would not injure Kelowna (ground (d)). Either one of grounds (a) and (d) would be sufficient. The judge also considered ground (b) but found it inapplicable because, in her view, maintaining the covenants was of some practical benefit to Kelowna.
- [8] The judge completed her analysis by considering whether to exercise her discretion in favour of granting the application:

- [111] At this third hurdle, the Court may consider whether or not it would be equitable to discharge the No-Build Covenants when assessing how to exercise its discretion: see *Burmout Holdings Ltd. v. Chilliwack (District)*, 1994 CanLII 3326 (B.C.S.C) [Burmout].
- [112] It is under this step of the analysis that my description of the transaction involving quid pro quo between Watermark and the City is important because courts have concluded that it is inequitable to cancel a registered charge where it would deprive the respondent of value because the petitioner is attempting to avoid the quid pro quo of the parties' agreement.
- [9] The judge concluded that, in the circumstances of this case, "the mere existence of consideration at the time of granting the Covenants does not make it inequitable to cancel them some 16 years later" (at para 113).
- [10] Kelowna maintains that the judge erred, with respect to ground (a), in her application of the correct legal test for obsolescence and in grappling with the evidence, and, with respect to ground (d), in concluding that there was no injury notwithstanding that there remained a practical benefit to Kelowna.
- [11] Alternatively, Kelowna submits that the judge erred in the exercise of her discretion both in principle and through palpable and overriding error. If the judge erred in both of the first two grounds, then this third ground does not arise.
- [12] For the reasons that follow, I would allow the appeal.

2. BACKGROUND

- [13] The Project that the corridor protected was originally titled the "Central Okanagan Bypass". It contemplated a highway corridor to UBCO/YLW that bypassed the urban sections of Kelowna. At its western end, it would diverge north from Highway 97 west of Lake Okanagan, crossing over a new bridge north of the present crossing and north of the city centre. It would then proceed east via an extension of Clement Avenue, continuing through agricultural lands to the north and west of Highway 97, ultimately ending at UBCO/YLW.
- [14] As it neared UBCO, the planned corridor passed across the Property, causing Kelowna to require the covenants as a condition of approving development on the Property.
- [15] Not surprisingly, the Project was scaled back. Later iterations were called the Central Okanagan Multi-Modal Corridor ("COMC") and the Clement Avenue Extension ("Clement Extension"). The proposed new crossing of Lake Okanagan was abandoned, but that did not end matters. Clement was constructed eastward from Gordon Drive to Spall Road. A four-lane highway was then proposed to continue Clement from Spall Road to Highway 33, thence extending north to UBCO. This later was downsized to a two-lane, at grade arterial road.

- [16] The concept evolved into three segments: Segment 1 involves the extension of Clement from Spall northeast to Highway 33. Segment 2 comprises extending Clement from Highway 33 north to McCurdy Road. Segment 3 contemplates the further extension of Clement north from McCurdy to John Hindle Drive (UBCO).
- [17] The portion of the corridor protected by the covenants is part of segment 3. Progress has been glacial. Around the time that the covenants were registered, the extension to Spall was expected to be completed by the spring of 2007. That extension has been completed. The next two phases (segment 1 and segment 2) were expected to be in place within the next three years, while segment 3 was expected to undergo a formal planning and public consultation process. Things did not work out quite that way.
- [18] A 2019 update (the "October 2019 Report") noted the increasing expense of the original plan, changes in design parameters, the benefit of downgrading it from a provincial highway to a city arterial road and reducing four lanes to two, the cost of the necessary interchanges, and the need to evaluate the benefits and costs alongside other projects as part of a Transportation Master Plan. It observed that segment 1 was not "shovel ready", though \$57,000,000 had been included for it in the current capital plan, which also included \$1,100,000 for land acquisition for segment 2. The October 2019 report did not specifically refer to segment 3.
- [19] At present, segment 1 has proceeded to the preliminary design phase only, and segment 2 to the information/planning phase. Segment 3 has not advanced beyond corridor protection. Watermark maintains that Segment 3 has, in essence, been abandoned--effectively since the October 2019 Report was provided to Council. Segment 3 has been superseded, Watermark contends, by other developments and plans, including a planned transit facility just north of the Property, and an alternative route to UBCO via Hollywood Road.
- [20] As the judge put it:
- [45] The crux of Watermark's argument in the Petition is that Segment 3 has effectively been abandoned and will never be built. In the alternative, Watermark argues that if Segment 3 is merely a remote possibility as it has not been planned or budgeted and may very likely be formally abandoned prior to its implementation.
- [46] In reliance of this submission, Watermark relies on the City's 2040 Official Community Plan and the City's 2040 Transportation Master Plan, which was endorsed on January 24, 2022 (collectively, the "2040 Plans").
- [47] To put the 2040 Plans into legislative context, I was referred to s. 473(1) of the Local Government Act, R.S.B.C. 2015, c. 1, which states:

473 (1) An official community plan must include statements and map designations for the area covered by the plan respecting the following:

...

(e) the approximate location and phasing of any major road, sewer and water systems;

...

[48] The 2040 Plans, I accept, do not include plans for a second bridge crossing. More specifically, the 2040 Transportation Master Plan contemplates a long-term vision for the Clement Extension to connect Clement Avenue to McCurdy Road (namely Segments 1 and 2 of the Clement Extension which I have defined above). Segment 3 is not included as part of 2040 Plans, but is not yet specifically identified as being formally abandoned.

[49] Notably, the 2040 Transportation Master Plan states the following regarding the Clement Avenue Extension:

No longer envisioned as a freeway, this project includes a two-lane, at grade arterial road initially developed to Highway 33 with the long-term vision to extend the road to McCurdy Road. The Okanagan Rail Trail would run adjacent to the new road, though realignment may be necessary along many segments.

[50] Further study, in partnership with the Ministry of Transportation and Infrastructure, was recommended prior to implementation.

[51] Even under the 2040 plans, Segment 2 of the Clement Extension is not projected to be completed until 2035. That is still more than a decade from the present date.

[52] However, Watermark accepts that the City does have a bona fide intention to proceed with Segment 2 and has to plan and budget accordingly for such a major infrastructure project. Watermark's position, as I articulated above, is that Segment 3 is not actually going to be built or it is such a remote possibility of ever being built that the No-Build Covenants no longer serve a useful purpose as there are no confirmed plans, related proposed budgets or capital funding initiatives to proceed.

[21] Kelowna asserts that it has not been abandoned. While there are no current budgetary plans for segment 3, Kelowna says that the protection of the corridor remains important for future planning. With respect to the Official Community Plan, Kelowna observes that segment 3 has never been included in such a plan, and therefore cannot be said to have been dropped.

[22] Kelowna points out that the current contemplated timeframe is even longer than the judge discussed. Contrary to what the judge said in para 51 of her reasons (see above), segment 2 is not projected to be completed by 2035. The plans indicate that in the period from 2031-2035, segment 1 (now two lanes instead of four) is to be completed at the cost of some \$37,440,000. With respect to segment 2, it is projected that the sum of \$4,190,000 is to be spent on capital cost (additional land acquisition)--not construction.

- [23] Given that timeframe, Kelowna says that segment 3 would not be expected to come into focus for budgeting until much later. In short, it has not been included in the current timeline because they will not even get to segment 2 within that timeframe. Segment 3 is thus outside the 20-year horizon contemplated by the Official Community Plan and Transportation Master Plan on which the judge focused.
- [24] Nevertheless, Kelowna points out, it has continued to protect the corridor and to consider its future use in planning documents. It took steps to protect the corridor when another subdivision was approved in 2017. Maintaining future COMC road alignment options was also noted in a 2020 report concerning the new proposed transit facility, and the COMC may eventually form part of the transportation network surrounding that facility. The 2023 preliminary design for that transit facility specifically referred to the future COMC, noting that "[t]his future corridor is planned to dissect the [transit facility parcels] to provide an alternative route to Highway 97 through Kelowna".
- [25] I observe parenthetically that the source of the judge's error in para 51 of her reasons is easily identified. The documents in question refer to "Clement 1", "Clement 2 Extension" and "Clement 3 Extension". Confusingly, these are not the same as segments 1, 2 and 3. "Clement 1" has been completed. The three "segments" refer to the yet-to-be completed sections. Consequently, "Clement 2 Extension" refers not to segment 2, but to segment 1 as that term has been used before us and in the court below. Similarly, "Clement 3 Extension" refers not to segment 3 but to segment 2. The judge evidently read the reference to "Clement 3 Extension" as being equivalent to segment 3, which it is not.

3. DISCUSSION

3.1 Overview and standard of review

- [26] As Watermark points out, its application was argued and decided primarily on the basis that the covenants are obsolete under section 35(2)(a) of the PLA. Not surprisingly, the parties' arguments focused primarily on the meaning of "obsolete" as used in that paragraph. This raises questions of statutory interpretation and the legal analysis of previous decisions of the Supreme Court of British Columbia on which the parties relied: *Maple Ridge Projects Ltd v British Columbia*, 1997 CanLII 3643, 1997 CarswellBC 1974 (SC); *Emil Anderson Construction Co Ltd v 0977415 BC Ltd*, 2017 BCSC 957; *Skene v Ucluelet (District)*, 2019 BCSC 2051; *Shannon Woods Developments Ltd v Dodds*, 1996 CanLII 870, [1996] BCJ No 2869 (SC); and *Vida (Re)*, 2021 BCSC 1444. The applicability of section 35(2)(d) similarly turns on such interpretation.
- [27] For questions of statutory interpretation and legal analysis, the standard of review is correctness. Watermark points out, however, that care must be taken to distinguish between statutory interpretation and statutory application (see, for instance, the discussion in *Tolko Industries v British Columbia*, 2024 BCCA 303 at paras 44-46). As the Supreme Court of Canada put it in *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32 at para 43:

- [43] The process for characterizing a question as one of three principal types -- legal, factual, or mixed -- is also well-established in the jurisprudence (*Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para 35). In particular, it is not disputed that legal questions are questions "about what the correct legal test is" (*Sattva [Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53], at para. 49, quoting *Southam*, at para 35); factual questions are questions "about what actually took place between the parties" (*Southam*, at para. 35; *Sattva*, at para. 58); and mixed questions are questions about "whether the facts satisfy the legal test" or, in other words, they involve "applying a legal standard to a set of facts" (*Southam*, at para. 35; *Sattva*, at para. 49, quoting *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).
- [28] Nevertheless, where the legal test applied was skewed by a flawed legal analysis, the correctness standard continues to apply.
- [29] With respect to section 35(2) generally, the parties agree that paragraphs (a) through (e) are to be read disjunctively, so that the court may cancel the charge if it is satisfied that the conditions in any one of the paragraphs have been met. That is indeed the effect of this Court's decision in *Vandenberg v Olson*, 2010 BCCA 204. In the respondent's submission, it follows that each paragraph must therefore be considered and interpreted independently. I disagree. Nothing in *Vandenberg* says as much. On the contrary, this Court recently summarized the proper approach to statutory interpretation in *G.D. v South Coast British Columbia Transportation Authority*, 2024 BCCA 252:
- [73] The modern approach to statutory interpretation requires that the words of a statute be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the statute and its objects and purposes: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 2, 1998 CanLII 837; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26; *Wang v. British Columbia (Securities Commission)*, 2023 BCCA 101 at para. 39. Consistent with this is the requirement of s. 8 of the Interpretation Act, R.S.B.C. 1996, c. 238, that every statute be construed as remedial, and "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[Emphasis in original.]

- [30] It follows, in my view, that the paragraphs of section 35(2) cannot be construed as independent silos, but must be considered in the entire context of the scheme of the statute and its objects and purposes.

3.2 Obsolete? Section 35(2)(a)

3.2.1 The judgment below

- [31] The judge summarized the law on obsolete covenants at para 78 by quoting from *Vida* at para 48:

[48] The Court of Appeal in *Collinson v. LaPlante*, 73 B.C.L.R. (2d) 257, 1992 CanLII 685 (C.A.) at para. 19 defined the term "obsolete" to mean something that is no longer practised or used or is out of date. Determining obsolescence does not involve the balancing of rights of the parties: *Collinson*, para. 18. Instead, the court must consider whether the purpose for which the restrictive covenant was granted can still be satisfied or whether it has become obsolete due to changes in the character of the land, the neighbourhood or other material circumstances: *Putt v. Kunetsky*, 2010 BCSC 394.

[Emphasis added.]

[32] This is consistent with *Vandenberg* where this Court observed at para 28 that the word "obsolete" should be given its ordinary meaning of "no longer practised or used; discarded; out of date".

[33] I observe that both *Collinson v LaPlante*, 73 BCLR (2d) 257, 1992 CanLII 685 (CA) and *Vandenberg* concerned applications to cancel easements. In *Collinson*, this Court said this:

[19] No technical meaning is to be given to the word "obsolete" in this provision. It is an ordinary English word which is defined in the *Shorter Oxford Dictionary*, 3rd ed., thus:

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

[20] Although the appellants had other access to their property they were continuing throughout the relevant period to use the easement road. It cannot therefore be said that this easement is "obsolete".

[34] In the present case, we are dealing not with an easement, but with no-build covenants intended to protect a corridor for future roadway development. By their nature, they relate to future use, not past or current use.

[35] The judge then proceeded to review the decisions in *Maple Ridge Projects*, *Skene*, *Emil Anderson* and *Shannon Woods*, concluding that this case was close to being "on all fours" with the decision in *Maple Ridge Projects*. I will review these cases in detail below. Upon consideration of these authorities, the judge was satisfied that *Watermark* had met its onus of proving the covenants to be obsolete:

[82] The petitioner in *Maple Ridge Projects* subsequently made several requests to have the covenant removed. The requests for removal were refused on the basis of future highway development. However, the Court released the covenant on application by the petitioner because it was invalid, and further held, in the event the Court erred in deciding that the covenant was invalid, the covenant could also be cancelled on the basis that it was obsolete and its removal would not injure the Ministry.

- [83] Leaving aside the distinguishing primary ground of invalidity (not argued by Watermark here), it is persuasive that the Court concluded that a similar restrictive covenant was obsolete approximately four years after it had been registered, stating:
- [41] [The covenant] was not intended to deprive the petitioner, possibly forever and in the unfettered discretion of the Minister, of the capability of developing its land.
- [42] It is not sufficient to claim that the purpose of the covenant was broader such that it extended to a non-approved, unfunded, possible highway interchange which might connect with a crossing of the Fraser River in a location which has not been endorsed by other ministry planning and for which no environmental assessment has been completed or initiated in any event.
- [84] In *Skene*, Justice Jackson found that the District of Ucluelet's abandonment of the development of what was originally intended to be a "unified single resort enterprise" in favour of development in a "patchwork fashion" was a material change which rendered the statutory right of way granted for the creation of a boardwalk obsolete: see *Skene* at para. 57.
- [85] I was also referred by Watermark to the decision of Justice G.P. Weatherill in *Emil Anderson Construction Co. Ltd. v 0977415 B.C. Ltd.*, 2017 BCSC 957 [Emil Anderson], wherein he found that certain charges were obsolete because there was only a remote possibility that certain amenities would one day be built and therefore could fulfill the charge's purpose to allow other owners to have access to such amenities. Specifically, as stated by Weatherill J.:
- [60] I am satisfied that [the respondent's] concern that future amenities will be constructed is based on a hypothetical possibility only. It could only occur if [the petitioner's] plans for development of Lot 2 change
- [36] The judge then considered the *Shannon Woods* case, upon which Kelowna relied:
- [87] *Shannon Woods* is not a case decided pursuant to s. 35 of the PLA. It was a petition seeking judicial review of a decision not to approve a preliminary subdivision layout plan on the basis of the need to protect a proposed highway corridor which would, if built, pass through a portion of the petitioner's lands proposed to be subdivided for residential construction. Albeit in obiter, the Court in *Shannon Woods* did consider the long timeframe for the conception and planning of highway projects as follows:
- [31] It is not disputed that the corridor has been an issue with the Ministry for approximately twenty years. The petitioner argues that the plans for such a corridor are vague, consisting only of the nebulous plans or studies described in Mr. Puhallo's affidavit. The required funds are not available from the Transportation Financing Authority. There is now a six month freeze on government spending for capital works. The petitioner says there is simply insufficient foundation in the evidence to establish a factual underpinning for non-approval of the P.L.A. on grounds of public interest.

- [32] The petitioner argues that the respondents ought not be permitted to protect a "possible future highway corridor. Since it is not presently needed, the petition submits it is an improper public interest concern.
- [35] I find that while the corridor proposal is not immediate, it is not speculative. It may not be built for 5 or 10 years, but Mr. Puhallo's job involves assessing demands for future and current growth. Continued development in the Okanagan Valley restricts the amount of land available and the feasibility of continued upgrades to existing highways. The Okanagan Valley has experienced rapid growth over the past 20 years [1976-1996], and very rapid growth in the last five or six [1990-1995/1996].
- [37] After considering these cases, the judge concluded as follows:
- [88] In my view, and upon consideration of the above cited law, I am satisfied that Watermark has proven that the No-Build Covenants are obsolete pursuant to s. 35(2)(a) of the PLA.
- [89] As the 2040 Plans establish, any hypothetical plan for Segment 3 of the Clement Extension would mean that construction of such a roadway would not even commence for at least 16 or more years, if at all. This exceeds the "long timeframe" which was referenced by the Court in Shannon Woods.
- [90] Moreover, I conclude that this case is much closer to being on all fours with the decision in Maple Ridge Projects. The conclusive decision not to proceed with the highway corridor is distinguishable from the case at bar, but the underlying principle that restrictive covenants are obsolete when the purpose of said covenants may never or will never be fulfilled is apt. Further, I do not consider it to be balancing the interests of the parties, something not permitted under s. 35(2)(a) of the PLA, to note that the City's pure speculation that Segment 3 of the Clement Extension might be built and that the eventual plans for the same may require use of the portions of the Lands subject to the No-Build Covenants effectively gives the City unfettered discretion to determine if Watermark is realistically capable of developing the Lands for the long foreseeable future.
- [91] Additionally, similarly to the decision in Skene, the City's effective abandonment of the historical vision of the COMC in favour of a patchwork extension of Clement Avenue from downtown Kelowna to McCurdy Road is, I conclude, a material change which renders the No-Build Covenants obsolete.
- [Emphasis added.]
- [38] From these excerpts, it is apparent that the judge relied heavily on three factors: the length of time that was expected to pass before construction of segment 3 would even be considered; the fact that the eventual construction of segment 3 was not certain, but was, in her view, "pure speculation"; and the "material change" arising from the evolution of the historical vision into what she termed a "patchwork".
- [39] I now turn to review the authorities upon which the judge relied.

3.2.2 The authorities

Maple Ridge Projects

- [40] The petitioner, Maple Ridge Projects, owned land in Maple Ridge on which it granted a no-build covenant to British Columbia in order to obtain approval for rezoning a portion of the land to permit residential development. It claimed that the covenant was invalid and unenforceable within the meaning of what is now section 35(2)(e) of the PLA; in the alternative, it argued that the covenant could be cancelled pursuant to the grounds set out in what are now paragraphs (a) through (d) of section 35(2) of the PLA.
- [41] Justice Pitfield concluded that the covenant was indeed invalid and therefore must be cancelled under paragraph (e). In case he was in error in that regard, Pitfield J. went on to consider the other paragraphs. After doing so, he concluded, as did the judge in the present case, that the covenant should be cancelled because it was obsolete (paragraph (a)), and because its cancellation would not injure British Columbia (paragraph (d)).
- [42] Justice Pitfield's conclusion that the covenant was obsolete was, as would be expected, highly dependent on the particular facts of the case and the nature of the covenant. The land in question was within 800 m of Lougheed Highway, and the covenant was extracted under a section of the Highway Act intended to ensure that development within 800 m of the intersection between a highway and a controlled access highway did not adversely affect the operation of the controlled access highway. On its terms, however, the covenant was to remain in force while any portion of the affected lands was required for "highway purposes".
- [43] Noting that the covenant did not define what highway purposes it had in mind, the judge referred to extrinsic evidence (a letter from the Minister) in concluding that the purpose was to maintain protection, as the Minister put it, "until such time that calculations for the ultimate right of way required for the Cottonwood alignment have been completed" (para 13). On the evidence, the judge found that the Cottonwood alignment had been abandoned. Instead, future highway plans had been modified to provide for a potential interchange of Lougheed Highway with a new highway proceeding south to a new bridge. Could this save the covenant? Justice Pitfield thought not:
- [41] I conclude that the covenant was intended to be temporal in nature. It was not intended to deprive the petitioner, possibly forever and in the unfettered discretion of the Minister, of the capability of developing its land. The affidavit evidence tendered at the hearing compels me to conclude that the Cottonwood alignment has been abandoned.
- [42] It is not sufficient to claim that the purpose of the covenant was broader such that it extended to a non-approved, unfunded, possible highway interchange which might connect with a crossing of the Fraser River in a location which has not been endorsed by other ministry planning and for which no environmental assessment has been completed or initiated in any event. The covenant is obsolete, within the meaning of paragraph 31(2)(a) [now 35(2)(a)] of the Property Law Act given the purpose for which it was obtained and the

circumstances as they now exist.

- [44] Justice Pitfield went on to conclude that even if the covenant were not obsolete, its cancellation would not injure British Columbia so that it could be removed pursuant to section 32(2)(d) [misstated in the reasons as "32(2)(e)", and now section 35(2)(d)]:
- [44] The current state of planning in respect of any possible use of a portion of the land in conjunction with an interchange is so preliminary and conceptual that no reasonable possibility of injury exists. If the respondent is of a contrary view, the petitioner's land may be purchased in the same manner as the respondent purchased other land in the area when the Corridor was in contemplation.
- [45] With respect to the judge below, I do not see how Maple Ridge Projects could be considered "on all fours" with the case before us. As she in fact noted, it turned primarily on the "conclusive decision not to proceed with the highway corridor", which she said was distinguishable from the present case (at para 90). That is clearly so. The Cottonwood alignment that the covenant was intended to protect had been abandoned. The equivalent in our case would be if the covenants were intended to protect a connection to the proposed second crossing of Lake Okanagan, which has certainly been abandoned. Here, however, as I review in more detail below, the project of extending Clement through to UBCO has not been abandoned. It has changed in a number of ways, but the fundamental purpose of the corridor has remained.
- [46] The judge then quoted paras 41 and 42 of Maple Ridge Projects, finding it persuasive that the court found a similar restrictive covenant to be obsolete about four years after it had been registered. Again with respect, those paragraphs from Maple Ridge Projects do not support what the judge took from them. What they indicate is that Pitfield J. found the restrictive covenant to be temporally related to the Collingwood alignment, which is clear from the sentence that the judge omitted from her quotation. As Pitfield J. went on to say in para 42, it followed that British Columbia could not succeed in its argument that although the original purpose had been abandoned, the covenant was broad enough to extend to a new, possible, yet "non-approved" and "unfunded", purpose. This is because it was temporally related to the Collingwood alignment, not to some undefined other purpose that had not even been planned.
- [47] That is not like the situation here. Remember, no one suggests that segments 1 and 2 have been abandoned. It is the prospect of constructing a roadway continuing from segment 2 via segment 3 to UBCO that is at issue. Unlike Maple Ridge Projects, the question is not whether Watermark's covenants can apply to a new purpose not contemplated when they were granted. Rather, it comes down to whether the delay and apparent ambivalence as to segment 3--which was the specific reason for the covenants--have rendered those covenants obsolete.

Skene

- [48] This case concerned an application to cancel a statutory right-of-way ("SRW") registered against property in Ucluelet. The property was one of several parcels that were once the subject of a proposed single resort development ("Reef Point"). The developer granted the SRW to Ucluelet over a portion of the lands on which the developer was to build a boardwalk. The purpose of the SRW was to allow Ucluelet to integrate it as part of comprehensive public pedestrian trail and boardwalk through the development and the community.
- [49] Successive development permits required the boardwalk to be completed, but it was never built. The developer ran into financial difficulties and had to abandon the development. As Justice Jackson put it,
- [19] The abandonment of the proposed single resort development resulted in the [developer's lands] being sold off to multiple purchasers. Subsequently, much of the [developer's lands] were individually developed in a "patchwork fashion", some as recreational properties and a few as small commercial resorts. They are not collectively integrated in ownership, management, or use. Some of the lots remain fully undeveloped.
- [50] Justice Jackson allowed the application to cancel the SRW. First, like Pitfield J. in *Maple Ridge Projects*, she found the SRW invalid under section 35(2)(e) of the PLA. She went on to say this:
- [57] Given my conclusion that the [SRW] is invalid on the basis of uncertainty, it is unnecessary for me to address the other arguments advanced by the Petitioners in support of cancellation of the [SRW] in detail. I will simply say that I find the abandonment of the development of the [developer's lands] as a unified single resort enterprise, in favour of their development in a "patchwork fashion" involving multiple successors in title, before the boardwalk was constructed, to be a material change in the Property. This renders the [SRW] obsolete as that term has been interpreted by the Court of Appeal: *Paterson v. Burgess*, 2017 BCCA 298 at para. 27.
- [51] This passage is, as Jackson J. noted, obiter. I confess, with respect, that it is not clear to me without the benefit of further analysis how a material change in the property rendered the SRW obsolete. Why would the right of way over which Ucluelet had planned to extend its public trail network not have the same currency in relation to multiple properties as it did when those properties were one?
- [52] But, more importantly for present purposes, I do not see how the evolution of the COMC in the present case could be considered a "material change" of the sort that was found in *Skene* to arise from the change from a unified, single resort enterprise to uncoordinated development in a "patchwork fashion" when the developer went bankrupt and abandoned the project.

- [53] There can be no doubt that was a material change in Skene, as Jackson J. found. But in the present case, the project remains a roadway extending Clement to UBCO. Modifying it from a four-lane highway to a two-lane arterial road, and dividing it into segments 1, 2 and 3 to be built successively, is not comparable. These do not affect the relevance of the corridor and, to the extent they are changes, they are not material to the covenants. It has always been Kelowna's project, and has always been contemplated as being built in successive segments, the last of which crosses Watermark's land. That is not an entirely new purpose as in Maple Ridge Projects, nor can it, per se, constitute an abandonment through material change as in Skene.
- [54] As stated above, the real question remains whether the covenants have become obsolete because of continual delay and apparent ambivalence in completing segment 3.

Emil Anderson

- [55] This case involved a contest between developers concerning an SRW registered against the petitioner's property. The purpose of the SRW was to ensure that if and when amenities were constructed, the future owners of the residential properties to be developed would be entitled to access them. The amenities were understood to include such things as a fitness centre, clubhouse, landscaped areas, and networks of trails for walking, hiking and bicycling.
- [56] The application to cancel the SRW arose during the development of one part, Lot 2, that the developer wished to subdivide into single-family and duplex lots. The project had received all necessary preliminary development approvals, none of which contemplated any amenities.
- [57] In considering the whether the circumstances had rendered the SRW "obsolete or no longer of use", Justice G.P. Weatherill said this:
- [59] The original purpose of the Charges was to provide all owners and guests of the Tower Ranch Development the ability to access any future amenities that may be built on Lot 2. I cannot see them serving any other purpose today. Therefore, if no such amenities are constructed, the Charges serve no purpose.
- [60] I am satisfied that Parkbridge's concern that future amenities will be constructed is based on a hypothetical possibility only. It could only occur if: EAC's future plans for development of Lot 2 change to include amenities that the City has stated it would not agree to; EAC sells a block of Undeveloped Lot 2 to another developer who decides to build amenities; or if TRCA changes its mind and decides to assume responsibility for the amenities, and the amenities cannot be accessed by way of a dedicated public road. In my view, the possibility of any of these events happening is extremely remote and unrealistic.

[Emphasis added.]

- [58] Again, with respect, I see no similarity between Emil Anderson and the present case. The "hypothetical possibility" to which Justice Weatherill referred is not comparable to the prospect of constructing a roadway continuing from segment 2 through segment 3 to UBCO. In Emil Anderson, the hypothetical possibilities were all events that, while conceivably possible, had never been planned and were neither expected to occur nor within reasonable contemplation. Hence the judge found them to be "unrealistic".

Shannon Woods

- [59] Shannon Woods was relied upon by Kelowna, but distinguished by the judge. As she noted, it was an application for judicial review of a decision refusing preliminary layout approval of the petitioner's development in the Okanagan. The petitioner's preliminary subdivision application was reviewed by the Ministry of Transportation and Highways, which expressed concern because it included an area of a proposed future transportation corridor, although a final decision had yet to be made regarding that corridor. For this reason, the approving officer denied the subdivision application on the basis that it was contrary to the public interest.
- [60] The judge found that the decision was not subject to judicial review, but went on to consider the petitioner's argument that the approving officer's decision that the plan was not in the public interest was flawed because it was based upon a speculative or inadequate factual foundation.
- [61] Justice MacKenzie noted at para 31 that the corridor had been an issue with the Ministry for 20 years and there was currently a six-month freeze on government spending for capital works. Nevertheless, she concluded that while the corridor proposal was not immediate, it was not speculative:
- [35] It may not be built for five or ten years, but Mr. Puhallo's job involves assessing demands for future and current growth. Continued development in the Okanagan Valley restricts the amount of land available and the feasibility of continued upgrades to existing highways. The Okanagan Valley has experienced rapid growth over the past 20 years, and very rapid growth in the last five or six.
- [36] Mr. Puhallo described four studies relevant to whether the corridor's protection is in the public interest. The first is a major route study undertaken in the early 1980s that related to the Coquihalla highway. Highway routes for the Coquihalla were considered in four phases. The fourth phase identified this corridor. At that time, the Ministry took some measures to protect the proposed route and purchased one section of right-of-way.
- [62] After reviewing that evidence, the judge concluded at para 46 that the corridor remained a concrete concern for the Ministry, providing a reasonable foundation for the decision that the development was against the public interest.

[63] The judge below correctly identified this discussion as obiter, given the initial finding concerning judicial review--as were the passages she relied upon in Maple Ridge Projects and Skene. It is nevertheless instructive. In our case, as in Shannon Woods, the corridor is part of a long-standing plan and steps have been taken to protect the segment in question, including covenants other than the ones at issue here, and land purchases. What has not happened is construction, although earlier segments are more advanced than they were in Shannon Mills.

Vida

[64] Although the judge referred to this case in relation to the test for "obsolete", she did not discuss it further. It, too, is instructive.

[65] In Vida, the petitioner had wished to preserve his two-acre property in Coquitlam as a bird and wildlife sanctuary after his death. As part of his plan in this regard, he granted a covenant and statutory right-of-way to The Land Conservancy ("TLC"). He proposed to donate the property to the Coquitlam Foundation in his will for this purpose, but that plan fell through. He remained owner, and the conservation covenant remained in force. He applied to cancel it on the ground that it had become obsolete because of current or imminent redevelopment in the neighbourhood, and his original purpose in granting the covenant had been frustrated by the fact that he has been unable to locate an organization willing to own and manage the property after he passed away.

[66] The judge rejected these arguments. She noted at para 49 that the purpose of the covenant was to preserve the property in its natural state for use in perpetuity as a bird and wildlife sanctuary. While she accepted that there may come a time when the character of the neighbourhood changes so that it is no longer effective for that purpose, that time had not yet come and the property remained an important refuge (at para 50).

[67] As to the question of future ownership, the judge observed that the restrictive covenant was binding on any subsequent owner, and that TLC was willing to own and manage the property as a bird and wildlife sanctuary. She concluded that while there had been changes in what the petitioner had initially contemplated, the restrictive covenant was not obsolete as its original purpose continued to be fulfilled.

3.2.3 Conclusion

[68] In my respectful view, the judge employed an erroneous interpretation of the meaning of "obsolete" as a result of a flawed legal analysis of cases interpreting section 35(2)(a) of the LTA. That analysis led the judge to apply a watered-down test.

- [69] The question is whether the covenant has become obsolete. In the context of a no-build covenant intended to protect a future roadway, this requires that the protection be of no use to Kelowna, or that it serve no purpose--whether because the Project has been abandoned altogether, superseded by other tangible plans, or is simply no longer within reasonable contemplation.
- [70] As we have seen, the judge based her conclusion that the covenants were obsolete on the following observations:
- 1) Any "hypothetical plan for Segment 3 would mean that construction of such a roadway would not even commence for at least 16 or more years, if at all. This exceeds the 'long timeframe' which was referenced by the Court in Shannon Woods" (at para 89).
 - 2) The underlying principle in Maple Ridge Projects is that restrictive covenants "are obsolete when the purpose of said covenants may never or will never be fulfilled", and Kelowna's "pure speculation that Segment 3 might be built and that the eventual plans may require use of the portions of the Lands" cannot give Kelowna "unfettered discretion to determine if Watermark is realistically capable of developing the Lands for the long foreseeable future" (at para 90).
 - 3) As in Skene, "the City's effective abandonment of the historical vision of the COMC in favour of a patchwork extension of Clement Avenue from downtown Kelowna to McCurdy Road is, I conclude, a material change which renders the No-Build Covenants obsolete" (at para 91).
- [71] With respect to (1), the length of the timeframe, at least in this case, is irrelevant if, in fact, the plan remains in play. It does. Although the judge described segment 3 as "hypothetical", the fact remains that it continues to be part of the plan. As will always be the case with government projects, it is subject to future planning and funding parameters, but that is not the same as being abandoned. There is no evidence to suggest that it does not remain a "concrete concern" (Shannon Woods at para 46).
- [72] With respect to (2), the fact that segment 3 might never be built because of future funding problems does not render it "pure speculation" of the sort discussed in Maple Ridge Projects. There, the specific project in mind had been expressly abandoned and the question was whether something might not turn up in the future for which the covenant would be useful. The fact remains, as the judge noted, that "the eventual plans may require use" of the corridor protected by the covenants. That being the case, in the context of the sequential planning of the three segments, the covenants cannot be described as obsolete as that word is used in the statute.
- [73] With respect to (3), what the judge described as "the City's effective abandonment of the historical vision of the COMC in favour of a patchwork extension " does not, in the circumstances, make the covenants "obsolete". The changes in question do not in any way impact the need for the very protection that the covenants were intended to provide: a corridor for a route to UBCO and YLW that bypasses downtown Kelowna and Highway 97

and passes through Watermark's property. It follows that an evolution in the design of that route--including abandoning a bridge across Lake Okanagan far to the west of segment 3, and a change from a four-lane highway to a two-lane arterial roadway to be built in segments--cannot constitute "effective abandonment" of the corridor protected by the covenants. For the covenants to be "obsolete" under section 35(2)(a), it is the purpose underlying that protection that must be abandoned. That has not occurred here.

- [74] Nevertheless, Watermark's principal argument was that segment 3 had been effectively abandoned and would never be built. As the judge noted at para 48, it was not "specifically identified as being formally abandoned" (emphasis added) in Kelowna's 2040 Transportation Master Plan, upon which Watermark relied. She observed, however, that other parts were not to be completed until 2035 (confusing segments 1 and 2 as discussed above). She went on to say this:
- [52] However, Watermark accepts that the City does have a bona fide intention to proceed with Segment 2 and has to plan and budget accordingly for such a major infrastructure project. Watermark's position is that Segment 3 is not actually going to be built or it is such a remote possibility of ever being built that the No-Build Covenants no longer serve a useful purpose as there are no confirmed plans, related proposed budgets or capital funding initiatives to proceed.
- [75] Therein lies one of the problems with the judge's findings. Completing segments 1 and 2, as Watermark concedes Kelowna intends, without segment 3, would compromise the intention expressed for many years of realizing a continuous roadway to UBCO and YLW parallel to Highway 97.
- [76] Watermark points, however, to the 2040 Transportation Master Plan where the "Clement Avenue Extension" is discussed with reference only to what are herein known as segments 1 and 2, with segment 2 described as within the "long-term vision" contemplated by the Plan. Watermark argues that this indicates an abandonment of segment 3. To the extent the judge accepted this (as noted, she observed that segment 3 was not "formally abandoned"), I consider such a finding to be a palpable and overriding error arising from her view of the three segments as a change to uncoordinated "patchwork", as in Skene, when, on all of the evidence, they were always sequential sections of a planned continuum. The difference between the first two segments and segment 3 is that the segment 3 has been put off, as noted above, beyond 2040.
- [77] It is, of course, true that the final segment may, in the end, be expressly abandoned as unaffordable, or because an alternative plan is preferred. But that has not yet happened. There has been no express abandonment, and no actions or expressions of intention that could constitute effective abandonment. This is demonstrated by the steps Kelowna has taken in the recent past. These include action taken to protect other portions of the corridor relating to segment 3 in 2017 when another subdivision was approved, and in and around the plans for the new proposed transit facility in 2020 as noted in Associated Engineering's

report to the City of Kelowna in 2023.

- [78] It is true that these do not indicate a commitment to proceed to complete segment 3, and the plan is subject to future budgeting and feasibility studies. But that is different from being abandoned and, in my view, does not yet satisfy the definition of "obsolete", properly understood. There has undoubtedly been considerable delay, and there remains uncertainty. But, as in Shannon Woods, additional measures have been taken to protect the corridor, and, as the various reports indicate, the planning here is, by its nature, for the long haul.
- [79] This is illustrated by the judge's conclusion when she considered section 35(2)(b) of the PLA. In the context of this case, that paragraph requires that if the covenants are not cancelled, Watermark's reasonable use of the land will be impeded (a given), "without practical benefit" to Kelowna. In considering the "practical benefit" aspect, the judge said this:
- [100] The impediment to the reasonable use of the Lands subject to the No-Build Covenants is not, however, without practical benefit to the City. The fact that I have concluded that Segment 3 of the Clement extension has been effectively abandoned rendering the No-Build Covenants obsolete does not mean it is not to the City's practical benefit to maintain said covenants for some speculative future road construction that might be envisioned beyond 2040. Simply stated, having the No-Build Covenants on title gives the City more options for future transportation strategic planning than if they are not pursued.
- [80] The "speculative future road construction that might be envisioned beyond 2040" was, of course, the proceeding with segment 3 after the completion of segment 1 (construction planned for 2031-2035) and segment 2 (land acquisition planned for 2031-2035; construction to start at an unspecified date). In one sense, anything planned after 2040 might justifiably be described as "speculative", because it is far in the future and no funding has been committed. But such a project invariably involves planning long into the future. This does not make it "obsolete", particularly given the accepted intention of Kelowna to proceed with segments 1 and 2.
- [81] On the contrary, the corridor through segment 3 remains a practical benefit to the City precisely for that reason. Losing the protection of the corridor would either force Kelowna to abandon the plan of that alternative route to UBCO and YLW altogether, or oblige the city to expend considerable resources to acquire the land after it has been developed--notwithstanding that Watermark knew from the start that it would not have the right to develop that part of its property.
- [82] At present, Kelowna is taking steps to confirm its rationale for continued corridor protection, and a report is forthcoming. Consequently, there may soon come a day when changes in the city's planning or in the character of the area (as was suggested in Vida) are such that segment 3 must indeed be considered abandoned, or continued protection of the corridor through the Property otherwise loses any practical value. But so long as the prospect of proceeding with segment 3 remains realistically in contemplation, protection of

its corridor cannot, in my view, be said to be obsolete within the meaning of the PLA. That the completion of the project has been delayed by many years, and is in the process of being reviewed, does not amount to obsolescence where it remains relevant to future planning. It has evolved but not been superseded in the sense contemplated by cases such as Maple Ridge Projects and Emil Anderson.

[83] I conclude, respectfully, that the judge erred in both law and fact in finding the covenants to be obsolete and cancelling them under section 35(2)(a) of the PLA.

[84] I turn now to consider the judge's alternative ground for cancelling the covenants: that their removal would not injure Kelowna, in accordance with section 35(2)(d) of the PLA.

3.3 No injury to Kelowna? Section 35(2)(d)

3.3.1 The judgment below

[85] In concluding that the covenants should be cancelled pursuant to section 35(2)(d) of the PLA in addition to section 35(2)(a), the judge reasoned as follows:

[104] In this regard, Watermark again relies on the decision Maple Ridge Projects where the Court concluded that the cancellation of the restrictive covenant would not injure the Province because there was no concrete plan in place to build an interchange over the encumbered portion of the land. The Court stated at para. 44 of Maple Ridge Projects:

[44] The current state of planning in respect of any possible use of a portion of the land in conjunction with an interchange is so preliminary and conceptual that no reasonable possibility of injury exists.

[105] In this case, Watermark's submission largely echoes its submission under s.35(2)(b) which, as noted, overlaps with its submission under s. 35(2)(a). Namely, Watermark argues that the removal of the No-Build Covenants would not injure the City because there are no plans to build Segment 3 of the Clement Extension or any other roadway through the Lands until possibly some date after 2040, if at all.

[106] As such, Watermark submits that the current state of planning for any possible use of the Lands for a future roadway is, as it was in Maple Ridge Projects, "so preliminary and conceptual that no reasonable possibility of injury exists."

[107] At para. 71 of Emil Anderson, the Court confirmed that the balancing of parties' interests is permitted under s. 35(2)(d). Accordingly, even if there is a remote possibility that Segment 3 of the Clement Extension (or some revised version thereof) would be built through the Lands at some date beyond 2040, the City has already constructed or definitively planned three alternate routes from downtown to UBCO since the No-Build Covenants were registered. Those being the routes via John Hindle Drive, Hollywood Road and Rutland Road. The removal of a fourth alternate route thus, it is asserted, will not injure the City. In comparison, Watermark would continue to suffer injury if its ability to develop the Lands is impeded.

[108] In this regard, I accept Watermark's submission. As articulated, I accept that there is some practical benefit to the City to maintaining the No-Build Covenants on the Lands. However, that practical benefit is modest and based on speculation of possible very long-term future strategic planning. In contrast, the impediment to Watermark's ability to develop the Lands is acute and objectively identifiable. With access to the portions of the Lands presently subject to the No-Build Covenants, Watermark can build access roads which will allow for the development of significant portions of the Lands in a manner consistent with the prior development of the other portions of the Original Property.

[109] For these reasons, I would also cancel the No-Build Covenants pursuant to s. 35(2)(d) of the PLA.

[Emphasis added.]

[86] Kelowna argues that the judge erred in law in concluding that "the balancing of parties' interests is permitted under s. 35(2)(d)".

3.3.2 The authorities

[87] In so concluding, the judge relied on *Emil Anderson* where Justice G.P. Weatherill held that "the balancing of the parties' respective interests is required under both s. 35(2)(b) and (d)" (at para 66; see also para 71). Justice Weatherill, in turn, relied on *Odyssey Tower Properties Ltd v The City of Surrey et al*, 2006 BCSC 1842 at para 24, a case involving an application to cancel an easement over Odyssey's lands.

[88] In *Odyssey*, Justice Garson, then of the Supreme Court of British Columbia, found that the easement was not obsolete under section 35(2)(a). As the judge did in the present case, she then went on to consider paragraphs (b) and (d), saying at para 24 that both of those provisions "involve the balancing of harm to the petitioner, if the easement is not cancelled, with the harm or damage to the respondents, if the easement is cancelled". For that proposition, Garson J. cited 444038 BC Ltd v Suraj Imports Ltd, 2004 BCSC 307 at para 38--a case that also involved an application to cancel an easement over the petitioner's property.

[89] In 444038, Justice Rice held at para 38 that, "[i]n considering ss. 35(2)(b) and (d), the use of the land by the petitioner must be balanced with the damage that cancellation of the easement would cause to the respondent", citing *Quadrant Development Ltd v Madiuk* (1980), 16 RPR 90, 1980 CanLII 690 (BCSC).

[90] And so we get to the source: *Quadrant Development*. In that case, Justice Locke considered an application to cancel an easement. The easement permitted the defendant to run an underground pipe across the applicant's lands to drain his swimming pool into a creek. The applicant proposed a subdivision plan and therefore wished to cancel the easement. Justice Locke said this at 99:

I specifically do not follow the Lands Tribunal case of *Re Leeds Road*, Wakefield, January 28, 1953 (unreported), which says that if there is any other use of the lands, the charge could not be cancelled under that subsection. Rather, I will decide whether the placing of the road is a reasonable use of the land in view of all the circumstances, and I think it is, and I think it is without practical benefit to others if the charge or interest is cancelled as there are no others (such as the merchants in the *Peachtree Mall* case) whose interests could be adversely affected. The only ones affected would be the two parties to this easement.

As to subs. (d), it is plain that the cancellation of the charge would "injure" Madiuk if taken in the pure legal sense as he has been deprived of a legal right, but in my view, pure legal injury would mean that this subsection is senseless as a charge could then never be cancelled and the existence of subs. (3) which says: "The court may make the order subject to payment by the applicant of compensation to a person suffering damage in consequence of it", supports this view.

I consider this entire section to involve a balancing of rights: of the large disruption and expense to be occasioned to Quadrant were it to have to relocate the road, versus the undoubted right of Madiuk to have his swimming pool drained. I think the use of the land as a road is a reasonable use. I look at the purposes of the easement and it is my opinion that the easement should be cancelled, subject to a proper order for payment to Madiuk of whatever damage he may suffer.

As Madiuk has previously connected the sanitary services of his house to the south sanitary sewer, I order the applicant, solely at its own expense, to make proper drainage of Madiuk's swimming pool to that sanitary sewer, the whole to be done by first-class construction and at a minimum of inconvenience to Madiuk as may be arranged, and in view of the circumstances of this case and the cavalier (probably unintended) treatment of Madiuk and the breakage of his pipe, he be entitled to tax solicitor-and-client costs throughout.

[Emphasis added.]

[91] I make two observations. First, all of these cases leading to the decision before us referred to a balancing of interests being required for both paragraphs (b) and (d). Interestingly, the judge below did not undertake such a balancing in relation to paragraph (b), and referred to the balancing as being permitted as opposed to required.

[92] Second, in *Quadrant Development*, Justice Locke was of the view that the entire section involved a balancing of rights. As this Court said in *Collinson*, however, at para 18 (to which the judge below referred in para 78 of her reasons), determining obsolescence under paragraph (a) does not involve the balancing of rights of the parties. In *Collinson*, this Court left open the question of whether the analysis under paragraphs (b) and (d) might involve considerations that require balancing the rights and interests of the parties.

[93] That changed in 2011 with the decision of this Court in *Wallster v Erschbamer*, 2011 BCCA 27 (a judgment that appears not to have been brought to the attention of the court in *Emil Anderson*). In *Wallster*, the petitioner applied under paragraph (b) for an order cancelling a restrictive covenant and easement registered against her property in favour of her

neighbour. The petitioner planned to build a new house on her property, and the effect of the covenant was to prevent that new house from being built above a certain height in order to preserve a view for the neighbour. She submitted that her reasonable use of her property--the construction of a new, energy-efficient home--would be impeded without practical benefit to her neighbour if the cancellation were not permitted.

[94] The judge below cited this decision when she dealt with paragraph (b):

[94] Justice Newbury, writing for the Court in *Wallster v. Erschbamer*, 2011 BCCA 27, outlined the requirements for relief pursuant to s. 35(2)(b) as follows:

[17] While s. 35(2)(b) is not worded felicitously, the question for the court seems clear enough: if the encumbrance is not modified, will the reasonable use of the appellant's property be impeded without practical benefit to, in this case, the respondents? Put another way, does the encumbrance as it now exists provide a practical benefit to the respondents? This is not the same as asking whether the denial of a specific modification will provide a practical benefit, although the difference is very subtle.

[95] Justice Newbury went on to consider whether paragraph (b) "entails the 'balancing' of the impediments that will be suffered by the petitioners if the restrictive covenant is not cancelled or modified, against the benefits enjoyed by the respondents and others if the status quo is maintained" (at para 18). She referred to a 2004 decision of the BC Supreme Court to that effect, but declined to adopt it:

[19] I am not persuaded that s. 35(2)(b) should be approached as a 'balancing' exercise. As I read the provision, the petitioner (Ms. Wallster in this case) must show that the reasonable use of the land (here, the erection of her new house, which in my view is obviously a reasonable use) will be impeded without practical benefit unless the petition is granted - in other words, that the continuation of the covenant or other charge provides no practical benefit. If this burden is not met, the petition should not be granted. It is clear that "practical benefit" can include subjective factors such as "neighbourhood aesthetics" (see 417489 B.C. Ltd. v. Scana Holdings Ltd. (1997) B.C.J. No. 2408, at paras. 72-4), and to that degree s. 35(2) may involve the exercise [of] some discretion by the court. It may also be the case that a truly "minimal" benefit - for example, the preservation of one inch of the height restriction in this case - could also be disregarded on the principle of *de minimis non curat lex*. But that principle was not engaged in this case, where there was evidence not only from the respondents but also from real estate professionals as to the value, in both subjective and objective terms, of preserving the respondents' view as is. Various photographs and projections of the comparative views from the respondents' house with and without the 16-inch modification supported the chambers judge's conclusion that they enjoy a practical benefit from the height restriction.

[*Italic emphasis in original; underline emphasis added.*]

[96] This Court cited and applied Wallster in Tri-X Timber Corporation v Rutherford, 2012 BCCA 71, stating this:

[18] The appellants do not dispute that, for the purpose of clause (b) of s. 35(2), the reasonable use of the three lots owned by the Bakers and Tri-X will be impeded if the building scheme is not modified or cancelled. Thus, the sole issue to be determined under clause (b) is whether the non-modification or non-cancellation of the building scheme would be "without practical benefit" to the appellants.

[Emphasis added.]

No balancing exercise was undertaken.

[97] Wallster was recently applied in Zhang v Nanaimo Airport Commission, 2024 BCSC 2061, where the judge took it a little further:

[32] Under s. 35(2)(b) and (d) the court does not conduct a "balancing" exercise of an easement's relative benefits and burdens on all impacted persons: Wallster v. Erschbamer, 2011 BCCA 27 at para. 19. Rather, the issue is whether: (1) the continuation of the easement provides no practical benefit to others; and (2) cancellation of the easement would not injure the person entitled to its benefit.

[Emphasis added.]

[98] In Wallster, however, Newbury J.A. considered only paragraph (b). Kelowna nevertheless submits that as goes paragraph (b), so must go paragraph (d). In my view, Kelowna is correct.

3.3.3 Interpreting the statute

[99] As a matter of statutory interpretation, it is essential that paragraph (d) be viewed in context. It is noteworthy that paragraph (b) refers to the potentially opposing interests of the parties in the form of (1) the reasonable use of the land by the applicant, and (2) the practical benefit of the charge to others, including the charge holder. Yet, as this Court has held in Wallster, by which I am bound, paragraph (b) does not involve a balancing of interests. In effect, as Newbury J.A. has analyzed it, the balancing has been done by the legislature (even if infelicitously worded). Once it is shown that the charge impedes the applicant's reasonable use of the land, the question is simply whether the continuation of the charge provides any practical benefit to others (not just the charge holder). If so, then the loss of that practical benefit outweighs the impediment to the others. There is no balancing between the degree of impediment and the value of the practical benefit.

- [100] Paragraph (d), on the other hand, is structured differently. It says nothing about the property owner or that owner's use of the land. It raises only the question of whether cancellation will injure the person entitled to the benefit of the charge. It concerns itself only with that person, and not with "others". On its face, there is nothing to balance, nor does its wider context suggest that the balancing of interests should nevertheless be undertaken.
- [101] Consequently, unlike paragraph (b), we are directed only to the question of injury to the charge holder. We are not to consider the charge's effect on any "others", nor whether it impedes the applicant's reasonable use of the land. Even if there is no impediment, the applicant will succeed if cancellation would not injure the charge holder. Suppose, for instance, the applicant believes that cancelling the charge will result in an increase in the property's market value, with a view to a possible future sale. Arguably, it could not be said that the charge will impede the applicant's reasonable use of the land. Nevertheless, the applicant would have a ground for cancelling the charge under section 35(2)(d) if it could demonstrate that cancelling it "will not injure" the person entitled to its benefit.
- [102] I agree with Justice Locke in Quadrant Development that "injury" must be taken as more than the simple deprivation of a legal right. That is no doubt what Justice Newbury had in mind in relation to paragraph (b) when she said that a truly minimal benefit could be disregarded on the principle of *de minimis non curat lex* (the law does not concern itself with trifles). Similarly, a truly minimal injury, such as the simple deprivation of a legal right, could be disregarded on the same principle.
- [103] But it is not necessary in this case to set the boundaries of what it takes to "injure" within the meaning of the paragraph. We are far from a *de minimis* situation. Deprivation of the legal right here has significant consequences. As the judge found, the covenants had a practical benefit to Kelowna, and, for the reasons discussed above, they cannot properly be described as "obsolete". In these circumstances, how could their cancellation not injure Kelowna?
- [104] As I noted earlier, cancelling the covenants would deprive Kelowna of the ability to complete a project that remains in concrete contemplation, at least without undergoing significant extra expense. The judge described the practical benefit as "modest", but it is real, and in my view its loss would "injure" Kelowna within the meaning of paragraph (d).
- [105] I further note parenthetically that the judge balanced this "modest" benefit against the impairment of Watermark's ability to develop the lands, but that impairment has been in contemplation right from the beginning. That was the point of Kelowna requiring the covenants in return for permitting Watermark to develop other portions of its original property and is consistent with the parties' expectations.

3.3.4 Conclusion

[106] I conclude, then, that the judge erred in law in balancing the parties' interests in the course of applying section 35(2)(d), and therefore wrongly concluded that the cancellation of the covenants would not injure Kelowna. Properly interpreted, cancellation would injure Kelowna within the meaning of paragraph (d), so that the covenants ought not to have been cancelled under that provision.

4. DISPOSITION

[107] For these reasons, I would allow the appeal, set aside the order of the judge cancelling the covenants under sections 35(2)(a) and (d) of the PLA, and order that the respondent's application under section 35(1) be dismissed.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Gomery"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/25/03/2025BCCA0382.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/kelowna-city-v-watermark-developments-ltd-2025>

Prepared on 26 October 2026 · Esheria