

CANADA / JUDGMENT

Skene v. Ucluelet (District)

2019 BCSC 2051

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2019 BCSC 2051 Skene v. Ucluelet (District)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Skene v. Ucluelet (District),

2019 BCSC 2051

Date: 20191129

Docket: S21306

Registry: Port Alberni

Between:

Brent John Skene and Laurie Karlene Skene

Petitioners

And

The District of Ucluelet

Respondent

Before: The Honourable Madam Justice Jackson

Reasons for Judgment

Counsel for the Petitioners:

M.E. Plett

Counsel for the Respondent:

M. Moll

Place and Dates of Hearing:

Port Alberni, B.C.

September 16 and 17, 2019

Place and Date of Judgment:

Port Alberni, B.C.

November 29, 2019

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I. Introduction

[1] The petitioners apply under s. 35 of the Property Law Act, R.S.B.C. 1996, c. 377 [PLA], for an order cancelling a statutory right of way registered against property they own in Ucluelet, BC. The District of Ucluelet opposes their application.

II. Facts

[2] Brent and Laurie Skene (the "Petitioners") are the registered owners of a property in the Reef Point development area of Ucluelet, BC, legally described as PID 023-956-712, Lot 7, Section 21, Clayoquot District, Plan VIP66186 (the "Property"). The Petitioners purchased the Property in 2013.

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- [3] The respondent District of Ucluelet (the "District") is a municipality under the Community Charter, S.B.C. 2003, c. 26.
- [4] The Property is one of several parcels that were once the subject of a proposed single resort development known as the Reef Point Adventure Station, conceived by Seabridge Construction Limited ("Seabridge"). Seabridge was a BC company incorporated in 1996, and changed its name several times over the years. For ease of reference, I will refer to it as "Seabridge". Seabridge planned to develop the Reef Point Adventure Station on the lands it owned at that time (the "Proposed Development Lands").
- [5] On January 24, 1997, Seabridge granted the District and Her Majesty the Queen in right of Canada a covenant registered against Lot 43, plan VIP 64738, as charge number EL10358 (the "Natural Boundary Covenant"). The Natural Boundary Covenant contemplated the possibility of the construction of a boardwalk over the subject lands.
- [6] On November 5, 1997, Seabridge subdivided some of its lands. The subdivision created a number of parcels. The Petitioners are successors in title to one of the parcels, namely the Property.
- [7] On March 11, 1998, the District held a special meeting of its Council to review a development permit application submitted by Seabridge for its proposed Reef Point Adventure Station. Questions about the boardwalk arose. The meeting minutes record that Seabridge was encouraged to provide supporting documentation as identified by the District Planner, including "a formal boardwalk/path plan". As of March 11, 1998, if any formal boardwalk/path plan had been prepared, it had not been provided to the District.
- [8] In a report to the District Mayor and Council dated March 25, 1998, Municipal Planner Felice Mazzoni and Superintendent of Public Works Glen Westendorp recommended the development permit be issued to Seabridge subject to certain conditions, including:
11. That the cycle path and boardwalk/path plan be completed in keeping with the commentary within this report in accordance with the plan attached to this report. [Emphasis added.]
- [9] No boardwalk/path plan was attached to the report.
- [10] On or about April 25, 1998, the District's Council passed a resolution authorizing the issuance of Development Permit No. UE-98000.3 to Seabridge for the development of Proposed Development Lands (the "1998 Permit"). The 1998 Permit included the following conditions:
10. That the cycle path and boardwalk/path plan be completed in keeping with the plan attached to this report.
11. A statutory right-of-way shall be registered on the land under the proposed boardwalk/path ensuring the unrestricted use of the entire boardwalk/path for public use and absolving the district from maintenance costs and upkeep.

12. In accordance with the original Preliminary Layout design dated September 1996, the applicant shall construct a 2.0 meter paved cycle path. It is understood that the existing Peninsula Road paved surface from Reef Point Road to the area of He-Tin-Kis shall be reduced to 3.5 meters to meet this criterion. The applicant shall ensure that all existing water and sewer apparatus remain accessible to the District of Ucluelet, Public Works Department with regards to the proposed boardwalk/path and cycle path.

[Emphasis added.]

- [11] The District's copy of the 1998 Permit is unsigned and no boardwalk/path plan is attached. There is no evidence the referenced "boardwalk/path plan" was ever prepared or attached to the 1998 Permit.
- [12] On August 5, 1998, an application to register a statutory right of way affecting 24 lots, including the Property, then owned by Seabridge (collectively the "Owner's Lands"), was submitted at the Land Title Office in Victoria and assigned registration number EM74676 (the "SROW"). The SROW is registered on title to the Property.
- [13] The SROW consists of a completed Land Title Act Form C. It includes a six-page agreement (the "SROW Agreement") and a one-page notice declining to register under s. 308 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA] dated August 12, 1998, prepared by a title examiner for the Registrar of Titles (the "Notice Declining to Register"). The Notice Declining to Register indicates the SROW was "returned" on the basis that a statutory right of way plan was required. The Notice Declining to Register also indicates if the requirement was not met within 31 days from the date of the notice, the application would become cancelled and void.
- [14] The SROW Agreement between Seabridge (as Owner/Grantor) and the District (as Grantee) includes the following recitals and terms:

Recitals

D. The Owner has constructed a walkway in the form of a pedestrian trail or boardwalk on the Owner's Land (the "Boardwalk") and wishes to grant a right-of-way over the Lands occupied by the Boardwalk (the "Public Boardwalk") to the District although it is understood by the District that the Boardwalk is part of the overall design of the Owner's development of a Recreational Village upon the Owner's Land.

E. The District wishes to obtain a right-of-way over the Owner's Land on which the Boardwalk has been constructed for use as part of an integrated comprehensive public pedestrian trail and boardwalk in the Development and throughout the community and Ucluelet Peninsula.

G. It is understood that the Owner will be selling the Lands set forth in the Schedule and that all subsequent Owners from time to time will be bound by a management agreement and the owners of all other Lands within the development such management entity to be burdened with the obligations of repair and maintenance herein.

H. It is also understood that the Owner will be encumbering the Lands with a Statutory Building Scheme prohibiting and binding all Owners from time to time from altering the construction, appearance or design of that portion of the Public Boardwalk situate upon any of the Lands.

Articles

1.0 GRANT OF RIGHT OF WAY

1.1 Grant, convey, confirm and transfer, in perpetuity, to the District, its successors and assigns, and all of its employees, agents, servants and licensees to the District for and on behalf of the public, at all times by day or night, the full, free and uninterrupted right, license, liberty, privilege, permissions and right of way, to enter, use, go, return, pass over and across the Public Boardwalk being on the Owner's Lands (the "Right of Way"), hereto described in the Schedule attached;

1.2 Grant, convey, confirm and transfer, in perpetuity, to the District, its successors and assigns, and all of its employees, agents, servants, workmen and contractors together with equipment and materials, the right to go upon, return, pass over and use the Right of Way for the purposes of constructing, installing, maintaining, repairing, improving, inspecting and replacing the structure, lighting, benches, or handrails in connection with the Public Boardwalk which the District may consider necessary or desirable only if the Owner breaches its obligations to maintain and build, and the District elects to exercise its rights under clause 3.4 herein.

2.0 THE PARTIES HERETO AGREE WITH EACH OTHER that:

2.1 Without limiting the generality of sections 1.1 and 1.2, it is acknowledged by the parties that the Right of Way granted to the District shall take effect only upon the opening of the Public Boardwalk, or sections thereof, to the public as the District and the owner may agree (the "Opening Date");

2.2 Despite Section 2.1, the owner may enter onto and cross or recross the Right of Way without consent of the District for the purpose of access to and egress from the Owner's Lands lying on either side of the Public Boardwalk or to the foreshore fronting the same, all of which is private property.

3.0 THE OWNER HEREBY COVENANTS TO AND AGREES WITH THE DISTRICT, as follows:

3.1 The Owner will not, nor permit any other person, without the written consent of the District first had and obtained, which consent will not be unreasonably withheld:

- (a) to make, place, erect, install or maintain after the date here of any building, structure, excavation, pile of material or other obstruction in, under or over the Right of Way so that it in any way interferes with or damages or prevents pedestrian access along or over the Public Boardwalk;
- (b) to do any act or thing which will interfere with or injure the Boardwalk construction, placed or maintained under or over the Right of Way;

3.2 To indemnify and save harmless the district from any and all liability whatsoever arising out of the breach by the owner of this agreement or the grossly negligent acts of the owner or its agents, servants, contractors or licensees and for any such occurrence each and every lot of the owner's lands shall carry general liability insurance to the extent of two million dollars per lot;

3.3 To keep the Boardwalk laid out, constructed, placed or maintained pursuant to this agreement in a good state of repair, free of garbage and in the form of design, construction and natural appearance as built at the date of execution of this Agreement;

3.4 That if the Owner breaches any of its covenants and agreements herein and does not remedy the default upon 30 days written notice to the Owner, the Owner grants, conveys, confirms and transfers to the District, in perpetuity, to the District, its employees, agents, servants or contractors together with machinery, equipment and materials, the right to go upon, return, pass over and use the Right of Way, subject to any covenants registered against the subject lands preserving the natural habitat, to carry out the work necessary to remedy the default, said rights of repair do not confer any right to change the design, materials, location or colour of the Boardwalk from that built by the Owner. The cost of such work will constitute a debt owing from the Owner to the District with interest at a rate of 3% per annum in excess of the Prime Lending Rate and, if not paid forthwith upon demand, in addition to any other legal or equitable remedy available to the District such costs may be added to the property taxes for the owner's land and may be recovered from the Owner in the same manner as property taxes.

4.0 THE DISTRICT HEREBY COVENANTS TO AND AGREES WITH THE OWNER, as follows:

4.2 From and after the Opening Date, to indemnify and save harmless the owner from any and all liability whatsoever arising out of the use of the boardwalk unless such liability arises out of the grossly negligent acts of the owner or its agents, servants, contractors, licensees or permittees or the owner's breach of any covenant or agreement to be performed by the owner. The District covenants to insure and keep insured the entire length of the boardwalk under its general liability insurance for all risks and injury, loss or damage the public may suffer while using the Boardwalk.

4.4 To consult with the owner prior to determining the Opening Date and except in the case of emergency to provide the Owner thirty (30) days notice of the dates and times of any proposed work on the Right of Way other than minor repairs, maintenance or landscaping;

4.9 In exercise of any of its rights granted herein, the District and the public are not conferred with any rights of access to the foreshore of the Owner's lands but solely upon the surface of the Land and Boardwalk as built.

5.0 THE PARTIES HERETO EACH COVENANT TO AND AGREE WITH THE OTHER, as follows:

5.3 The covenants herein shall be covenants running with the land and that none of the covenants herein contained shall be personal or binding upon the parties hereto, save and except during the Owner's seisin or ownership of any interest in the lands of the owner, and with respect only to that portion of the Lands of the Owner of which the Owner shall be seised or in which he shall have an interest, but that the Lands of the Owner, nevertheless, shall be and remain at all times charged here with;

5.5 Any dispute that arises in the courts of the exercise by the Owner and the District of any right under this Agreement, including a right of consent, or related to the performance of any covenant to be performed under this Agreement may be submitted by the parties to arbitration pursuant to the Commercial Arbitration Act, R.S.B.C. by a single arbitrator appointed jointly by them;

5.7 This Agreement shall enure to the benefit of and be binding upon the parties hereto and their successors and assigned and their heirs and administrators respectively;

5.9 That upon the Owner presenting a surveyors Reference Plan of the Boardwalk, defining specifically the Boardwalk, as built by the Owner and as set forth in the Development Permit, the District shall sign, execute and deliver a modification of the Statutory Right of Way;

[Emphasis added.]

[15] The SROW language contemplated, and was intended to permit, public access to a boardwalk Seabridge had already constructed on the Owner's Lands as part of its development project (the "Boardwalk").

[16] There is no evidence indicating the "management agreement" referred to in the SROW Agreement was ever prepared or executed, nor is there evidence explaining what was meant by "management entity" referenced in the SROW Agreement.

[17] Some time around March 29, 2000, Seabridge submitted an amendment application with respect to the 1998 Permit. On April 11, 2000, the District's Council authorized the issuance of development permit UE-2000.1 (the "2000 Permit"), which contained the following conditions:

5. That the cycle path/boardwalk /trail plan be completed in keeping with the commentary within this report.

Cycle / Pedestrian Path

Cycle/pedestrian path - A 6 metre statutory right-of-way will be registered on the old section of Peninsula Road which will guarantee public access to the Terrace beach area.

A public right-of-way shall be registered on Lot 39, linking the proposed parking lot to the public right-of-way along the old portion of Peninsula Road.

The pedestrian boardwalk over the of the [sic] remainder of the development will remain as per the original development permit issued in 1998 and will eventually become a formal extension of the Wild Pacific Trail.

[Emphasis added.]

[18] However, the 1998 Permit did not include a development plan showing the boundaries of the proposed boardwalk. Further, by 2000 Seabridge had run into financial difficulties and abandoned its plans to develop the Reef Point Adventure Station. No boardwalk was ever built on the Property. On December 5, 2005, Seabridge was dissolved for failing to file its annual report.

[19] The abandonment of the proposed Reef Point Adventure Station single resort development resulted in the Owner's Lands being sold off to multiple purchasers. Subsequently, much of the Owner'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.

[20] Around July 2015, the Petitioners sought to obtain a copy of the statutory right of way plan associated with the SROW; however, no statutory right of way plan was ever deposited with the Land Title Office and no statutory right of way plan is attached or linked to the SROW.

[21] In August 2015, the Petitioners received a "Notice of Works", signed by John Towgood on behalf of the District, which contained the following:

The District of Ucluelet is doing investigative and preparatory work for the completion [sic] the boardwalk/trail path located generally along the inlet foreshore of Spring Cove This concept was approved by council thru [sic] Development Permit (DP) UE-90000.3[1] [sic]. [Emphasis added.]

[22] On November 24, 2015, the Petitioners submitted a request for information under the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, for any records in the custody or control of the District with respect to the 1998 Permit, the 2000 Permit, and the SROW (the "FOI Request").

[23] On December 1, 2015, the Petitioners attended a District community budget meeting. They raised concerns about a lack of consultation surrounding a grant application the District had submitted to support its building of connector trails, in which it had represented the District had undertaken consultation with all stakeholders. The Petitioners were asked to meet with someone from the District's Planning Department and report back.

- [24] Later that week, the Petitioners met with John Towgood, the District's Planning Assistant (the "December Meeting"). During the December Meeting, the Petitioners again expressed their concern that the District had represented it had consulted with stakeholders, when it had not consulted with the Petitioners. In her first affidavit, Ms. Skene deposed that at the December Meeting the Petitioners asked Mr. Towgood whether there was a design plan for the boardwalk or trail and he advised them one had not been prepared. In his first affidavit, filed in response to Ms. Skene's, Mr. Towgood did not dispute Ms. Skene's evidence on that point.
- [25] In late January 2016, in response to their FOI Request, the Petitioners received a package containing eight documents (the "Disclosed SROW Documents"). No statutory right of way plan or development plan associated with the 1998 Permit, or original boardwalk plan, prepared by Seabridge or anyone else, was included in the Disclosed SROW Documents.
- [26] The Petitioners filed their petition on June 23, 2016. Just over six months later, on January 17, 2017, the Petitioners received a Public Notice from the District, which stated:

The District of Ucluelet will be performing surveying and staking work in preparation of construction of the Spring Cove Pedestrian Trail. The intent of the surveying work is to define the boundaries of the trail area and to assist with the creation of a survey plan. [Emphasis added.]

- [27] On or about September 28, 2018, a statutory right of way plan was deposited with the Land Title and Survey Authority and assigned registration number EPP 68571 (the "2018 Statutory Right of Way Plan"). The 2018 Statutory Right of Way Plan informs several statutory rights of way that were registered subsequent to the SROW on several properties to which the SROW also applies (the "New Statutory Rights of Way").
- [28] The New Statutory Rights of Way are similar in form and content to each other. The New Statutory Rights of Way each include an agreement between the respective owners, all successors in title to Seabridge's Owner's, Lands and the District (the "New Agreements"). However, the recitals included in the New Agreements are very different from the recitals in the SROW Agreement. Whereas the SROW Agreement recitals referred to a boardwalk having already been constructed by Seabridge, the New Agreements recitals contemplate the future construction and reconstruction, by the District, of a ground level oceanfront pathway.
- [29] The grants contained in the New Agreements confer the same rights as those conferred in the original SROW; however, unlike the SROW Agreement, there are no references in the New Agreements to a "Recreational Village", a management agreement, or a statutory building scheme. Nor do the New Agreements contain the positive obligations imposed on the property owners in the SROW Agreement, including the obligation to indemnify the District and to maintain the contemplated boardwalk.

III. The Statutory Framework

[30] Section 35 of the PLA allows the court to make an order modifying or cancelling certain charges or interests registered against land, including a statutory right of way. Section 35 is a "comprehensive code", and s. 35(2) sets out an exhaustive list of the grounds upon which a court can make such an order: *Vandenberg v. Olson*, 2010 BCCA 204 at para. 23; *Lafontaine v. University of British Columbia*, 2018 BCCA 307 at para. 51. Section 35(2) reads as follows:

35(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.

[31] The Petitioners acknowledge that in order to succeed they must satisfy the court their application is not premature, there are grounds for cancelling the SROW, and that the court should exercise its discretion in favour of cancelling the SROW.

IV. Is the Application Premature?

[32] The Petitioners say their application is not premature because there are no impending agreements, arbitrations, or other considerations that could resolve the deficiencies that permeate the SROW: *Langlois v. Tessaro*, 2018 BCSC 1463 at paras. 28-30; *Newco Investments Corporation v. British Columbia Transit* (1987), 14 B.C.L.R. (2d) 212 at 222-223 (C.A.) [*Newco*]. The Petitioners further submit their application is not premature because, in its current form, the SROW burdens them with positive obligations and purports to require them to take certain action.

[33] The District does not argue the petition is premature.

[34] For the reasons outlined by the Petitioners, I agree their application is not premature. I therefore turn to address the merits of the Petitioners' application.

V. Are there Grounds to Cancel the SROW?

A. Position of the Petitioners

[35] The Petitioners rely on two grounds in their petition and argue there are three reasons the SROW should be cancelled. First, relying on s. 35(2)(e) of the PLA, they argue the SROW is invalid due to a lack of certainty. Second, also relying on s. 35(2)(e), they argue the SROW is invalid and unenforceable because it contains positive obligations that go to the heart of the SROW. Finally, relying on s. 35(2)(a), the petitioners argue there have been material changes in the character of the Property, the neighbourhood, and the circumstances involving the development of the Property and its surroundings that render the SROW obsolete. In particular, the Petitioners argue the SROW was predicated on the development of a single resort. They argue the fact that the area now consists of multiple lots which are not owned, operated, or managed collectively constitutes a material change in the character of the Property, the neighbourhood, and its surroundings.

B. Position of the District

[36] The District argues the SROW is sufficiently certain to enable it to be enforced, and that the positive obligation terms, which it acknowledges are unenforceable against the Petitioners, can be severed. It submits the SROW was intended to secure the rights necessary for the District to provide a public waterfront boardwalk in perpetuity. The District's position is there has been no material change to the character of the Property, the neighbourhood, or any other circumstances that would justify finding that the SROW is obsolete.

C. Analysis

1. Is the SROW Invalid for Lack of Certainty?

[37] The Petitioners argue the SROW is invalid due to a lack of certainty. In their view, the charge is too wide and vague and is undefined because there is no plan registered with, attached to, or incorporated into the SROW.

[38] A statutory right of way, like other restrictive covenants, is to be interpreted based on an application of the general principles of contract interpretation: *Tessaro v. Langlois*, 2019 BCCA 95 at para. 18 [Tessaro]. The paramount goal of contractual interpretation is to determine "the intent of the parties and the scope of their understanding": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47 [Sattva]. The exercise of contractual interpretation involves reading "the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para. 47. Whether parties to a contract reached consensus on sufficiently certain terms, is to be assessed as at the time the agreement was made. The factual context in which the contract was created, and the background and purpose of the document known to the parties at the time, serve as guides to its interpretation: *Hofer v. Guitonni*, 2011 BCCA 393 at para. 14 [Hofer]. However, evidence of surrounding circumstances must not overwhelm the words of the agreement: *Sattva* at para. 57.

[39] Where the agreement's meaning is ambiguous, it is to be resolved in accordance with the "strict construction approach", which requires a restriction on the use of land to be clearly expressed, and ambiguity to be resolved in favour of the free use of the land: Hofer at para. 19, citing with approval *Goodwin v. Ridley*, 2006 BCCA 581 at paras. 11-12.

[40] In *Newco* at 224, Justice Taggart noted:

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.

[41] That principle has been consistently affirmed: *585582 B.C. Ltd. v. Anderson*, 2015 BCCA 261 at para. 21 [585582 B.C. Ltd.]; *Cole v. Paterson*, 2019 BCSC 45 at para. 42 [Cole].

[42] In *585582 B.C. Ltd.*, Tysoe J.A. considered whether a covenant was invalid due to uncertainty. In that case, Tysoe J.A. observed that while the covenant in issue prohibited the public rental of the unit unless it was done in accordance with a rental pool management agreement, the rental pool management agreement was not attached to the covenant or incorporated by reference and did not even exist at the time of the creation of the covenant. Tysoe J.A. found the covenant invalid on the basis of uncertainty, and in so finding made the following comments at para. 27:

There is no certainty with respect to the terms of the Rental Pool Management Agreement and, as a result, there is a lack of certainty in the covenant itself. By looking at the covenant registered against a unit, a successor in title to the unit cannot determine the terms by which the unit may be rented to the public.

[43] At all times material, the LTA has required a statutory right of way plan to be deposited when an application to register a statutory right of way is submitted, unless the Registrar has dispensed with the requirement on the grounds of hardship or economic loss: LTA, s. 113(2). The requirements of such a plan are detailed in s. 116 of the LTA:

Requirements of statutory right of way plans

116 (1) A statutory right of way plan tendered to the registrar for deposit under section 113 must, in addition, comply with the following requirements:

- (a) the area taken from each section, district lot or parcel, as the case may be, must be shown on the plan;
- (b) the boundary lines of each section, district lot or parcel affected by the plan must be shown according to the original survey, and there must also be shown a sufficient number of angular and linear measurements to define the limits of the statutory right of way and to show their connection with each section, district lot or parcel through which the statutory right of way passes;

- (c) if the statutory right of way is through land that has been subdivided and shown on any deposited plan, the plan must show distinctly, as to all registered parcels affected by the statutory right of way, the boundaries and designation of each parcel according to the deposited plan, and a sufficient number of angular and linear measurements to show the location and connection of the statutory right of way with each registered parcel and subdivision affected;
 - (d) except as provided in section 117, the centre line from which measurements to the limits of the statutory right of way are shown must be referenced on the ground by iron posts or equally permanent monuments, so placed as to identify the points of deflection from all tangents, and the plan must show, by angular and linear measurements, the relation of all corners of the land within the statutory right of way plan to those iron posts or monuments;
 - (e) if transition curves are used on the located centre line of the statutory right of way, they must be replaced in each case on the plan tendered for deposit by a simple curve tangential to the main tangent and compounded with the main curve at its junction with the transition curve, and the simple curve must then be called a terminal curve;
 - (f) if the limits of the statutory right of way are governed by a circular curve on the centre line, they must be circular curves concentric with and at the appropriate radial distance from the governing centre line curve;
 - (g) if the limits of the statutory right of way are governed by a transition curve on the centre line, they must be formed by a series of straight lines connecting points at the appropriate distances from the centre line, measured along the radii, or radii produced, or along the line bisecting the angle between contiguous chords of the transition curve, as the case may be.
- (2) If there is a statutory right of way through unsurveyed Crown land, it is acceptable to the registrar if a sufficient number of angular and linear measurements are shown on the statutory right of way plan to define the limits of the land affected by the statutory right of way.
- [44] The benefit of the statutory right of way plan that complies with those requirements is clear. It provides the certainty and transparency necessary where the use of the land is restricted. In this case, there is no evidence a statutory right of way plan relating to the SROW was ever deposited.
- [45] The District argues a statutory right of way plan is "not strictly required at this time" because s. 113(2) of the LTA contemplates the possibility of the registration of a statutory right of way without a statutory right of way plan, and argues the statutory right of way can be described by other means. In its view, the statutory right of way was intended to and did confer "rights to pass over an area identified by the district as desirable for a public pedestrian trail". The District argues the fact that the SROW appears on title is proof that it was registered without a plan.

[46] The District's position is that the SROW was validly registered and argues the fact the SROW appears on title is proof of valid registration. However, the Notice Declining to Register indicating the SROW was "returned" on the basis that a statutory right of way plan was required, is inconsistent with the SROW being validly registered. There is no direct evidence indicating the Registrar dispensed with the requirement for the plan to be deposited. No submissions were made regarding the nature and effect of s. 113(6) of the LTA, which states:

113(6) Subject to a contrary enactment, the deposit of a statutory right of way plan unaccompanied by an instrument of grant does not confer an interest in the land affected but if the part of the register relating to the land is stored by electronic means, the registrar must make a note of it in the register against the indefeasible title.

[47] However, in my view the District's position that the SROW was validly registered, even if correct, does not advance its position that the SROW is certain. The "area" over which the District asserts its rights is not defined with any certainty through any other means.

[48] Even if I were to ignore Tysoe J.A.'s ruling in 585582 B.C. Ltd. that a successor in title must be able to determine the terms of the covenant by examining it, the District's argument that the development permits issued in 1998 and 2000 "prescribed the general location of the boardwalk" still do not provide a sufficient level of certainty. Which development permit? Which boardwalk map? The maps merely provide a general idea of something that has not yet been identified.

[49] In Cole, Justice Donegan considered a restrictive covenant that attached a plan that described an area using a black outline filled in with black diagonal lines. Donegan J. found the marking to be vague and imprecise. In the case before me, there is not even such a vague and imprecise plan attached to the SROW. Similarly, the management agreement referred to in the SROW is also not attached. Indeed, it appears, similar to 585582 B.C. Ltd., that no management agreement existed at the time the SROW was submitted to the Land Title Office, or at anytime thereafter.

[50] The District argues a successor in title would know from the covenant that there were restrictions on the Property, and could look elsewhere to find them, and that the SROW was sufficiently certain. There are two reasons why that position cannot succeed. First, there is no certainty about where a successor in title could search to find that information. The District referred to a promotional pamphlet used by Seabridge to market the Reef Point Adventure Station. However, that document is, at best, vague and imprecise. A boardwalk is depicted, but not described with any specificity. Further, the boardwalk depicted in that pamphlet was a fiction. There is no information about when that marketing material was prepared in relation to the SROW, and the evidence demonstrates the concept of the Reef Point Adventure Station underwent various changes over time. Regardless, the evidence demonstrates the boardwalk was not built. At best, that advertising pamphlet was a design concept.

- [51] Second, Tysoe J.A. rejected an argument similar to that advanced by the District in 585582 B.C. Ltd.:
- [29] In my opinion, that does not create certainty because it requires a successor in title to look outside the covenant to determine all of the terms related to the restricted use of the strata Lot
- [31] If there are to be restrictions on the use of a strata lot, a successor in title is entitled know the specifics of the restrictions, and it is not sufficient for the covenant to refer in general terms to a rental pool without any reference to the terms and conditions applicable to it and without an independent mechanism for the terms and conditions to be established in the event the successor in title and the rental manager are unable to agree on them.
- [52] The District pointed out there is an arbitration clause in the SROW. However, that clause is permissive and not mandatory. It is not an independent mechanism Seabridge and the District obliged themselves to pursue in the event they were unable to agree on the SROW's terms and conditions. Similarly, the Petitioners as successors in title are not bound to that process. In this case, the arbitration clause does not constitute an independent means by which the terms and conditions of the SROW can be established.
- [53] The SROW was predicated on a fact that never materialized: the construction of a boardwalk by Seabridge in the Owner's Lands. The SROW was to be over land chosen by the then titleholder, Seabridge. Seabridge agreed to provide the District with certain rights over a part of the Property once Seabridge had determined the boundaries. But Seabridge never did. In my view, there was no crystallization of any interest in land the SROW could have conveyed to the District because the boundaries of that interest were never determined.
- [54] I acknowledge that in Tessaro a blanket easement was registered in contemplation of the parties later registering a defined easement. However, the circumstances of that easement are distinguishable from the SROW. In Tessaro, the transferor had agreed to grant the transferee an easement over the whole of the servient tenement with the intention that the transferee would have the right to construct the driveway "on any part of the servient tenement in the transferee's sole discretion". In contrast, under the SROW the precise boundaries of the Boardwalk, and the corresponding easement, were within the sole discretion of Seabridge, as the transferor.
- [55] The District also relies on Kassell v. Probasco, 2007 BCSC 937, a decision of Justice Hinkson (now Chief Justice Hinkson), in support of its position that the SROW is sufficiently certain. However, in that case the Court did not find the scope of the easement was uncertain, but rather found both sides, and their predecessors in title, had failed to adhere to the precise limitations of the easement. Indeed, it is clear from the Court's reasons that the location of the easement was clearly specified and identifiable; the location of the easement had been varied previously and was modified again, with specificity, by the Court: see paras. 9, 27, and 47-48.

[56] For the reasons herein, I find the SROW is invalid due to uncertainty.

2. The Petitioners' Other Arguments

[57] Given my conclusion that the SROW 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 SROW in detail. I will simply say that I find the abandonment of the development of the Owner'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 SROW obsolete as that term has been interpreted by the Court of Appeal: *Paterson v. Burgess*, 2017 BCCA 298 at para. 27

[58] I also find the District's move towards entering into New Agreements reflect its reasonable and candid acknowledgement before me that the positive obligations contained in the SROW Agreement do not run with the land and are invalid terms of the SROW that do not bind the Petitioners or any other successors in title. While the District argued those positive obligations did not go to the core of the SROW and could be severed, in my view that position is not sustainable. The result of such severance would be permission to place public access boardwalks on the Property with no one contractually obliged to maintain them. The SROW Agreement and the New Agreements recognize that public safety in relation to any boardwalks on the Property is essential. The positive obligations go to the heart of the SROW. On that basis, I also find the SROW invalid and unenforceable.

D. Should the Court Exercise its Discretion to Cancel the SROW?

[59] The parties agree I am to consider all of the consequences of cancelling the SROW in assessing how to exercise my discretion under s. 35 of the PLA: *Paterson* at para. 29; *Cole* at para. 64.

[60] The District submits if the SROW is cancelled it will lose the benefit of the bargain it made. The District further submits I should consider the "public" nature of the SROW and argues the public interest inherent in that interest supports an exercise of my discretion to refuse cancellation of the SROW.

[61] With respect to the District's first argument, I have found the very nature of the quid pro quo between Seabridge and the District to be uncertain, and the SROW consequently invalid. Because of that uncertainty, no binding bargain was ever formed. The District is at least partially responsible for the fact that what it intended to receive was not properly recorded. Its loss of rights is the product of the uncertainty it permitted. Saving the District from the consequences of its own actions, and inactions, is not a basis upon which I am prepared to exercise my discretion to refuse cancellation of the SROW.

[62] Further, I am of the view that the public nature of the SROW is not a relevant factor for consideration. As noted above, the parties agree the SROW is to be interpreted using standard principles of contractual interpretation. There will always be some public interest

involved when dealing with statutory rights of way; that is the character of the right. To introduce the public character of the SROW into the analysis regarding the exercise of discretion would result in an approach that favours the public entity party. I was taken to no authority that supports such a principle.

- [63] Even if I viewed the public nature of the SROW to be a relevant factor, its consideration would not affect my conclusion that this case is not one where it is appropriate to exercise my discretion not to cancel the SROW. The District has made no commitment to actually build a boardwalk network, so there is not necessarily any public benefit being lost. Further, it is clear more details regarding any boardwalk on the Property, such as those details involving maintenance and safety contained in the New Statutory Rights of Way, still need to be addressed. Therefore, cancellation of the SROW is not the only impediment to the creation of a boardwalk network. In addition, cancellation of the SROW does not mean the boardwalk network can never proceed. The District remains free to negotiate with the Petitioners and other successors in title in order to pursue the boardwalk network initiative. Finally, the public nature of the interest at stake cuts both ways. Public authorities such as the District have options that are not available to most private entities: Community Charter, S.B.C. 2003, c. 26, s. 31. Thus even if the SROW is cancelled, the District is not without options.
- [64] The District also submits the remedy of cancellation is too severe, and the fact the Petitioners did not seek modification of the SROW should weigh against cancelling the SROW. However, the deficiencies inherent in the SROW are not limited to the positive obligations included in the SROW Agreement, and are not of a character that renders them capable of being remediated through modification by the court. To do so would be to rewrite the SROW. There is no indication in the SROW of how far from the ocean the boardwalk would be placed, how wide the boardwalk would be, or any terms specifying a host of other details about the specific placement of the easement. While the District suggests that "reasonable" details of the easement could be imposed, to do so in the context of the SROW would not constitute a modification of the easement, but rather a post-facto drafting by the court of an agreement for the parties. That is not the role of the court.
- [65] In the circumstances of this case, I am satisfied that cancelling the SROW is the proper exercise of my discretion.

VI. Conclusion

- [66] Under s. 35(2) of the PLA, I am satisfied the SROW is invalid and its registration should be cancelled. Therefore, under s. 35(1), I order the cancellation of the SROW.

"Jackson J."

- [1] The reference to development permit UE 9000.3 appears to be in error, since the 1998 Permit, which approved Seabridge's development of the Reef Point Adventure Station had the number UE 9800.3.
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