

CANADA / JUDGMENT

Thompson-Nicola (Regional District) v. Cade

2019 BCSC 1644

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1644 Thompson-Nicola (Regional District) v. Cade

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thompson-Nicola (Regional District) v. Cade,

2019 BCSC 1644

Date: 20191004

Docket: S185307

Registry: Victoria

Between:

Thompson-Nicola Regional District

Plaintiff

And

Christopher Charles Cade and

Paul Christopher Patton

Defendants

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for the Plaintiff:

J. Plonka

Counsel for the Defendants:

C. Aubuchon

Place and Date of Hearing:

Victoria, B.C.

August 27, 2019

Place and Date of Judgment:

Victoria, B.C.

October 4, 2019

- [1] This is a summary trial application by the plaintiff Thompson-Nicola Regional District (the "plaintiff" or "TNRD") seeking an injunction restraining the defendants Christopher Cade and Paul Patton from using their properties as short-term rentals. The plaintiff alleges the short-term rentals are not permitted under a zoning bylaw. The plaintiff also seeks declarations regarding such use.
- [2] The underlying facts are not in dispute and the central issue is interpretation of zoning bylaws and legislation. I am satisfied that I am able to find the facts necessary to decide the issues and it would not be unjust to do so. This matter is appropriate for determination by summary trial application.
- [3] The plaintiff is a regional district pursuant to the Local Government Act, R.S.B.C. 2015, c. 1. The plaintiff currently regulates land use within its boundaries by the Thompson-Nicola Regional District Zoning Bylaw No. 2400, 2012 (the "Current Zoning Bylaw"). The plaintiff previously regulated land use by the Thompson-Nicola Regional District Zoning Bylaw No. 940, 1985 (the "Previous Zoning Bylaw") which was repealed upon adoption of the Current Zoning Bylaw in April 2012.
- [4] Mr. Cade is the owner of the property at 3525 Copper Creek Road (the "Cade Property"). Mr. Patton is the owner of the adjoining property at 3521 Copper Creek Road (the "Patton Property"). The Cade Property and the Patton Property (collectively the "Properties") are waterfront properties on Red Lake. The Properties are within the TNRD and zoned LR-1 (Lakeshore Residential Single-Family Zone).
- [5] Mr. Cade bought the Properties in April 2008 to be used in a venture with his business partner Mr. Patton. They intended to use the Properties as recreational properties and for short-term rentals. Mr. Cade believed the Previous Zoning Bylaw in effect at the time permitted such use. By the end of 2008, Mr. Cade had constructed a cottage on each property. Each cottage contains two bedrooms, one bathroom and cooking facilities. In November 2008, Mr. Cade transferred title to one of the Properties to Mr. Patton.

- [6] It is not in dispute that since late 2008, the defendants have used the Properties for short-term rentals. The defendants require the renters to agree to certain terms and conditions which are discussed further below. Rental records from 2012 to 2018 show that there have been nearly 300 rentals for one or the other of the Properties since 2012. Close to half of these are for three days or less, and the vast majority are for fewer than 10 days. The defendants advertise the Properties together on the internet and have joint rental records even though the Properties are separately owned. Mr. Cade is primarily responsible for the rental of both Properties.
- [7] Mr. Cade and Mr. Patton use the Properties for personal use approximately two weeks per year and allow friends and family to stay in the cottages when they are available.
- [8] In 2010, 2011, and 2016 the plaintiff and Mr. Cade communicated regarding the use of the Properties. The plaintiff issued warning letters and bylaw infraction notices to the defendants, saying that short-term rentals of less than 28 continuous days are not permitted. The defendants disagree with the plaintiff's position. The issue between the parties was not resolved and by resolution the plaintiff authorized this action.

Statutory Injunction

- [9] Pursuant to s. 420 of the Local Government Act and s. 274 of the Community Charter, S.B.C. 2003, c. 26, the plaintiff may bring a proceeding in the Supreme Court to restrain the contravention of a bylaw or a provision of the Local Government Act.
- [10] Section 274 of the Community Charter provides for a statutory injunction, not an equitable injunction. The considerations for an equitable injunction - irreparable harm and the balance of convenience - are not required on an application for a statutory injunction: *Peachland (District) v. Peachland Self Storage Ltd.*, 2011 BCCA 466 at para. 27. Once a local government has established a clear breach of a bylaw, the discretion of the court to refuse a statutory injunction is very limited and will only be exercised in exceptional circumstances: *Vancouver (City) v. Maurice*, 2005 BCCA 37 at paras. 34-35. As a general rule, the duty of a local government to carry out the provisions of a statute or its bylaws is of such a public nature that it cannot be waived, lost or vitiated by mere acquiescence, laches or estoppel: *Langley (Township) v. Wood*, 1999 BCCA 260 at para. 12.
- [11] The defendants are not advancing an argument that there are exceptional circumstances that would justify this Court exercising its discretion to refuse an injunction, nor are the defendants alleging any acquiescence, laches or estoppel. The issue is therefore whether the plaintiff has established a clear breach of the Current Zoning Bylaw.

Overview of the parties' positions

- [12] The plaintiff alleges that the defendants' use of the Properties as short-term rentals is prohibited under the Current Zoning Bylaw.

- [13] The defendants argue they are not prohibited from using the Properties as short-term rentals because they were permitted to do so under the Previous Zoning Bylaw and therefore the short-term rentals are a permitted non-conforming use under the Local Government Act and the Current Zoning Bylaw.
- [14] In response to the defendants' non-conforming use argument, the plaintiff argues that short-term rentals were not permitted under the Previous Zoning Bylaw. In addition, for other reasons concerning the building permit process and the alleged lapse of continuous use of one of the Properties, the non-conforming use exemption does not apply.

Bylaw Interpretation

- [15] It is useful to review some of the principles of bylaw interpretation. Bylaws are interpreted using a broad and purposive approach to give effect to the intention of the enacting body: *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014 BCCA 271 at paras. 9 to 18. In *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494, at para. 13 the Court adopted a passage from Elmer Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67, which was modified to conform to the context of that case:

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

- [16] The parties also referred to the presumption of effectivity. In *Okanagan-Similkameen (Regional District) v. Leach*, 2012 BCSC 63 [Leach] the Court summarized:
- [54] A statute is presumed not to have superfluous words or provisions and the courts should presume that all words were included for a specific purpose and should be given effect. The rule of effectivity was described by Ruth Sullivan in *Driedger on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis, 2008) at 210: "every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose".
- [17] The courts have adopted a liberal approach in interpreting the statutory non-conforming use exemptions in favour of the user: *Leach* at paras. 117-118.

Does the Current Zoning Bylaw prohibit short-term rentals?

- [18] I find that subject to the non-conforming use provisions, the Current Zoning Bylaw prohibits short-term rentals of the Properties. This was not contested by the defendants at the hearing.
- [19] The Current Zoning Bylaw permits only identified uses of land, and all other uses are prohibited:

2.5 General Compliance

No person shall erect, construct, locate, alter, reconstruct or maintain any building or locate or carry on any industry, business, trade or calling, or use any land or building contrary to the provisions of the Bylaw and any use not expressly and specifically permitted by the Bylaw is hereby prohibited.

[20] The LR-1 zone permits the following uses:

11.1 Permitted Uses

In the LR-1 zone, the following uses are permitted on a parcel and all others are prohibited:

Principal Uses

(a) One single family dwelling, and one two family dwelling, or one manufactured home.

Accessory Uses

The following uses are only permitted subject to a principle use existing on the parcel:

- (b) community recreation facilities;
- (c) home based business;
- (d) accessory building; and
- (e) bed and breakfast.

[21] A single family dwelling is defined as:

DWELLING, SINGLE FAMILY means a detached building, used exclusively for residential purposes, consisting of one dwelling unit used or intended to be used as the permanent home or residence of one family.

[22] The short-term rentals do not come within the definition of Dwelling, Single Family, which refers to exclusive use for residential purposes for one family. Nor do the short-term rentals come within any of the other permitted principal or accessory uses.

[23] The short-term rentals do come within the definitions of Rentable Unit and Traveller Accommodation Use which are not listed as permitted uses in the LR-1 zone. Those definitions are:

RENTABLE UNIT means a separate unit which may be either free standing or sharing common walls, containing one or more rooms with self-contained living, sleeping and sanitary facilities and may include cooking facilities, providing temporary accommodation and not residential use.

TRAVELLER ACCOMMODATION USE means a building or group of buildings containing rentable units, used or intended to be used as temporary tourist accommodation for less than 30 consecutive days, with each rentable unit being self-contained, having its own bathroom with a water closet and bath or shower, with or without cooking facilities but does not include a campground or manufactured home park.

[24] The Current Zoning Bylaw permits the continuance of previous lawful non-conforming use as follows:

2.9.1. Subject to the provisions of the Local Government Act governing non-conforming uses, the lawful use of any land, water surface, building or structure existing at the time of the adoption of the Bylaw may be continued.

[25] The issue is therefore whether the short-term rentals were permitted under the provisions of the Local Government Act and the Previous Zoning Bylaw.

Were the short-term rentals permitted under the Previous Zoning Bylaw?

[26] The burden of proving a lawful non-conforming use is on the party asserting such use on a balance of probabilities: Leach at para. 103.

[27] The defendants rely on s. 528(1) of the Local Government Act, which states:

- s. 528 (1) Subject to this section, if, at the time a land use regulation bylaw is adopted,
- (a) land, or a building or other structure, to which that bylaw applies is lawfully used, and
 - (b) the use does not conform to the bylaw,

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

[28] The defendants argue that the short-term rentals come within the definition of Holiday Home or Recreational Cottage ("HHRC"), which is a permitted use in the LR-1 zone.

[29] The relevant provisions of the Previous Zoning Bylaw concerning the LR-1 zone are:

PURPOSE

The purpose of this zone is to permit low density lake oriented residential developments on lakes where such developments are considered suitable.

8.1 PERMITTED USES

The use of any parcel of land in this zone shall be in accordance with the provisions herein and any use of buildings, structures, or land not in accordance with these provisions shall be prohibited:

- (a) Single family dwellings, two family dwellings, mobile homes, holiday homes or recreational cottages;

- (b) Professional practice, homecraft or occupation;
- (c) Accessory buildings;
- (d) Community recreational facilities in conjunction with the lakeshore residential development including marinas, swimming pools, and tennis courts; and
- (e) Golf courses.

[30] Relevant definitions in the Previous Zoning Bylaw are:

DIVISION ONE - DEFINITIONS

1.1 All words or phrases have their normal or common meaning except where they are changed, modified or expanded by the definitions in the Division.

1.10 "Dwelling, Single Family" means a detached building, used exclusively for residential purposes, consisting of one dwelling unit.

1.12 "Dwelling Unit" means one or more rooms with self-contained cooking, eating, living, sleeping and sanitary facilities used or intended to be used as a residence for one or more persons.

1.20 "Holiday Home or Recreational Cottage" means a dwelling which is not used for year-round residential occupancy and which may include cooking, eating, living, sleeping and sanitary facilities.

1.23 "Mobile Home" means a single family dwelling unit equipped with a water closet and a bathtub or shower, waste from which may be disposed of directly into a sewer or ground disposal, and manufactured as a unit or units intended to be occupied in a place other than its place of manufacture on a year-round, long-term basis. It may be designed with detachable towing gear and upon arrival at the site, can be completed and ready for occupancy except for placing on foundations, connections of utilities and some incidental assembly.

1.28 "Motel and Hotel" means a building or group of buildings containing rentable units, occupied or intended to be occupied temporarily by tourists or transients with each unit having its own parking space conveniently located on or off the site and each rentable unit being self-contained, having its own bathroom with a water closet and a bath or shower, with or without cooking facilities. Access may be by individual outside access for each unit or by common access and hallways. Motel and hotel includes motor hotel, auto court and resort, and may involve a restaurant, coffee shop and entertainment establishments.

1.32 "Rentable Unit" means a separate unit which may be either free standing or sharing common walls with other units used or intended to be used for the accommodation of one or more persons on a short term or transient basis.

[31] The defendants argue that short-term rentals come within the definition of HHRC because:

- a) HHRC is a separate and distinct use from other listed permitted uses such as Dwelling, Single Family and Mobile Home. The plaintiff intended to create a different category of building use when it crafted the definition of HHRC;
 - b) there are differences between the definition of HHRC and the definitions of other permitted uses in s. 8.1(a) of the Previous Zoning Bylaw, which indicate that the plaintiff did not intend HHRC to be only for residential use. Dwelling, Single Family means a detached building used exclusively for residential purposes. In contrast, the definition of HHRC omits similar language regarding exclusive use for residential purposes. Mobile Home, another permitted use in the LR-1 zone, is also defined as a single family dwelling, and refers to long term use. HHRC is not defined as a single family dwelling, but only a dwelling;
 - c) there is nothing in the definition of HHRC that prohibits short-term rentals;
 - d) a holiday home or recreational cottage is generally understood to be a dwelling for temporary and recreational use that is likely to be rented out during portions of the year. Absent a prohibition on short-term rentals, a single family dwelling can include short-term rentals: Leach at paras. 112 and 113;
 - e) there are other permitted uses such as professional practice, homecraft or occupation, which are not residential and which also show the plaintiff intended to permit non-residential uses; and
 - f) Mr. Cade had conversations with the plaintiff's staff when he was applying for building permits and he advised that he intended to use the Properties for short-term rentals. No staff advised him such use was not permitted. The defendants do not rely on this for an estoppel argument, but to point out that it was apparently not obvious to the plaintiff's staff that, as the plaintiff alleges, such activity is not permitted.
- [32] The plaintiff argues that short-term rentals do not come within the definition of HHRC because:
- a) the stated purpose of the LR-1 zone is to permit low density residential developments;
 - b) the definition of HHRC states that it is a dwelling. The definitions of Dwelling, Single Family and Dwelling Unit refer to residence or residential use. Therefore, a HHRC was intended to be a secondary residence or vacation home;
 - c) the common meaning of "residential" and similar words is reviewed in Leach. The rental of a detached dwelling to short-term paying guests is not a normal and customary residential use: Leach at para. 71;
 - d) the Previous Zoning Bylaw distinguishes between residential use and temporary tourist use. It has a specific definition for Rentable Unit and Motel and Hotel. Had the plaintiff intended to include these as permitted uses in the LR-1 zone, it would have listed them;

- e) the definition of HHRC does not include Rentable Unit, which is defined as accommodation for short-term or transient use;
- f) the short-term rentals come within the definition of Motel and Hotel. The definition of Motel and Hotel refers to "Rentable Units" and temporary occupancy by tourists or transients. Although short-term rentals of a cottage are not what is colloquially understood to be a motel or hotel, the Previous Zoning Bylaw states in s. 1.1 that "[a]ll words or phrases have their normal or common meaning except where they are changed, modified or expanded by the definitions in the Division";
- g) the terms of use of the contract the defendants require occupants to sign when renting the cottages support the conclusion that the short-term rentals come within the definition of Motel and Hotel, as the terms refer to a "license" and "not a tenancy" for "transient occupancy, akin to a hotel accommodation". Those terms are:

The Licensee acknowledges that this is NOT a tenancy for the Property. The Property is not rented for more than 30 days, and is taxed and treated as transient occupancy, akin to a hotel accommodation.

Property laws do not apply to the license granted herein, and the Licensee may be removed as a Trespasser immediately upon termination of this license. The Property is rented on regular short-term periods, and for a significantly higher rate than a non-vacation rental. Often a licensee is scheduled to begin vacation in the Property on the same day as the check-out of another prior licensee. If Licensee stays even one additional day, we would face significant logistical problems with the next licensee, including possible liability. As such, Licensee agrees to vacate immediately on the check-out day, at designated time

- h) when Mr. Cade spoke with the staff of the plaintiff in 2008, the discussions he had were with the building inspector, and not the zoning bylaw officers, so it is not surprising that the building inspector did not comment on zoning issues.

[33] In response, the defendants argue that short-term rentals do not come within the definition of Motel and Hotel. That definition does not include a dwelling unit or single family dwelling. If the short term rentals do not come within Motel and Hotel, they must come within HHRC as that definition best captures the use.

[34] For the following reasons, I find that the short-term rentals do not come within the definition of HHRC, and that therefore short-term rentals are not a lawful use under the Previous Zoning Bylaw.

[35] In interpreting the bylaw, it is important to keep in mind the plaintiff's purpose in enacting the bylaw. The stated purpose of the LR-1 zone is to "permit low density lake oriented residential developments". The purpose does not mention commercial use.

- [36] I agree with the defendants that a separate category of permitted use, HHRC, was created, and that the words of that definition must be given effect. However, I find that: the definition of HHRC itself and in comparison to other defined terms; its placement in subsection s. 8.1(a) along with other residential uses; and the commonly understood meaning of residential; all point to a HHRC being a vacation or seasonal home, used as a residence for part of the year, and does not include short-term rental use.
- [37] The initial words defining a HHRC state that it is a "dwelling". The definition does not refer to a Dwelling Unit. Dwelling is not defined. Dwelling Unit is defined, and refers one or more rooms "with self-contained cooking, eating, living, sleeping and sanitary facilities". The definition of HHRC refers to a dwelling "which may include cooking, eating, living, sleeping and sanitary facilities". Thus, the use of the word "dwelling" in the definition of HHRC, rather than Dwelling Unit, refers to a dwelling that may not include all amenities.
- [38] Even though "dwelling" and Dwelling Unit are separate, did the plaintiff intend to incorporate residence into the meaning of dwelling in the definition of HHRC? In my view, the answer is yes. Dwelling Unit refers to use "as a residence for one or more persons". The definition of HHRC refers to a dwelling "which is not used for year round residential occupancy". Those qualifying words suggest that the word "dwelling" must be for residential use, otherwise the qualification would be unnecessary. Further, the qualification does not say "not used for residential occupancy" or "not used for exclusive residential occupancy". In my view, the qualifying words refer to the temporal aspects of residency.
- [39] There is no reference to Rentable Unit in the definition of HHRC, nor in the definitions of any of the other permitted uses in subsection 8.1(a). The definition of Rentable Unit refers to short-term or transient use. In my view, if the plaintiff had intended to include such use, it would have included that term in the definition of HHRC.
- [40] All of the other permitted uses in subsection 8.1(a) of the Previous Zoning Bylaw refer to residential use. A Mobile Home is defined as a single family dwelling. The definition of Dwelling, Single Family refers to residential use. Further, the definition refers to occupation on a year-round, long-term basis.
- [41] "Residential" and "residence" are not defined in the Previous Zoning Bylaw. Pursuant to s. 1.1, words not defined are to be given their "normal or common" meaning. In *Leach*, the word "residence" was defined in one of the bylaws as referring to a "permanent or seasonal home or lot", but the Court also reviewed previous cases on the meaning of similar words. The case authorities support the conclusion that the word residence means a person's home for a considerable length of time, where the person actually lives, and that the principal use of a detached building by short-term paying guests is not a normal or customary residential use. In *Leach*, the Court stated:

[67] The meaning of the terms "residential" and "reside" were considered by the BCCA in *Kamloops (City) v. Northland Properties Ltd.*, 2000 BCCA 344 where the Court of Appeal stated as follows at para. 14:

... they refer to having one's home in a particular place "for a considerable length of time", and define "residential" to mean "occupied mainly by private houses"...

[68] Black's Law Dictionary, 8th ed. (St. Paul: West Pub. Co., 2004) at 1335 defines residence as:

The act or fact of living in a given place for some time. 2. The place where one actually lives, as distinguished from a domicile. Residence usually just means bodily presence as an inhabitant in a given place; domicile usually requires bodily presence plus an intention to make the place one's home. A person thus may have more than one residence at a time but only one domicile. Sometimes, though, the two terms are used synonymously. ...

[69] In *Whistler (Resort Municipality) v. Miller*, 2001 BCSC 100, the primary authority relied upon by the Regional District, the term "residential" was expressly defined in the bylaw as meaning a fixed place of living, excluding any temporary accommodation, to which a person intends to return when absent. The term "tourist accommodation" was also defined as meaning a building containing one or more habitable rooms or dwelling units that are used primarily for temporary lodging by visitors. The Court held at para. 23 that it was therefore:

...untenable to suggest that the rental of a detached dwelling to short term paying guests is a normal and customary residential use. ...this is particularly true in the context of the Bylaw where Residential/Tourist Accommodation Zones have been established and in which detached dwelling and tourist accommodation uses are expressly permitted.

[70] In the 2008 Zoning Bylaw, unlike the bylaw considered by the Court in *Whistler*, there is no express provision to oust temporary accommodation as a permissible use in the RS1 Zone. This renders the analysis in *Whistler* distinguishable.

[71] I do accept, nonetheless, that on the principles articulated by the Court in *Whistler*, the rental of a detached dwelling to short-term paying guests is not a normal and customary residential use in the sense of being the principal use for this type of property.

[42] The defendants argue that absent a prohibition on short-term rentals, a single family dwelling can include short-term rentals, and cites the Court's finding in *Leach* at paras. 112-113 in support of that proposition. In *Leach*, the definition of single family dwelling was different than that here, and did not include any reference to residential use. While it is possible that in certain circumstances a single family dwelling can include short-term rentals, it depends on the wording of the bylaw. As stated in *Leach* at para. 53, "each bylaw must be interpreted within its own particular context and in light of its own wording".

[43] No authority was cited by the defendants for the proposition that a holiday home or recreational cottage "is generally understood to be a dwelling for temporary and recreational use that is likely to be rented out during portions of the year". Given the lack of

any authority or references, I am not satisfied there is a general understanding that the dwelling is likely to be rented out. However, even if that were true, it is not the generally understood meaning that applies. Section 1.1 of the Previous Zoning Bylaw states that all words or phrases have their normal or common meaning "except where they are changed, modified or expanded by the definitions". In this case, HHRC is defined and it is that definition which governs.

- [44] The Previous Zoning Bylaw does permit other uses which are not residential in the LR-1 zone. Recreational facilities and golf courses are not residential, but may be amenities consistent with residential use. "Professional practice, homecraft or occupation" are not residential, but a later clause in the Previous Zoning Bylaw states that they must be carried out primarily by residents and confined to the interior of a single family dwelling, again consistent with the plaintiff's stated purpose that the LR-1 zone be residential. All of these other uses are listed under separate subheadings from "single family dwellings, two family dwellings, mobile homes, holiday homes or recreational cottages", which I find all refer to or incorporate residential use in their definitions.
- [45] The plaintiff argues the short-term rentals come within the definition of Motel and Hotel. Conversely, the defendants argue the short-term rentals do not come within Motel and Hotel and therefore come under HHRC as this best captures the use. As the defendants argue that short-term rentals come only within the definition of HHRC, it is not necessary for the plaintiff to show the short-term rentals come within any other definition because any non-listed use is prohibited. In *Leach*, the defendant owner argued that the plaintiff had to show that the alleged prohibited use fell within another class of use, and if it did not, it was presumptively permitted despite a general clause prohibiting all uses unless specifically permitted. The Court rejected that argument:
- [63] I am not persuaded that the general prohibitive clause is only engaged if the challenged use more appropriately fits in another class of uses in another zone. Rather the appropriate inquiry is to examine what is permitted in a given zone; any other uses are prohibited.
- [46] In this case, it is the plaintiff who is making the argument that the short-term rentals fall within another class of use that is not specifically permitted. It is not necessary to determine whether the short-term rentals come within the definition of Motel and Hotel. However, I will address this argument for completeness.
- [47] In my view, the short-term rentals do come within the definition of Motel and Hotel. While I recognize that the cottages are not what are colloquially understood to be a motel or hotel, it is the definition in the bylaw which governs. Each cottage is a building which is being used as a Rentable Unit for temporary tourist or transient use. The building permit documents show there was parking, and the cottages meet the requirements for being self-contained and having bathing facilities. Further, the defendants' terms and conditions of use reinforce this conclusion by stating that the "license" is "akin to a hotel". I note that the definition of Motel and Hotel in the Previous Zoning Bylaw is similar to the definition of Traveller

Accommodation Use in the Current Zoning Bylaw.

- [48] In making this finding, I acknowledge the Court in Leach came to a different conclusion (at paras. 108-9), and found that the short-term rentals for five weeks during the summer months did not come within the definition of motel or come within the meaning of hotel. However, in that case the rental use was different than here and the definition of motel included "temporary accommodation to the travelling public" and hotel was not defined.
- [49] In conclusion, I find the defendants' short-term rentals of the Properties do not come within the definition of HHRC and are not a lawful use under the Previous Zoning Bylaw. As a result, the short-term rentals are not a non-conforming use under s. 528(1) of the Local Government Act and s. 2.9.1 of the Current Zoning Bylaw. I find the plaintiff has established a clear breach of the Current Zoning Bylaw and an injunction should be ordered.
- [50] Given my findings, it is not necessary to address the other arguments made by the plaintiff, but I will do so for completeness. The following discussion assumes, as an alternative, that the short-term rentals do come within the definition of HHRC.

Did the building permit issues render the use unlawful?

- [51] The relevant portions of subsections 528(2) to (4) of the Local Government Act state:
- s. 528 (2) If a non-conforming use authorized under subsection (1) is discontinued for a continuous period of 6 months, any subsequent use of the land, building or other structure becomes subject to the land use regulation bylaw.
- (3) The use of land, a building or other structure, for seasonal uses or for agricultural purposes, is not discontinued as a result of normal seasonal or agricultural practices, including
- (a) seasonal, market or production cycles,
- (4) A building or other structure that is lawfully under construction at the time of the adoption of a land use regulation bylaw is deemed, for the purpose of this section,
- (a) to be a building or other structure existing at that time, and
- (b) to be then in use for its intended purpose as determined from the building permit authorizing its construction.
- [52] Evidence at the hearing established that neither Mr. Cade nor Mr. Patton had obtained an occupancy certificate. In April 2008 Mr. Cade applied for a building permit to build on each property an "820 square foot recreational cabin". These were approved in May 2008. On the building permit applications, in the section for "Type of Building", the "Residential" box is ticked. The building permit applications also contain an acknowledgement by the applicant that issuance of a building permit is not a representation by the plaintiff that the project complies with "other applicable Regional District Bylaws".

- [53] The building permit for Mr. Cade's property describes the "Application Type" as "Dwelling" and "Use" as "SFD", which stands for Single Family Dwelling. The building permit for the Patton property, which is completed by a different employee of the plaintiff, describes both of these categories as "SFD". Both building permits also state that the "Zone" is "LR-1". Under "Comments" in the building permit for the Cade Property, it states: "A Single Family Dwelling is a permitted use in the LR-1 (Lakeshore residential Single Family) Zone of Bylaw No. 940".
- [54] Mr. Cade states that except for some minor items, the cottages were completed prior to the start of the winter in 2008. A final inspection was not completed and occupancy certificates were not obtained, and in June 2010 the building permits expired. In early 2012, the plaintiff realized occupancy certificates had not been issued and notified the defendants. This resulted in Mr. Cade renewing the building permits for both Properties in March 2012, a month prior to the Current Zoning Bylaw being adopted. The renewed building permits expired in March 2013 without occupancy certificates being granted. In March and June 2013, the plaintiff inspected the Properties. The plaintiff acknowledges in argument that, with the exception of a graspable handrail in each cottage, only two minor deficiencies had not then been remedied for each cottage. In December 2013 the plaintiff wrote to Mr. Cade advising that his building permit had expired without a final inspection. The plaintiff has no record of any further discussions with Mr. Cade or Mr. Patton regarding these deficiencies. As a result, occupancy certificates were never granted. The plaintiff has never commenced enforcement proceedings as a result of the failure to obtain the occupancy certificates. Mr. Cade swears that he intends to finish the construction and will apply for the occupancy certificates.
- [55] The Thompson-Nicola Regional District Building Regulations Bylaw No. 2066, 2055 (the "Building Bylaw") prohibits occupancy without an occupancy certificate:
- 16.1 No person shall occupy or use a building or structure or part of a building or structure until an occupancy certificate has been issued.
- [56] The plaintiff argues that at the time the Current Zoning Bylaw came into effect:
- a) no occupancy certificates had been issued, and the cottages could not be lawfully used within s. 528(1);
 - b) the cottages were lawfully under construction pursuant to the renewed building permits. Buildings under construction are only entitled to lawful non-conforming use protections to the extent set out in s. 528(4);
 - c) the building permit for each cottage only approved use as a single family dwelling and not as short-term rentals or as a HHRC. Section 528(4)(b) specifically incorporates the "intended purpose as determined from the building permit". The plaintiff refers to *Fritz v. Victoria (City)*, [1990] B.C.W.L.D. 1570 (S.C.);

- d) when the building permits expired in March 2013 the buildings ceased being lawfully under construction and therefore were not lawfully used; and
- e) alternatively, by September 2013 when six months had elapsed without lawful construction resuming, the basis on which the Properties could have had lawful non-conforming use also lapsed.

[57] The defendants argue that:

- a) "lawfully used" in s. 528(1) refers to lawful under zoning and land use bylaws and not other bylaws. The defendants rely on *Central Saanich (District) v. Amaryllis Enterprises Inc.*, [1991] B.C.J. No. 3461 [Amaryllis]. Zoning bylaws cannot be used to enforce other bylaws;
- b) at the time the Current Zoning Bylaw came into effect, the cottages were not under construction. The cottages had been built by late 2008 and had already been in use as short-term rentals for three years. Section 528(4) is intended to apply to buildings that are under construction and are not able to be used for their intended purpose because of the construction. It is not intended to capture circumstances where work is substantially complete and the buildings are being used, but the occupancy certificates have not been obtained; and
- c) even if s. 528(4) applies, the plaintiff is reading the building permits too narrowly. The building permits should be interpreted broadly in light of the description of work in the building permit applications which refer to recreational cabins and the permits themselves which refer to the LR-1 zone. The building permits need not state that the cottages would be used for short-term rentals or HHRC's. Further, Mr. Cade should not have had to critically examine the permits issued to determine if "SFD" would permit a HHRC. If the plaintiff wanted to curtail short-term rentals, it could have inserted such restrictions into the building permits. Further, there is no evidence that the plaintiff distinguishes between a single family dwelling and a HHRC when it issues a building permit. Any doubt as to the prior permitted use ought to be resolved in favour of the defendants. The plaintiff is using s. 528(4) as a sword. It is a protective provision for owners.

[58] In reply, the plaintiff distinguishes Amaryllis and says it addressed a business license. Unlike building and zoning bylaws, the plaintiff has a degree of discretion in granting business licences. Business licences regulate the user; building and zoning bylaws regulate the use of land.

[59] I am persuaded that previous case authority supports the proposition advanced by the defendants that lawful use in s. 528(1) refers to the previous zoning and land use bylaws and not separate building bylaws. In Amaryllis, the defendant had failed to obtain a business licence and the District argued that this rendered the previous non-conforming use under the zoning bylaw to be unlawful. The Court drew a distinction between business licence bylaws and zoning bylaws. The Court stated at para. 38:

I am persuaded on the basis of the reasoning in Grandview that the words "lawfully used" as contained in s. 970(1) of the Municipal Act [similar wording to s. 528(1)] should be confined to lawful with respect to land use bylaws and not extraneous business licensing regulations. The appropriate remedy with respect to the lack of a business licence lies within the penalty provisions of By-law No. 816, s. 12, and not in the form of an injunction.

- [60] While zoning and building bylaws may have overlapping subject areas, I am not persuaded that this is sufficient to import compliance with building bylaws into the concept of lawful use for the purposes of s. 528(1). The plaintiff has remedies available if it wishes to enforce the Building Bylaw.
- [61] Both counsel advised they were unable to find any case authority on whether a building that is essentially built and is being used, but has not yet been issued an occupancy permit is "under construction". They advised the case law they did find consisted of scenarios on the other end of the construction timeline where construction was about to or just beginning and parties argued the "commitment to use" doctrine.
- [62] Even though building permits were in existence and no occupancy permits were yet issued at the time the Current Zoning Bylaw was adopted, in my view, the cottages were not "under construction" within the meaning of s. 528(4). The purpose of s. 528(4) is to maintain the status quo. It protects owners who have not yet completed construction and are not able to establish actual use for the intended purposes at the time of the bylaw change. That is not the situation here. It is not logical to deem a building to be in existence and to deem a property to be in use, when in this case, the cottages were in fact already in existence with some minor deficiencies and were in fact already being used. This illustrates why s. 528(4) is not applicable.
- [63] Even if the cottages were under construction within s. 528(4), I do not agree that because the building permits were issued for single family dwellings that any other consistent use, such as a HHRC, is not permitted. The plaintiffs are reading the building permits too narrowly. The building permits also refer to the LR-1 zone. If the plaintiff's reasoning were correct, then a person who was building a single family dwelling which was intended to be used as a permitted HHRC could not use the home as such. Further, there is no evidence that the plaintiff distinguishes between a single family dwelling and a HHRC when it issues building permits.
- [64] Fritz is distinguishable from the situation here. In Fritz, the owner was building an addition to a house which went beyond what was authorized by the building permit. The house was therefore not lawfully under construction. The Court held that the homeowner could not claim a lawful non-conforming use when he had made changes to the construction authorized under the building permit. In this case, Mr. Cade built what was authorized by the building permits.

- [65] In *Newton v. Victoria (City)*, 2018 BCSC 728, a building was lawfully under construction at the time of the bylaw amendment, and short-term rental use was previously a permitted use. The building permit stated that the building was for a "residential complex", but also noted it was in Zone CA-3. The City argued that the use of the residential units for short-term rentals was not an intended purpose as determined from the building permit. The Court rejected the City's argument:
- [46] The building permit allows for a residential complex within Zone 3-CA. In my view, a plain reading of s. 528(4), the issue to be determined is not whether short-term rental is the Building's intended purpose as determined from the building permit. Rather, the issue to be determined is whether residential complex in Zone CA-3 is the building's intended purpose as determined from the building permit. That is what the building permit authorized and that is what should be considered, not whether the building permit expressly stated that some units may be used for short-term rentals.
- [66] In this case, the cottages' intended purpose as determined from the building permits, is single family dwellings in the LR-1 zone. A use consistent with that, such as a HHRC that is a single family dwelling, is permitted.
- [67] In conclusion, I do not accede to the plaintiff's arguments that the use was unlawful because the defendants did not have an occupancy certificate, or that the cottages were under construction. Even if the cottages were under construction, I do not agree that the intended purpose as determined from the building permits was restricted solely to use as a single family dwelling, and not a use consistent with that such as a single family dwelling to be used as a HHRC.

Did the defendants cease continuous use for six months?

- [68] The plaintiff argues that the defendants had discontinued short-term rental use of one of the cottages for six months and therefore pursuant to s. 528(2) any subsequent use of that cottage becomes subject to the Current Zoning Bylaw. The plaintiff points to a gap of just over six months where there was no rental of one of the cottages, and says there is no evidence of seasonal cycles.
- [69] The defendants say they have continuously used the Properties for short-term rentals since 2008, and argue they cannot control if they do not get a rental in a certain time period. The defendants do not argue there were seasonal cycles. They argue if there is any ambiguity, the non-conforming use provisions should be given a liberal interpretation in their favour.
- [70] In *Leach*, the Court stated:
- [118] The liberal interpretation in favour of users, noted in *Sunshine Coast*, also applies with respect to whether a use has been discontinued. The courts have taken a broad approach to "use" in order to avoid the expiration of a lawful non-conforming use through discontinuance.

[120] In *Osoyoos (Town) v. Nobbs*, 2002 BCSC 1743, aff'd 2004 BCCA 431, Mr. Justice Meztger considered whether the use of the owner's travel trailer for residential purposes and the use of the lot as a recreational vehicle park qualified as lawful non-conforming use. The previous owners and present owners had used the site every summer for camping. However, one of the issues raised was the fact that the owners only used the land for "summer camping". Hence, the Town argued that the prior use was discontinued under s. 911 of the LGA, as there were periods of longer than six months that had elapsed between each camping use. Nevertheless, the Court found that there had been on-going use protected by s.911. The Court concluded as follows:

13. The purpose of allowing a non-conforming use to continue after a bylaw has been passed is to protect the status quo. This lot is to be used for summer camping, and that use has never changed. I find that the lapse provisions only apply if this lot was not used for camping in the May through September period in any one year. There has never been a thirty day or six month lapse of that particular use. The status quo is preserved ...

(emphasis mine)

[121] On appeal, Saunders J.A. writing for the Court, upheld the trial judgment. She noted as follows with respect to the proper approach to determining the relevant "use" in the context of an alleged discontinuance:

20. In my view the issue here on "use" is not whether the use of this lot meets a particular definition in a bylaw, but whether the present use is, in substance, the same as it was in 1973. Setting aside for the moment the issue of degree, in my view the answer is yes. The trial judge found as a fact, amply supported by evidence, that "[f]riends and relatives of the owners have brought tents, trailers and recreation vehicles onto the property every year since it was first purchased in 1969". The evidence establishes that the present owners use the trailer, still capable of road use, and that friends bring recreational vehicles and tents onto the property....Here, on the findings of fact by the trial judge, supported by the evidence, this lot was a "private camping site" available for all degrees of camping in 1973 to family and friends of the owners and it remains so today. That being the case, one cannot say there has been a discontinuance of that use so as to sever the legality of the non-conforming use under s. 911(1) of the Act. (emphasis added)

[71] In *Leach*, the Court concluded, "it emerges from the jurisprudence that it is the actual use in the general sense that matters with respect to continuance of lawful non-conforming use" (para. 124).

[72] Reviewing the rental records in this case, I find there has been continuous use of the Properties as short-term rentals. The use prior to the adoption of the Current Zoning Bylaw was in substance the same as it was after the adoption.

[73] I therefore do not accede to the plaintiff's argument that the non-conforming use provision ceased to apply because the use was discontinued for six months.

[74] Before concluding this area, I will address an evidentiary argument made by the plaintiff, but only with respect to the continuous use issue. Mr. Cade referred to rental records from 2012 to date. These were produced in this litigation and appended to an affidavit sworn by a representative of the plaintiff. Even though the plaintiff and defendants agree the Properties have been used for short-term rentals since late 2008, the plaintiff argues that Mr. Cade did not explicitly state in his affidavit that the contents of the rental records are true, and did not establish that these are business records under the business records exception of the Evidence Act, R.S.B.C. 1996, c. 124. The plaintiff says that Mr. Cade's statement that the cottages have been continuously used as short-term rentals is "conclusory". In my view, although Mr. Cade did not use the words "the contents of the rental records are true", it is clear that is what he meant. Mr. Cade said the records are "the best record we have of the rental history". Further, the plaintiff has relied on these documents to show the extent of the rentals and that there is a six month gap.

Order

[75] This court declares that Christopher Charles Cade has breached the Current Zoning Bylaw by permitting his property at 3525 Copper Creek Road, Thompson-Nicola Regional District, legally described as:

Lot 14 Section 24 Township 22 Range 21 West of the 6th Meridian Kamloops Division Yale District
Plan 22483 PID 006-835-023

to be used for an unlawful purpose, being Traveller Accommodation Use, contrary to the Current Zoning Bylaw.

[76] This court declares that Paul Christopher Patton has breached the Current Zoning Bylaw by permitting his property at 3521 Copper Creek Road, Thompson-Nicola Regional District, legally described as:

Lot 15 Section 24 Township 22 Range 21 West of the 6th Meridian Kamloops Division Yale District
Plan 22483 PID 006-835-031

to be used for an unlawful use, being Traveller Accommodation Use, contrary to the Current Zoning Bylaw.

[77] The defendants Christopher Charles Cade and Paul Christopher Patton, and anyone else with notice of this Order, are permanently restrained and prohibited from using either the Cade Property or the Patton Property for Traveller Accommodation Use contrary to the Current Zoning Bylaw.

"Norell J."

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