

CANADA / JUDGMENT

Vida (Re)

2021 BCSC 1444

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1444 Vida (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vida (Re),

2021 BCSC 1444

Date: 20210723

Docket: S211030

Registry: New Westminster

In the Matter of section 35 of the Property Law Act, R.S.B.C. 1996, c. 377 and amendments thereto

And

In the Matter of the Cancellation of Restrictive Covenant Registered in the Land Title Office under Charge Number BX430081 and Statutory Right of Way registered in the Land Title Office under Charge BX430082 and Rent Charge registered in the Land Title Office under Charge BX430083 all against the Lands and Premises located at 3690 Victoria Drive, Coquitlam, British Columbia, more particularly known and described

as Parcel Identifier: 007-606-532 Lot "D" Section 17 Township 40 New Westminster District Plan 15191

And

In the Matter of the Application by Steve Vida

Before: The Honourable Justice Lamb

Reasons for Judgment

Counsel for Petitioner:

B.P. Kaminski

Counsel for Respondent:

B.J. Friesen

Place and Date of Hearing:

New Westminster, B.C.

June 3, 2021

Place and Date of Judgment:

New Westminster, B.C.

July 23, 2021

Introduction

- [1] This is a petition to cancel a restrictive covenant, statutory right of way and rent charge in favour of TLC The Land Conservancy of British Columbia ("TLC") that are registered against a residential property in Coquitlam, B.C. The restrictive covenant generally preserves the property "as is" so that it can be used as a bird and wildlife sanctuary.
- [2] The owner says the restrictive covenant is obsolete. He says that the neighbourhood surrounding the property has been or will soon be redeveloped in a way that frustrates the purpose of the restrictive covenant. The owner also relied on two alternate grounds for cancelling the restrictive covenant.
- [3] TLC opposes the removal of the charges and argues that this application is premature. Alternatively, TLC says that the restrictive covenant is far from obsolete and that the protection of urban green space to accommodate birds and wildlife is more critical than ever as densification continues apace.
- [4] The City of Coquitlam took no position on the petition but filed an affidavit from a municipal employee to provide the City's perspective on events in which it was involved.
- [5] For the reasons that follow, I find that the restrictive covenant should not be cancelled as the petitioner has failed to satisfy any of the conditions for cancellation set out in s. 35(2) of the Property Law Act, R.S.B.C. 1996, c. 377 and amendments thereto.

Background

- [6] In 1968, the petitioner Steve Vida (the "owner") and his wife Donna Vida purchased a bare lot at 3690 Victoria Drive in Coquitlam, B.C. (the "Property"). The Property is nearly two acres in size. In 1972, they built a house and lived there together until Mrs. Vida passed away in 1997. Mr. Vida, now 95 years old, continues to live in the house on the Property.

- [7] In support of his petition, Mr. Vida deposed that he and his wife particularly enjoyed viewing the birds and other wildlife that would frequent the Property. Mr. Vida started a bird-feeding routine which resulted in his buying 40 pounds of black sunflower seeds every two weeks so that he could fill the various birdfeeders on the Property.
- [8] After Mrs. Vida passed away, Mr. Vida began to look for a way to keep the Property in its current condition so that the birds and wildlife could continue to use and enjoy the Property. Mr. Vida discovered that TLC had covenants and other instruments that could be registered against title that would restrict future development and preserve the Property in its current state.
- [9] TLC is a non-profit, charitable land trust working to protect BC's natural and cultural heritage. As of 2005, TLC was designated by the Minister of Sustainable Resource Management as a person authorized to accept covenants and statutory rights of way under ss. 218 and 219 of the Land Title Act, R.S.B.C. 1996, c. 250. According to TLC's Executive Director, Cathy Armstrong, TLC relies primarily on such covenants and on gifts of land and capital by donors in order to carry out its mandate. Ms. Armstrong asserts that all types of properties are suitable for TLC's conservationist actions, though TLC is currently placing a high priority on the preservation of urban green space (of which the Property is an excellent example), as that type of land is quickly disappearing as more and more development occurs.
- [10] In furtherance of his plan, Mr. Vida confirmed that the Coquitlam Foundation was prepared to own and manage the Property as a bird and wildlife sanctuary after his death. Mr. Vida understood at the time that TLC did not have the financial means to take on that role. In 2005, Mr. Vida changed his will to bequeath the Property to the Coquitlam Foundation and granted a conservation covenant and statutory right of way to TLC. The conservation covenant included a rent charge in favour of TLC to ensure that the Property remained unchanged. Mr. Vida deposed that he would not have agreed to the restrictive covenant, statutory right of way and rent charge if the Property could not be maintained and used as he wanted.
- [11] In 2012, the Coquitlam Foundation informed Mr. Vida that it was no longer willing to accept the Property under the terms and conditions originally discussed. Mr. Vida then looked for another entity that would be willing to own the Property and preserve it as a bird and wildlife sanctuary after this death.
- [12] In the fall of 2012, Mr. Vida approached the City of Coquitlam to find out if the City would allow him to donate the Property to the City on the basis that it would be used as he intended. After protracted negotiations, talks between Mr. Vida and the City ended in July 2016. The biggest stumbling block to the negotiations was the City's insistence on and Mr. Vida's resistance to public access to the Property.

- [13] After July 2016, Mr. Vida looked for other charities or organizations that would agree to own and manage the Property as a bird and wildlife sanctuary after his death. Mr. Vida does not detail those efforts, but he says in his affidavit made December 18, 2018, that he was unable to find a party willing to preserve the Property as he intended.
- [14] In April 2018, Mr. Vida's niece, Terry Vida, contacted TLC to ask about removing the restrictive covenant, as she believed the Property would sell for less if the restrictive covenant remained in place. Counsel for Mr. Vida advised the Court that Mr. Vida has changed his will such that the Property is now bequeathed to his niece. Despite Terry Vida's inquiry to TLC, the petition asserts that Mr. Vida "has always intended that the Property be kept in its current state and be used in perpetuity as a bird and wildlife sanctuary."
- [15] It is not clear whether Mr. Vida investigated the possibility of donating the Property to TLC at any point after 2012. In response to the petition, TLC has indicated a willingness to own the Property if Mr. Vida chooses to donate it to TLC.
- [16] Mr. Vida filed this petition in February 2019 to cancel and discharge some or all of the restrictive covenant.

The Conservation Covenant

- [17] In March 2005, the restrictive covenant, statutory right of way and rent charge (collectively, the "agreement") were registered on the Property's title at the Land Title Office. The agreement specifically provides that it is binding on Mr. Vida and any subsequent owner. Mr. Vida acknowledged that he obtained independent tax advice and that he was advised by TLC to obtain legal advice before entering into the agreement.
- [18] Pursuant to the agreement, the parties agreed that the Property "contains significant amenities, including flora, fauna and natural features, of great importance to [Mr. Vida], to [TLC] and to the public." They also agreed that a statutory right of way pursuant to s. 218 of the Land Title Act was necessary for TLC to fulfill its obligations under the agreement.
- [19] The parties agreed that the general intent of the agreement was:
- (a) to protect, preserve, conserve and maintain [the Property] and the Amenities [defined to include any natural, scientific, environmental, wildlife, plant life or cultural value relating to the Property] in a natural state, while accommodating education and human residential use of the land;
 - (b) to prevent any occupation or use of [the Property] that will significantly impair or interfere with the natural state of [the Property] or the Amenities.
- [20] The agreement was to be perpetual in order to "reflect the public interest in the protection, preservation, conservation and maintenance of the natural state of [the Property] and the Amenities for ecological and environmental reasons."

Restrictions on use of the Property

- [21] The agreement prescribes restrictions on how the owner can use the Property and what changes require TLC's approval. Specifically, the Property can only be used as a private residence, a rental property or an educational site with a caretaker's residence. The Property must not be subdivided. Alterations to the Property that would have a detrimental impact on its use as a wildlife habitat (for example, removing trees, depositing waste or soil, or constructing buildings) are prohibited without written approval from TLC, the covenant holder.
- [22] On the other hand, Mr. Vida reserved the right to use, occupy and maintain the Property in any way not expressly precluded and in a manner consistent with the intent of the agreement. This included Mr. Vida's right to maintain or replace the existing residence and outbuildings, to allow education and nature interpretation on the Property and to enhance the wildlife environment by placing bird feeders on site. Mr. Vida remained responsible for all costs and liabilities related to ownership and use of the Property.
- [23] In order to ensure compliance with the agreement, Mr. Vida granted TLC a license and statutory right of way to inspect the Property at least once a year and to preserve the Property to the condition it was in as of 2005. If TLC believed that Mr. Vida had breached the agreement, TLC could serve notice on Mr. Vida requiring him to remedy the breach, or TLC could remedy the breach at Mr. Vida's expense. The agreement includes a perpetual rent charge as security for Mr. Vida's obligations under the agreement that ranks in priority to all other financial charges and encumbrances registered against the Property. The rent charge is granted under s. 219 of the Land Title Act as an integral part of the statutory covenant created by the agreement and as a fee simple rent charge at common law.

Baseline Inventory Report

- [24] Schedule A to the agreement, the "Baseline Inventory Report" dated April 14, 2004, objectively described the Property and Amenities as of the date of the agreement. The Baseline Inventory Report states that part of the Property is covered by forest and that Mr. Vida added native plants and bird feeders to the lawn and ornamental garden to make them more appealing to wildlife. In addition to the house and carport, there was a greenhouse and shed. The Report indicates that the owner's main goal is to leave the vegetation on the Property in its natural state with a secondary goal of improving the habitat for wildlife by controlling invasive species and adding more native plants or structures as appropriate.
- [25] The Baseline Inventory Report describes the ecological significance of the Property as follows:

Overall, the significance of the Property derives from the fact that it is a relatively undisturbed second growth forest in a district that is rapidly [losing] its natural areas due to urban expansion. It is an important site since it provides habitat for many species of wildlife.

- [26] On the topic of rare species and communities, the Baseline Inventory Report notes that there are 75 animal species and 111 plant species in the Chilliwack Forest District that are "red, blue or yellow listed in BC". None of these species was identified on the Property though the possibility remained that they might occur on the Property. The Baseline Inventory Report documents that the Property appeared to be a good habitat for a variety of migratory songbirds, woodpeckers, sapsuckers, raptors and owls. Small mammals including squirrels and mice frequented the area, and raccoons and the occasional bear were documented visitors.
- [27] The Baseline Inventory Report says that the current owner intends to transfer title of the Property to the Coquitlam Foundation Land Trust. I note that the intended transfer was not included as a condition of the agreement.

Current status of the Property

- [28] Mr. Vida says that the area surrounding the Property has changed significantly since 2005, when most of the neighbourhood consisted of single-family homes built on lots of two acres or more. Between 2005 and 2018, according to Mr. Vida, most if not all of the land surrounding the Property "has been or is in the process of being subdivided and re-developed into multi-family housing and/or single-family homes which are built on substantially smaller lots." Mr. Vida says that the area used to be "semi-rural" but by 2018 it had become urban. Mr. Vida says that based on the changes in the vicinity of the Property, he has "severe doubts" whether the Property will be able to be kept in its current condition and used as a bird and wildlife sanctuary after his passing.
- [29] Raul Allueva, an employee of the City of Coquitlam, made an affidavit that attaches a copy of the Partington Creek Neighbourhood Plan (the "PCNP"), part of a land use planning bylaw adopted in 2013 that applies to the Property. The PCNP prescribes a mix of commercial, civic and residential land uses, as well as areas designated for parks, recreation, open spaces, and environmentally sensitive areas throughout the area covered by the plan.
- [30] Based on Mr. Vida's intended use, the City contemplated designating the Property as open space or conservation area under the PCNP; instead, the City designated the Property as "Suburban Residential," consistent with its use at the time, as Mr. Vida did not have a fixed plan on how to secure his wishes when the PCNP was adopted. This was shortly after the Coquitlam Foundation had informed Mr. Vida it would no longer be able to care for the Property after his death in the way he intended.
- [31] According to Mr. Allueva, the lands surrounding the Property are designated as "Townhousing Residential" to the north and east, "Suburban Residential" to the south and "Park and Recreation" to the west. The lands to the west of the Property contain a large rocky knoll, and the City plans to create a park there. The lands to the south of the Property are inappropriate for dense residential use. Although the lands to north and east are designated "Townhousing Residential", there has been little redevelopment of the area since 2005. Mr.

Allueva anticipated that the townhouse-designated lands to the north or east of the Property would not be ready for redevelopment in accordance with the PCNP and applicable zoning until at least 2024.

[32] To the extent that there are any contradictions in the evidence of Mr. Vida and Mr. Allueva regarding the status of development in the Property's neighbourhood, I accept the evidence of Mr. Allueva as it is more precise, thorough and substantiated by reference to Coquitlam's official community plan.

[33] Torrey Archer, Biologist and Land Manager with TLC, visited the Property on August 14, 2018, to meet with Mr. Vida and to view the Property. Ms. Archer observed that the Property remained in its natural state and that it was "very active in terms of wildlife." Ms. Archer opined that the Property continued to be a valuable wildlife sanctuary in its natural state and that the conservation covenant held by TLC was "very much serving its purpose." Ms. Archer concluded that:

[b]ased on [her] professional experience as a Biologist and Land Manager, and on [her] observations of the Property, the significance of preserving the Property and maintaining the Restrictive Covenant in place increases at or above the same rate of development pressure, making the protection of this urban wildlife habitat even more important.

[34] After the initial exchange of the pleadings and affidavits in this matter, Mr. Vida retained AquaTerra Environmental Ltd. to prepare a Significant Natural Features assessment of the Property. AquaTerra did the assessment in January 2020 and prepared a report dated March 2020 that was filed in evidence.

[35] Mr. Vida asked AquaTerra to include an evaluation of "the function and value of habitat features on-site as it relates to habitat retention, and in relation to adjacent and nearby properties in a larger ecosystem context given that the local area is undergoing re-development."

[36] Based on the description in the AquaTerra report, the site conditions for the Property have not changed significantly since the Baseline Inventory Report was prepared in 2004. The forest of mature native trees and shrubs is still in place. AquaTerra reports that there is an artificial pond located east of the residence that may be utilized by birds. AquaTerra documents that there were several bird feeders and nearby vegetation in the backyard of the residence that were "actively used" by "numerous bird species" during the site assessment. The AquaTerra report identifies some features (two sheds, a small stone fence) that have the potential to become a bat or mammal refuge. AquaTerra notes there are several wildlife trees and blow down that provide "valuable nutrients and habitat to birds, small mammals and amphibians." AquaTerra records several bird species that were actually observed on the Property in addition to evidence of nesting.

[37] The AquaTerra report lists various species of birds, mammals and invertebrates that appear on federal species at risk lists that are expected to "occur" on the Property based on available habitat types observed during the field assessment. However, AquaTerra says that there are no rare species from the BC Conservation Data Centre database that were present on the Property, and there were only a handful of sensitive species from the database found in the vicinity of the Property. The Property's ratings as a habitat suitable for potentially occurring provincially or federally-listed rare and endangered species are either low or low-moderate with one exception.

[38] AquaTerra concludes in part as follows:

Based on the [Significant Natural Features] assessment conducted by AquaTerra personnel, the site's overall vegetation was similar to the vegetation composition described within the covenant and remained functional, providing some natural habitat for wildlife, including foraging and nesting opportunities for birds and transient/forage habitat for wildlife.

[Emphasis added.]

[39] The AquaTerra report notes that future re-development is expected in the neighbourhood and concludes that "both direct and indirect impacts from the adjacent land development may affect the site." This may include loss of adjacent forest and habitat, leading to wind blowing down trees on the Property, a change in the species that use the Property, and a risk that invasive species will have an opportunity to establish on the Property.

Legal framework

[40] The Court's authority to cancel a restrictive covenant is found in s. 35 of the Property Law Act:

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

(e) a restrictive or other covenant burdening the land or the owner;

(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.

[41] The test to be applied in these circumstances was neatly summarized by Justice Greyell in 676604 B.C. Ltd. (Re), 2010 BCSC 1624 at para. 22, aff'd 2011 BCCA 447:

A petitioner must therefore overcome three hurdles to succeed on an application under s. 35: first, it must demonstrate that the application is not premature; second, it must demonstrate that the application fulfils one of the five criteria set out in sub-sections (a)-(e); and third, it must persuade the court that, considering all of the circumstances, the court should exercise its discretion in favour of granting the application.

Is the application premature?

[42] In some cases, an application pursuant to s. 35 will be premature when it would be appropriate to await the outcome of an event external to the restrictive covenant, such as potential zoning changes or an application to remove land from the Agricultural Land Reserve, before considering whether any of the s. 35(2) conditions are satisfied.

[43] In *Newco Investments Corp. v. British Columbia Transit*, 14 B.C.L.R. (2d) 212, 1987 CanLII 2662 (C.A.) at para. 33, the Court of Appeal considered the issue of prematurity:

[W]here it appears that considerations, material to a determination whether grounds exist under paras. (a) to (e), have not yet materialized or where, for other reasons, it would be better to defer to a later date consideration of whether the covenant should be struck out, the application should be dismissed. For example, an application under s. 31(2)(e) [now s. 35(2)(e)] on the ground the covenants are unenforceable for uncertainty might be premature if it was shown that future events such as a pending agreement or a decision on arbitration could resolve the uncertainty....

[44] TLC argues that the application is premature on the basis that:

- a) TLC has not expressed any desire to relinquish, forgive or cancel the restrictive covenants;
- b) TLC has held and maintained the restrictive covenants from 2005-2019;
- c) TLC continues to be in the business of preservation and conservation, and is the holder of a large number of preservation or conservation covenants;
- d) Mr. Vida still owns the Property, so the parties to the restrictive covenant when created in 2005 remain the parties involved in 2019; and
- e) Mr. Vida states in the petition that he "has always intended that the Property be kept in its current state and be used in perpetuity as a bird and wildlife sanctuary."

[45] In this case, in my view, there is nothing that would make it more appropriate to defer the application to cancel the restrictive covenant to a later date. The points raised by TLC to say the application is premature are either immaterial or more properly responsive to the petitioner's arguments in respect of s. 35(2)(a) through (c). For example, whether or not Mr. Vida is still the owner is immaterial, as the restrictive covenant is a perpetual charge on the Property that is binding on Mr. Vida and any successive owner of the Property; the restrictive covenant is effective irrespective of Mr. Vida's current intention for the Property. The application to cancel the restrictive covenant does not have to wait for the day when TLC is no longer in the business of preservation and conservation.

[46] I am satisfied that the application is not premature as there are no considerations that have yet to materialize that require deferral of this application.

Is one of the conditions in s. 35(2) satisfied?

[47] The petition focused on s. 35(2)(a), but the owner made oral submissions that s. 35(2)(b) and (c) also applied.

(a) Is the restrictive covenant obsolete?

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

[49] In this case, the purpose of the restrictive covenant was to preserve the Property in its natural state so that it could be used in perpetuity as a bird and wildlife sanctuary. The AquaTerra Report and the observations of Torrey Archer confirm that the restrictive covenant has effectively preserved the Property in essentially the same state it was in as of 2005 when the restrictive covenant was granted. A variety of bird species continue to frequent the Property to visit the bird feeders and to build nests in the forest. The forest offers sanctuary and nourishment to small mammals and amphibians. The fact that the Property does not rate highly as a habitat for species at risk is irrelevant to the stated purpose of the restrictive covenant.

[50] The petitioner says the restrictive covenant is obsolete because of current or imminent redevelopment in the neighbourhood. I accept that there may come a time when the character of the neighbourhood changes such that the Property is no longer an effective bird and wildlife sanctuary. Until that time, I find on the evidence that the Property is an important refuge from the pressures of urbanization.

- [51] Mr. Vida argues that the original purpose of the restrictive covenant has been frustrated by the fact that he has been unable to locate a group or organization willing to own and manage the Property in a manner consistent with the restrictive covenant after he passes away. Although Mr. Vida granted the restrictive covenant to TLC with a concurrent plan to bequeath the Property to the Coquitlam Foundation, the restrictive covenant was not made contingent on that specific bequest. The restrictive covenant binds the current and any successive owner of the Property, whomever that might be. In any event, I am not satisfied that the original purpose has been frustrated in the manner suggested, as TLC is currently willing to own and manage the Property as a bird and wildlife sanctuary.
- [52] In summary, the restrictive covenant is not obsolete as the original purpose continues to be fulfilled.
- (b) Is the reasonable use of the land impeded without practical benefit to others?
- [53] Justice Punnett summarized how to determine whether s.35(2)(b) is satisfied in *Langlois v. Tessaro*, 2018 BCSC 1463 (aff'd with variance of another issue at 2019 BCCA 95):
- [32] Section 35(2)(b) of the Property Law Act provides that "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". The petitioners must demonstrate there is no practical benefit in the respondents retaining the Easement as modified (*Wallster v. Erschbamer*, 2011 BCCA 27 at para. 19). They bear the burden of establishing there is no gain or practical benefit to the respondents in keeping the existing Easement and Easement Modification (*Olenczuk v. Mooney*, 2014 BCSC 825 at para. 56). They do not have to show that no reasonable use of the land is possible without modification but only that the proposed use is reasonable (417489 B.C. Ltd. v. Scana Holdings Ltd. (1997), 74 A.C.W.S. 1091 (B.C.S.C.) at para. 70).
- [33] Both subjective and objective factors may be considered: *Olenczuk* at para. 56.
- [54] Mr. Vida submitted that reasonable use of the property is not possible with the restrictive covenant in place. In particular, Mr. Vida's counsel asserted without evidence that it was not possible to secure a mortgage against the Property because of the restrictive covenant and in particular the "draconian" rent surcharge.
- [55] I am not able to make any findings on this point in the absence of evidence.
- [56] Even if the reasonable use of the Property was impeded, section 35(2)(b) would only allow for cancellation of the charge if the restrictive covenant does not result in a practical benefit to others. I accept TLC's submission that the Property does provide practical benefit to others including to:
- TLC, by furthering its mandate of protecting British Columbia's natural and cultural heritage, and
 - the community at large and the neighbourhood, as they benefit from having urban green space.

[57] The condition in s. 35(2)(b) is not satisfied.

(c) Did TLC expressly or impliedly agree to the modification or cancellation of the restrictive covenant?

[58] It is clear from TLC's opposition to the petition that it does not expressly agree to the modification or cancellation of the restrictive covenant. There is no evidence to support a finding that TLC impliedly agreed, through words or conduct, to modification or cancellation of the restrictive covenant.

Conclusion

[59] The petitioner has failed to satisfy any of the conditions set out in s. 35(2) that might allow for the cancellation or modification of the restrictive covenant, the statutory right of way or the rent surcharge.

[60] The petition is dismissed. TLC is entitled to its costs on Scale B.

"Lamb J."

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