Case Name:

Fenwick v. Parks

Between

Kenneth F. Fenwick, Kenneth F. Fenwick as a representative of Shirley P. Fenwick, Frederick W. Thomas, Lorna M. Veitch, Terrance K. Brown, Bonnie C. Brown, and Phyllis Wilson, Joanne Schaefer, Joanne Schaefer as a representative of Peter G. Dyson, Barbara F. Dyson, John V. Markoskie, Florence J. Markoskie, Walter M. Hughes, Doris M. Hughes, John A. Parsons, Merle L. Parsons, Vernon R. Kreye, Marguerite E. Kreye, Shirley J. Barton, James M. Reid, Norah C. Reid, and Columbia Containers Ltd. (Don Moore, and Lorraine Moore), Rudolph Deleske, Rudolph Deleske as a representative of Joan E. Deleske, Viola M. McKee, Janet L. Millington, Pamela M. Conrad, William C. Robson, Sandra D. Robson, James T. Flynn, Anne M. Flynn, Keith B. Stockman, June J. Stockman, Robert G. Cotter, Gloria J. Cotter, Rudolf H. Meuser, Margarete Meuser, William B. Watson, June R. Watson, Lesley A. Barton, Grietje Reinders, Joyce E. Britton, Edna E. Manderson, Joseph K. Burghardt, Magdelena S. Burghardt, John G. Ward, Phyllis J. Ward, James T. MacFarlane, Barbara J. MacFarlane, John Pawlyshyn, and Doris S. Pawlyshyn, Donald Wrigley, and Donald Wrigley as a representative of Dorothy E. Wrigley, Lynda A. Wrigley, Alan G. Latimer, Lorraine M. Latimer, Doreen A. Hegarty, Esther Furrer Turanec, Robert C. Smith, Mary Smith, John Gelson, Maureen Gelson, and Mark Leffler, petitioners, and

Wayne E. Parks, Patricia Parks, Gordon Allan Duke, Carrol Marie Duke, Gregory K. Allen, Lloy P. Allen, James S. Dell, Bonnie R. Mardis, Laurine J. Hellam, Roger E. Davidson, Margaret P. Davidson, Frances Fong-O Fung, Alfred C. Killip, Gladys M. Killip, John Stephen Boyle, Debra Anne Boyle, Sharon J. Breining, Sharon J. Breining as a representative of Leonard Harrison Berry, Alan N. Hughes. Barbara J. Hughes, Charles G. Raymont, David K. Edgell, Sharon M. Edgell, Archibald R. Pick, Jeanne E. Pick, Betty Joan Smith, and June Elizabeth Philpot, respondents

[2004] B.C.J. No. 1791

2004 BCSC 1132
Nanaimo Registry No. S38505

British Columbia Supreme Court
Nanaimo, British Columbia
Burnyeat J.
(In Chambers)

Heard: August 10 - 11, 2004.
Judgment: August 30, 2004.
(59 paras.)

Counsel:

Counsel for the Petitioners: D.T. Ramsay, Q.C.

Counsel for the Respondents, Wayne K. Parks, Patricia Parks, Gordon Allan Duke, Carrol Marie Duke, Gregory D. Allen, Lloy P. Allen, James S. Dell, Bonnie R. Mardis, Laurine J. Hellam, Roger E. Davidson, Margaret P. Davidson, Alfred C. Killip, Gladys M. Killip: R.C. Di Bella

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¶ 1 **BURNYEAT J.**:— Pursuant to ss. 246(1)(a)(i), 246(4), 246(7) and 246(8) of the Strata Property Act, R.S.B.C. 1998, c. 43 ("Act") and ss. 1.1, 4(a), 14.2, 14.13 and 17.17 of the Regulations to the Act, ("Regulations"), the Petitioners apply for an Order that the Schedule of Unit Entitlement of Strata Plan VIS 2014 ("Plan") be amended in accordance with the Act and the Regulations to accurately reflect the habitable area for each of the 55 Strata Lots making up the Plan.

APPLICABLE STATUTORY PROVISIONS

¶ 2 The following sections of the Act came into effect in 2002 (for s. 70) and 1998 (for s. 246):

> 70(4) Subject to the regulations, if an owner wishes to increase or decrease the habitable part of the area of a residential strata lot, by making a nonhabitable part of the strata lot habitable or by making a habitable part of the strata lot nonhabitable, and the unit entitlement of the strata lot is calculated on the basis of habitable area in accordance with section 246(3)(a)(i) or on the basis of square footage in accordance with section 1 of the Condominium Act, R.S.B.C. 1996, c. 64, the owner must
>
> (a) seek an amendment to the Schedule of Unit Entitlement under section 261, and
>
> (b) obtain the unanimous vote referred to in section 261 before making the change. 2002, c. 22, s. 11.
>
> 246(1) The person applying to deposit a strata plan must establish the unit entitlement of a strata lot in accordance with subsection (3).
>
> (2) The person applying to deposit a strata plan must indicate the unit entitlement of each strata lot in a Schedule of Unit Entitlement in the prescribed form.

(3) The unit entitlement of a strata lot, other than a strata lot in a bare land strata plan, must be calculated as follows:

(a) if the strata lot is a residential strata lot, the unit entitlement is either

(i) the habitable area, in square metres, of the strata lot, as determined by a British Columbia land surveyor, rounded to the nearest whole number,

(ii) a whole number that is the same for all of the residential strata lots, or

(iii) a number that is approved by the superintendent and that in the superintendent's opinion allocates a fair portion of the common expenses to the owner of the strata lot; ....

(4) For the purposes of subsection (3), "habitable area" has the meaning set out in the regulations. ....

(7) Subject to the regulations, an owner or the strata corporation may apply to the Supreme Court for an order under subsection (8) if

(a) the unit entitlement of a residential strata lot is calculated on the basis of habitable area in accordance with subsection (3)(a)(i) or on the basis of square footage in accordance with section 1 of the Condominium Act, R.S.B.C. 1996, c. 64, and

(b) the actual habitable area or square footage is not accurately reflected in the unit entitlement of the strata lot as shown on the Schedule of Unit Entitlement.

(8) On application under subsection (7) and after consideration of the matters set out in the regulations, the Supreme Court may

(a) order that a Schedule of Unit Entitlement be amended, in accordance with the regulations, to accurately reflect the habitable area or square footage of a strata lot, and

(b) make any other orders it considers necessary to give effect to an order under this subsection.

¶ 3 The Regulations coming into effect on September 6, 2000 include the following:

5.1(1) An owner who wishes to decrease the habitable part of the area of a residential strata lot without amending the Schedule of Unit Entitlement need not comply with the requirements set out in section 70(4) of the Act.

(2) An owner who wishes to increase the habitable part of the area of a residential strata lot without amending the Schedule of Unit Entitlement need not comply with the requirements set out in section 70(4) of the Act if

(a) the increase to the habitable part, combined with any previous increase to the habitable part, is less than 10% of the habitable part and less than 20 square metres, and

(b) the owner obtains the prior written approval of the strata corporation.

14.2 For the purposes of section 246 of the Act, "habitable area" means the area of a residential strata lot which can be lived in, but does not include patios, balconies, garages, parking stalls or storage areas other than closet space.

14.13 No application may be brought under section 246(7) of the Act unless one or both of the following conditions apply:

(a) the actual habitable area or square footage of a strata lot is at least 10% greater than, or 10% less than, the habitable area or square footage used to determine the unit entitlement of the strata lot;

(b) the actual habitable area or square footage of a strata lot is at least 20 square metres greater than, or 20 square metres less than, the habitable area or square footage used to determine the unit entitlement of the strata lot.

BACKGROUND

¶ 4 The Strata Lots in question form part of what is referred to as the Pebble Beach development ("Development"). The Development is adjacent to the beach in Parksville and consists of 9 two-storey units and 46 one-storey units. This is a dispute between some of the owners who own one-storey units and some of the owners who own two-storey units. Strata Lots 30, 31, 32, 33, 36, 37, 38, 39 and 40 constitute the two-storey units in the Development.

¶ 5 Michael A. Sims is a British Columbia Land Surveyor. Mr. Sims prepared the survey plans for each of the phases of the Development. In his affidavit, Mr. Sims states:

(a) During the preliminary work prior to preparing the plans for Phase 1, I was told by the developer or their agent, that there might be a preliminary sale of a unit which would require the garage to be converted to an office. This would make the garage "habitable area". It was decided that if this one garage was considered habitable, then all garages should be treated the same. They all were, so the areas of all the garages in all 13 phases are included in the "habitable area" calculations for each strata lot.

(b) When it came time to prepare the plans for Strata Lots 30 to 33 and 36 to 39, I was told by the developer that only the entrance area to the basement of these units would be finished. The area of each of these finished basement entrance areas was 8.4m ...

(c) The remainder of the basements (an area of 103m - 104m would not be finished and would be used for storage only. This area of 103m - 104m was not included in the original unit entitlement calculations.

(d) I was told that the structure for Strata Lots 40 - 45 had to have a basement under the part for Strata Lot 40. This was done as it was located on a bank and main floor levels had to be maintained for all six units. I was told that the basement was to be for storage only. This basement has not been directly measured, so I have to assume the area to be equal to the main floor, not including the garage. Said area being 129.8m.

¶ 6 The dispute centres around two matters: (a) the fact that the garages have been included as "habitable area" of all strata lots even though there is no evidence that any of them have been converted from garage use to habitable use and (b) the fact that all but a small portion of each of the lower levels in the 9 two-storey units have been excluded from the habitable area calculations even though all of the nine owners of two-storey units have finished these areas beyond the 8.4m2 area that was allocated within each of those units as being "habitable area". Because the common expenses of the Strata Corporation are shared by the owners in accordance with their pro-rata unit entitlements, some of the owners of the one-storey units believe that the original unit entitlement set out by Mr. Sims is unfair to them.

¶ 7 Regarding the current use of the one-storey and two-storey units, included within a one-storey unit is space for the furnace and hot-water tanks for the unit. This space constitutes less than 10% of the total area within these strata units. The furnace and hot-water tanks for the two-storey units are contained within the space which has not been included as "habitable area". The improvements to the ground floor of the two-storey units vary considerably. The uses include TV-rooms, bedrooms, computer rooms, closet areas, wine-making rooms, games-rooms, laundry-rooms, office areas, and storage areas of vastly varying sizes.

¶ 8 Mr. Sims prepared a draft "Schedule of Unit Entitlement" so that the "habitable area" calculation included the area of each Strata Lot "which can be lived in, but does not include patios, balconies, garages, parking stalls or storage areas other than closet space." In preparing this draft, Mr. Sims states that he has "... assumed that all the basement areas for Strata Lots 30 to 33 and 36 to 39 and the basement area of Strata Lot 40 are areas which can be lived in".

¶ 9 The following table sets out the difference between the present unit entitlements of the nine Strata Lots, the present percentage of Unit Entitlement represented by the nine Strata Lots and the Unit Entitlement and percentage of Unit Entitlement set out in the draft of Mr. Sims:

	Present		Draft of Mr. Sims	
Strata Lot	Unit Entitlement	% of Total Entitlement	Unit Entitlement	% of Total Entitlement
30	1747	1.783	2402	2.7
31	1757	1.793	2418	2.8
32	1760	1.796	2423	2.8
33	1754	1.790	2413	2.8

36	1743	1.779	2394	2.7
37	1754	1.790	2415	2.8
38	1754	1.790	2416	2.8
39	1752	1.788	2411	2.8
40	1607	1.641	2596	3.0

¶ 10 If the Unit Entitlements were amended to take into account the Draft of Mr. Sims, the average monthly Strata Fee Charge for the owners of the 9 two-storey units would rise by approximately 55% or approximately $255.00 per month on average to approximately $395.00 per month on average.

DISPUTES ABOUT THE SCHEDULE OF UNIT ENTITLEMENT

¶ 11 It may well be that the dispute about unit entitlement may have started as early as 1993. The March, 1995 Strata Council Minutes reflect a request from two of the unit holders to "... study the makeup of the Unit Entitlement for the complex." The August 21, 1996 Strata Council Minutes reflect two letters received regarding the question and this notation:

> The Property Manager will send an explanation of unit entitlements in response. A review of assessments for 55 units by a surveyor would cost approximately $15,000.00.

¶ 12 In evidence is a document headed "Information Regarding Unit Entitlement". While undated, it was probably provided to owners and potential owners in 1995 or 1996. It contains information which was said to have been put together by the "By-Law Chairman" of the Strata Council in 1994-95. The document contains the following:

> The eight attached units above the pond, known during development as the "Crestview" units, were marketed and sold as single story with detached garage and unfinished lower level. The only portion of the lower level that was finished was the stairs down and the foyer leading out to the patio. Three doors were included to close off the unfinished area. This area is included in the assessed entitlement.
>
> Unit entitlement was based, in all 55 units, on habitable space at time of sale. The "Crestview" show home (#30) was completely finished and sold as such; therefore, there may be a case for higher strata fees for that unit. In all other units, finishing was arranged after purchase. Unit #38 had their lower level finished by the builder "to show home specifications". Unit #37 had a rough mudding of gyproc done and finished the rest themselves. Unit #36 has recently added a small studio but has no bathroom facility. Unit #39 has finishing done by the builder to their own specifications. Therefore, each unit has a different area of habitable space on the lower level and would have to be considered individually as to reassessment. That also brings up the question of the finishing of garages in other units where office or studio space has been added after purchase. What should be done in this case?
>
> If future councils wish to pursue this matter the first step would have to be the receipt of approval from the strata corporation to spend the $10,000 necessary for re-survey. Our understanding is that this approval must be 100% of owners. After the survey, if the Superintendent approves the restructuring of unit entitlements, a further $6,000 is needed to register the changes in the Land

> Titles office and this also must be approved 10% by the strata corporation. (These costs are based on 1995 prices and could be higher in future).
>
> Unit Entitlement - A report will be circulated prior to the AGM with regard to this issue.

¶ 13 There is a notation in the March 5, 1997 Strata Council Minutes that a report would be circulated prior to the Annual General Meeting of the Strata Corporation. There is this notation in the March 17, 1997 Strata Council Minutes:

> Unit Entitlement - The unit entitlement fee structure at Pebble Beach was assessed according to the area of habitable space on each strata lot. In the case of Units 30, 31, 32, 33, 36, 37, 38, 39, 40, this has not changed, regardless of the fact that some of the lower floors have been finished. The area of land they cover is still the same. In order to effect any change to the fee structure, all units in Pebble Beach would have to be re-assessed and registered with the Land Title Office, and all the costs, would have to be borne by all owners, either by a one time Special Assessment, or increased monthly fees over a period of time and with no foreseeable benefits to anyone. The cost for this is currently being determined and will be available for the AGM.

¶ 14 As part of the records of the Strata Corporation, the then Chair recorded an April 6, 1999 conversation that she had with the Condominium Officer of the Superintendent of Real Estate. Recorded in those notes is the advice that the Condominium Officer stated: "... for insurance purposes on destruction, the two-storey units would be assessed as built i.e., one-storey with unfinished space on the lower level. No compensation would be given to those owners for replacement value of the lower levels."

ACTIVITIES AFTER THE ACT WAS AMENDED

¶ 15 After the enactment of s. 246(7) of the Act, further attention was paid to the possibility of amending the Schedule of Unit Entitlement for the 55 strata units. The Minutes of the July 11, 2001 Meeting of the Strata Council reflect a motion that potential buyers and the listing real estate agents be advised that the basement areas had not been approved as habitable area and might be: "... the focus of a possible future challenge of the Unit Entitlement". Most of the owners who purchased units after that date were advised of the ongoing debate and the possibility that unit entitlement might change.

¶ 16 On July 13, 2001, the property manager for the Strata Corporation forwarded a letter to the Registrar, Land Titles Office, setting out the history of the dispute and stating:

> Several strata lots at Pebble Beach are currently offered for sale, some of which are two-storey units. Some Owners have complained at the unfair advantage enjoyed by the two-storey Owners who can offer more accommodation with lower strata fees. .... We would appreciate your guidance on the proper procedure that the Strata Corporation should follow to correct the inequity caused by the inadequate Unit Entitlement.

¶ 17 The letter which is in evidence has a note on it indicating that the Registrar's Office was of the belief that there was no errors so that the Registrar could not intervene except "... following unanimous resolution of the owners".

¶ 18 In an August 13, 2001 letter to the Regional District of Nanaimo, the property manager requested clarification regarding the Occupancy Permit issued relating to the two-storey units. Despite the initial advice received that no permits were issued to allow further improvements in the basement of the two-storey units, the

Regional District wrote on October 5, 2001 to advise that the Occupancy Permits issued for the nine units would allow: "... finished rooms as per building permit plans in basement".

¶ 19 In September, 2001, a "Discussion Paper" was circulated to the owners setting out a number of recommendations including that the Strata Corporation convene a Special General Meeting "... to unanimously approve a Resolution to revise the Schedule of Unit Entitlement of all 55 Units at Pebble Beach to include any additional habitable area ...." in the 9 two-storey strata units. Under the heading "Justification", the Strata Corporation set out the following reasons in the Discussion Paper:

* The present Schedule of Unit Entitlement does not match the habitable area of the Two-Storey Units and Unit #40 and, therefore, contravenes Section 246(3) of the Strata Property Act.

* The present Schedule of Unit Entitlement results in strata fees that are unfair.

* The new Strata Property now provides a clear, legal process to deal with this matter.

* The cost of the professional fees ($3,750) is not excessive compared to the original estimate of $25,000.

* The cost of the professional fees and registration charges should be paid by the Strata Corporation and funded from the Contingency Reserve Fund, since this situation was not caused by the Owners of the Two-Storey Units, but rather by the Developer.

* Many Owners, including many of those in the Two-Storey Units, wish to see this matter resolved now, once and for all. This issue of unfairness has persisted for many years and adversely affects the spirit of community at Pebble Beach.

* Unless this issue is resolved now, the legal requirement to fully disclose these issues will limit the ability of these Owners to sell their strata lot and may result in higher legal costs to the Strata Corporation in the future.

¶ 20 A "Town Hall" Meeting was called for October 2, 2001. The purpose of the meeting was to review the Discussion Paper which had been circulated. An ad hoc committee was struck to examine the choices available to owners and to the Strata Corporation to resolve the ongoing issue. The ad hoc committee produced its "Final Report" on November 12, 2001. The recommendations included assigning a "deemed basement habitable square-footage of 300 square feet and applied equally to all two-storey basement units ..." and that this formula is adopted as the basis for altering the Schedule of Unit Entitlement.

¶ 21 In response to a request forwarded by the management company of the Strata Corporation, the Manager of Real Estate of the Financial Institution Commission of the Ministry of Finance wrote on February 15, 2002 to set out a number of comments including the following:

> The Garage Areas
>
> The legislation that governed the creation of strata corporations at the time that the strata plans for your Development were filed, was the Condominium Act. Section 1 of the Act required that

the unit entitlement of a strata lot be based on the area of a strata lot. It did not require that the total area include only habitable areas and exclude garages. However, the Act further required that the Schedule of Unit Entitlement be approved by the Superintendent of Real Estate, and it was the Superintendent's policy that the area to be counted for the purpose of establishing unit entitlement should be "habitable," and exclude areas such garages and storage areas.

All of the strata plans should therefore have delineated the garage area and shown its measurements, as was done with the strata plan for phase 10. In addition, the garage areas should have been excluded from the total habitable area used to calculate unit entitlement.

As I know you are aware, the Condominium Act was replaced by the Strata Property Act (the "Act") on July 1, 2000. Regulation 14.2 of the Act now clearly defines "habitable area" as excluding garages.

In addition, Regulation 14.12(2) of the Act permits the registrar of the Land Title Office, after examining evidence, to correct any error in a registered strata plan. Pursuant to Regulation 14.12(1), "error" means any erroneous measurement or error, defect or omission in a registered strata plan, and "registered strata plan" includes any document that forms part of the strata plan under the Condominium Act, such as the Schedule of Unit Entitlement.

The strata corporation may therefore present evidence that the garage areas were erroneously included in the calculation of the Schedule of Unit Entitlement to the registrar of the Land Title Office and request that it be corrected. The evidence usually consists of a statutory declaration of a surveyor which explains the nature of the error and how it should be corrected. I have spoken about this matter with Mark Frantzen, who is the acting registrar of the Land title Office, and he indicated to me that an application under Regulation 14.12 should be accompanied by a strata corporation resolution passed by a unanimous vote.

The Basement Areas

In our telephone conversation, you have advised me that you believe that the basements of the nine strata lots in phase 8 and 10 were undeveloped at the time the strata plans were deposited in the Land Title Office. However, all of the basements are now used as living space as a result of improvements undertaken by either the purchasers or the developer at the time a strata lot was sold to a purchaser. The improvements consist of the construction of bedrooms, recreation rooms and in some strata lots, bathrooms. The buildings are built into a slope with one end of the basement submerged below grade and the opposite end of the basement completely above grade.

The Superintendent of Real Estate, in approving Schedule of Unit Entitlement under the Condominium Act, never had a policy that basement areas were to be counted as either habitable or non-habitable area. Under the new Act, Regulation 14.2 defines habitable area, and it likewise does not determine whether basement areas are habitable or non-habitable. It states the following:

> For the purposes of section 246 of the Act, "habitable area" means the area of a residential strata lot that can be lived in, but does not include patios, balconies, garages,

parking stalls or storage areas other than closet space.

> Basement areas may therefore, be either habitable or non-habitable area. If a surveyor prepares a Schedule of Unit Entitlement which is based on habitable area, Regulation 14.2 requires the surveyor to determine whether any basement area "can be lived in", and if it can, the area must be included in the calculation of unit entitlement. It may not always be easy for a surveyor to make this determination, and owners may not understand the reasons why the determination was made or agree with it.

¶ 22 After that letter was received, the Chair of the Strata Council requested access to the two-storey units in order that a "Professional Surveyor" could inspect the basement areas to determine if the areas were "habitable". After receiving the reactions of some of the owners in that regard, a Special Resolution was put to the April 30, 2002 Annual General Meeting which would have allowed a person authorized by the Strata Corporation to "... survey and measure the habitable area within the strata lot." The Special Resolution required a 75% vote and it was defeated although those in favour of the Special Resolution constituted 67% of the votes in the secret ballot which was undertaken.

¶ 23 A June 12, 2002 Report was prepared prior to a further "Town Hall" meeting of the Strata Corporation. That report stated in part:

> The Strata Corporation now has the opportunity to resolve this longstanding problem. Since 1993, the Owners at Pebble Beach have struggled to find a solution to the incorrect calculation of Unit Entitlement throughout the complex. This has resulted in an unfair assessment of strata fees over this nine-year period and has afforded some Owners at Pebble Beach a significant advantage when competing in the real estate market.
>
> The problem was caused by the Developer instructing the Surveyor to (a) omit the area of the developed basements, in Units #30 - 33, 39 and #40, from the calculation of the habitable area and (b) include the area of all garages in the calculation. Both of these actions contravene the Strata Property Act and could result in a legal challenge of the Schedule of Unit Entitlement in the Supreme Court.
>
> Under the 1979 Condominium Act the process to alter unit entitlement was not clear and the cost was estimated at $25,000 or more. This high cost, and a lack of unanimity among the Owners, delayed any decisive action to solve the problem.
>
> We are advised by the Land Titles Office and by the Superintendent of Real Estate that the Schedule of Unit Entitlement can be altered if the Owners pass a Unanimous Resolution to do so.
>
> However, if the Unanimous Resolution is defeated, the assenting Owners have the option to pass a 3/4 vote to take the matter to the Supreme Court.

¶ 24 At the Town Hall meeting on June 24, 2002, it was decided that only what was referred to as Option 2 would be put to a vote at a Special General Meeting of the Strata Corporation. Option 2 would see unit entitlement based on 75% of "Actual Basement Habitable Area (Excluding Garage)." On August 20, 2002, the Council met and advised all owners present that the vote by secret ballot to alter the unit entitlement pursuant to Option 2 had

received only 76% approval.

¶ 25 Subsequently, sufficient owners petitioned the Strata Corporation to call a further Special General Meeting which was then held on October 14, 2002. The resolution before the meeting was to compel the Strata Corporation to "... make formal application to the BC Supreme Court for an Order under Section 246(8) of the Strata Property Act instructing that the Schedule of Unit Entitlement be amended to accurately reflect the actual habitable area for the strata lots ....". The vote on the Special Resolution was conducted by secret ballot and the results were 40 votes in favour (72.7%) and 15 votes against (27.3%). Accordingly, the Special Resolution failed to obtain the necessary 75% of vote. This Action was then commenced.

SITUATIONS OF SOME OF THOSE WHO PURCHASED TWO-STOREY UNITS

¶ 26 Ms. Parks and Mr. Parks purchased Strata Lot 30 on May 15, 2002. They were advised by the previous owner and their realtor that this Strata Lot had been the display unit. Ms. Parks also states:

> We understand that the first or the basement floor of Strata Lot 30 had been completed by the developer to show prospective buyers in the strata corporation how the first floor could be completed.

¶ 27 Dr. and Ms. Duke purchased their home on September 2, 2003. Prior to waiving all the pre-conditions to their purchase, they were advised by the Chair of the Strata Council that various attempts had been made to change the unit entitlement but that those attempts had all failed.

¶ 28 Ms. Hellam and her late husband purchased their home in December, 1992. In her affidavit, Ms. Hellam states that only the upper floor of their unit was completed when they purchased the unit and that the lower basement area was unfinished "... except for the vestibule at the bottom of the stairs". "My late spouse and I decided not to finish the lower or basement area ... except for one part".

¶ 29 Mr. and Ms. Davidson purchased their home on March 15, 2002. At the time of the purchase: "... we were aware that there was an issue about Unit Entitlement for among others, our strata lot".

¶ 30 Mr. and Ms. Killip purchased their home on January 7, 1997. Ms. Killip stated that, when they viewed what would become their strata unit, the unit "... was at the stud stage, in that the rooms themselves on the main floor in the strata lot had been framed but nothing else. There are no stairs yet installed to travel to the first floor or basement area of the strata lot" and that:

> The developer told us that the strata lot would be finished for the main or second floor only but that we could arrange to pay extra to have the basement or lower level first floor finished to our liking.

¶ 31 Mr. and Ms. Allen purchased their home on May 30, 2002 and Mr. Allen states that they were not aware that there was an issue about unit entitlement when they purchased and that they only learned for the first time in June, 2002 that there was an issue about "... readjustment or alteration of unit entitlement to our strata lot and eight others ...".

¶ 32 Mr. and Ms. Dell purchased their home on May 29, 1998 and Mr. Dell states that, when they purchased, they were not aware that there was an issue about Unit Entitlement. Mr. Dell indicates that he first became aware of the problem in May, 2001 as a member of the Council for the Strata Corporation.

EXPERT OPINIONS RECEIVED IN EVIDENCE

¶ 33 Danny Carrier was qualified as a B.C. Land Surveyor in 1972. Mr. Carrier provided an opinion for the Respondents. In his June 4, 2004 Affidavit, Mr. Carrier attaches a "policy guideline" about habitable areas that was developed by the Superintendent of Real Estate under the Real Estate Act prior to the introduction of s. 14.2 of the Regulations. Policy Statement No. 4 states in part:

> 1. "Unit Entitlement" is defined in the Condominium Act as the indication of "the share of an owner in the common property, common facilities and other assets of the strata corporation, and is the figure by reference to which the owner's contribution to the common expenses of a strata corporation is calculated". The Condominium Act further sets out a formula for the calculation of unit entitlement based on the area of each strata lot in ratio to the total area of all strata lots. The Superintendent may accept or require an alternative schedule.
>
> 2. It is a matter of policy that the Superintendent will require that the above formula be based on "habitable" area and should not include areas such as patios, balconies, parking stalls or storage areas, aside from closet space in the strata lot. Alternative formulas will be considered if such alternatives result in more equitable contribution by the owners to the common expenses of the strata corporation.

¶ 34 Mr. Carrier continues in his affidavit:

> It is my experience that different developers and different Land Surveyors used different criteria in assessing whether or not a given space was "habitable", and in particular, whether or not space that was capable of being made habitable but was not made habitable at the time of construction should be included.
>
> Under the policy attached as Exhibit "A", the Superintendent could approve a strata plan if the formula used to calculate unit entitlement was "equitable", and it was my experience that the Superintendent would consider a formula to be equitable if it was consistent in its treatment of all members of the strata corporation.
>
> It was my experience that the Superintendent would consider a formula to be "equitable" if it included space that could be made habitable, or if it excluded such space, provided it did so consistently throughout the strata plan.
>
> My review of the filed Strata Plans that are the subject matter of these proceedings included two areas, the garages and the basement area, that could be made habitable, but, with the exception of the garage in one unit, were not made habitable at the time of construction. The strata plan treated these spaces the same for all units, designating all of the garages as habitable space, and designating only 8.4m of the basement area as habitable space.
>
> In my opinion, given what Mr. Sims has stated in paragraph 4 of his affidavit dated October 24, 2003, Mr. Sims prepared the strata plans and unit entitlement schedules for The Owners, Strata Plan 2014 consistent with the Guideline.
>
> In my opinion, Mr. Sims consistently prepared the current unit entitlement schedules for this

> strata corporation by including garages and only 8.4m of the basement areas in the strata lots now questioned by the Petitioners in this proceeding.
>
> These schedules of unit entitlement were approved by the Superintendent of Real Estate and accepted for filing by the Registrar of the Victoria land title office for all 13 phases of this strata corporation.

¶ 35 Brent Taylor was qualified as a B.C. Land Surveyor in May, 1984 and also provided an opinion for the Respondents. At the request of counsel for the Petitioners, Mr. Taylor attended in Court and was cross-examined on the contents of his Affidavit. His Affidavit stated in part:

> In my opinion, Mr. Sims prepared the current unit entitlement schedules for this strata corporation in a consistent manner by including all garages and, with the exception of strata lot 40, an equal area of the basement areas in the strata lots, being 8.4m, now questioned by the Petitioners in this proceeding.
>
> These schedules of unit entitlement were approved by the Superintendent of Real Estate and accepted for filing by the Registrar of the Victoria land title office for all 13 phases of this strata corporation.
>
> From my experience, since 1984 the Condominium Act placed and the Strata Property Act places a Land Surveyor in the role of a public officer with the responsibility for adjudicating what is habitable area and what is not.
>
> The Condominium Act, in particular, provided no guidance in the legislation or Regulations made under the Condominium Act to guide the Land Surveyor what was to be "habitable area".
>
> The physical characteristics of a development such as:
>
> a. the ceiling height,
>
> b. the existence or non existence of roughed in walls,
>
> c. the existence or non existence of partition walls,
>
> d. the existence or non existence of roughed in plumbing,
>
> e. the existence or non existence of roughed in wiring,
>
> f. the existence or non existence of exterior windows, and
>
> g. the existence or non existence of exterior doors,

are all factors which I consider when determining whether an area is a "habitable area" or not.

Based upon my review of the original strata plans in this proceeding and the Sims Affidavit, the garages and basement areas were not habitable at the time of the original construction, but were capable of being made habitable by future renovations.

The original strata plan treated all of these areas in the same way, by designating all of the garages as habitable areas, and other than strata lot 40, by designating 8.4m of the basement areas habitable.

In order to determine whether the basement areas, and garages are now habitable, it would be necessary to examine each strata lot to determine what renovations had taken place, and where not all of the space was renovated, to measure the actual habitable space in each unit.

One difficulty is trying to assess what is actually habitable space, as opposed to space that could be made habitable, is that the area can change from time to time as future renovations take place, and habitable space is converted into storage space or otherwise made not habitable, or an area that is not currently habitable is made habitable.

In my review of the filed strata plans for the strata corporation in this proceeding I note that Mr. Sims failed to label those areas he considered not to be "habitable area". In my experience it is common practice to label non-habitable areas in a strata lot to identify their anticipated use. Accordingly, I would have expected to find that all but 8.4m of each lower level of the two story strata lots for the strata corporation in this proceeding would have been labelled "storage". Such a label serves to notify future owners of a limitation on the use of such area.

In my opinion, the habitable area and the unit entitlement of the strata corporation in this proceeding, The Owners, Strata Plan 2014, appear to have been consistently interpreted and complied with the acceptable standards of the time, and have been approved by the Superintendent of Real Estate and registered by the Registrar in the Victoria land title office.

¶ 36 Under cross-examination, Mr. Taylor agreed that the decision as to what would be habitable was sometimes made prior to the structure being complete - "as long as walls are permanent". He also agreed that he would not rely on what the owner developer said but would place more weight on what he saw at the site and what was shown in the architectural plans. Regarding how Mr. Sims approached the assessment of the unit entitlement, I record Mr. Taylor as having stated:

> He did not make the best decisions. He was consistent and that is supported by the Policy Statement. Equality is a strong requirement especially in a phased development to establish fairness. Only Strata Lot No. 40 is inconsistent.

¶ 37 In answer to questions put to Mr. Taylor by me, Mr. Taylor was of the opinion that, if the unit entitlement was not changed, then the occupation of areas presently outside of what was included in the Unit Entitlement Schedule for the two-storey units should not continue. However, Mr. Taylor remained of the view that consistency between units of the same type (such as one-storey units or two-storey units) was the consistency that was required

rather than a consistency between different types of units within a strata plan.

B.C. ASSESSMENT AUTHORITY VALUATIONS

¶ 38 For most of the one-storey units, the B.C. Assessment Authority valuations are about $180,000. For 8 of the 9 two-storey units, the valuations are about $276,000 while the remaining unit is valued at $208,500. While not all of the original purchase price information relating to the two-storey units is available, it appears to be the case that the valuations of one and two-storey units as established by the B.C. Assessment Authority approximately reflect the respective purchase prices of the one-storey and two-storey units.

CASE AUTHORITIES AND DECISION

¶ 39 There appears to have been only one previous petition under s. 246 of the Act: Kranz v. The Owners, Strata Plan VR29 (2003), 8 R.P.R. (4th) 268 (B.C.S.C.) and on appeal at (2004) 16 R.P.R. (4th) 193 (B.C.C.A.).

¶ 40 Mr. Kranz applied for an Order reducing the unit entitlement of a residential strata lot owned by him. Unit entitlement was based on an assigned "net suite square foot area" and the sum of 3,302 square feet had been assigned as the unit entitlement of the strata lot owned by Mr. Kranz whereas the surveyor retained by him stated that only 2,082 was habitable. Because of a finding that the net habitable area was actually 3,049 square feet, Melnick J. came to the conclusion that Mr. Kranz did not meet the threshold test of establishing that the square footage used to determined the unit entitlement of his strata lot was 10% greater than the square footage of the habitable area of his strata lot. Because that was the case, Mr. Kranz did not meet the precondition set out in s. 14.13 of the Regulations and his Petitions was dismissed.

¶ 41 While the following comments are obiter dicta, Melnick J. made some very helpful comments about the definition of habitable area:

> At this point, it is important to consider the definition of "habitable area" utilized for the purposes of s. 246 of the SPA. Notably, Regulation 14.2 refers not to the portion of a residential strata lot which is lived in but rather that which "can be lived in".
>
> To put it bluntly, I do not accept Mr. Kranz's characterization of a portion of strata lot A as being uninhabitable because it is a "storage" area. It is not storage area in the sense that certain condominiums have designated stalls or cubicles in storage rooms or basement areas of their buildings. No evidence was put before me to suggest that the so-called storage area could only be used for that purpose. .... However, it is not reasonable to expect the Owners to deduct a large area of square footage from strata lot A for the purpose of determining its habitable area just because Mr. Kranz chooses not to develop a portion of strata lot A. If Mr. Kranz were allowed to dictate the habitable area of his own strata lot, similarly, any strata lot owner could do the same to reduce her or his unit entitlement. In that context, Regulation 14.2 of the Strata Property Regulations makes very good sense. (at paras. 15-6)

¶ 42 On appeal, Finch C.J.B.C. on behalf of the Court dismissed the appeal stating that Melnick J. was correct in refusing to vary the unit entitlement as Mr. Kranz had failed to establish the 10% difference between the actual habitable area or square footage of his strata lot and the habitable area or square footage used to determine the unit entitlement of his strata lot.

¶ 43 While the decisions in Kranz deal with a different application under a different section of the Act, the comments of Melnick J. about how to define "habitable area" establish that it is not the portion of a residential strata lot which is actually inhabited but rather that which could be inhabited. That is clearly what was intended by the

Legislature when the words "can be lived in" were included.

¶ 44 I also adopt the reasoning of Melnick J. regarding the reference to "storage areas" in s. 14.2 of the Regulations. I am satisfied that the exclusion of "storage areas" was not meant to exclude habitable area within a strata unit that was being used to store belongings or goods but, rather, was meant to exclude storage areas which, like "patios, balconies, garages, and parking stalls", are located outside of or adjacent to areas which would be inhabited by owners and/or storage areas which are located on common property.

¶ 45 Even if I am incorrect in coming to that conclusion, in the absence of evidence that the storage areas within the 9 units in the Development can only be used for storage, I am of the view that the owners of the 9 units are not in a position to argue that their present use of space as storage areas eliminates the possibility that the space should not be included within what can be described as the "habitable area" within the residential strata lot. As "habitable area" means that area within a residential strata lot which can, could or is capable of being lived in, I am satisfied that the current use of a portion of a home as a storage area does not remove that area from that which could be lived in if its use were changed so that it became habitable.

¶ 46 "Habitability" is defined in Black's Law Dictionary, 7th ed. (West Group-St. Paul, Minn) as: "the condition of a building in which inhabitants can live free of serious defects that might harm health and safety". The New Oxford Dictionary of English defines "habitable" as "suitable or good enough to live in" and "inhabitant" as "a person ... that lives in or occupies a place".

¶ 47 It is clear that the entire lower floor areas of the two-storey units could be lived in if appropriate improvements were made to those areas. The areas are certainly suitable or good enough to live in and the owners of the two-storey units could live in the lower floors free of "serious defects that might harm health and safety". These lower floor areas are at ground level such that there is access through the areas on to the patios that are adjacent to the two-storey units. As well, the best evidence that they can be lived in is that large portions of the ground floors within the 9 units are already being lived in.

¶ 48 After reviewing Policy Statement No. 4, the Act, the Regulations, and the role taken by the Superintendent of Real Estate, I am satisfied that the underlying principles in establishing a Unit Entitlement Schedule is to require that any formula used to calculate unit entitlement is "consistent" and "equitable". It is only in this way that an equitable contribution to the common expenses of a strata development could be assured. While the option was available after 1998 for the same number to be applied for all of the residential strata lots (pursuant to s. 246(3)(a)(ii) of the Act), that option was not available when this Strata Plan was approved so that the concept of consistency and equitable treatment of all owners should prevail. In the language of the s. 246(3)(a)(iii), unit entitlements for each strata lot should be calculated so as to allocate: "... a fair portion of the common expenses to the owner of the strata lot".

¶ 49 Accordingly, I reject the submission of the Respondents that treating all one-storey units uniformly and treating all two-storey uniformly although differently from the one-storey units can amount to treating owners consistently or equitably. While Messrs. Taylor and Carrier were both of the opinion that it would be equitable to include or exclude habitable space as long as that was consistently dealt with within particular types of units within the Plan, I am satisfied that this would be inconsistent between owners and inconsistent with the Act and the Regulations. To exclude almost 50% of potentially habitable space merely because it happened to be in a lower floor area in a two-storey unit does not treat all unit owners consistently. It could not be the case that consistency and equality would be produced by ignoring the underlying principle of the Act and the Regulations that habitable space be included so that each owner would pay a fair portion of the common expenses.

¶ 50 It would inequitable for the owners of the one-storey units to continue to pay monthly strata fees roughly equal to the monthly fees being paid by those owners whose units are almost twice as large. The current B.C. Assessment Authority valuations show that the current value of the two-storey units takes into account the extra

square footage which is said not to be habitable. Even taking into account the effect that the dispute between the owners may have on current market values, it is clear that the owners of the two-storey units have the benefit of not only the higher market value but also of the disproportionately lower monthly allotment of expenses.

¶ 51 While many of the purchasers of the two-storey units may well have been influenced by the fact that not all of the habitable space within their units was included within their unit entitlement and while all purchasers were entitled to rely on the Schedule of Unit Entitlement registered against title in the Land Title Office, I can not conclude that any purchaser of a two-storey unit was of the belief that the basement could not be inhabited. On the bases of what was told to prospective purchasers by the developer, of the state of Strata Lot 30 as a display unit showing an already developed basement area, and of the development that had already taken place prior to the purchase of a number of the two-storey units, I am satisfied that prospective purchasers were well aware that the basements could be developed. I am also satisfied that reliance on what was set out in the Schedule of Unit Entitlement cannot be a complete bar to an amendment of that Schedule. If it was, then the Legislature would not have created the power available to the Court under s. 246(7)(a) of the Act. While it is a factor to be taken into account when dealing with the question of whether any change in the Schedule is appropriate or not, I am satisfied that it is not an overwhelming factor in the case at bar.

¶ 52 I am also satisfied that Mr. Sims was mislead about the intent of the developer to leave most of the lower level as space which would not be habitable just as he was mislead when he was advised that the garages would be converted to habitable space. I am satisfied that it would be inappropriate to leave the Unit Entitlement Schedule intact when it was based on misleading statements made to the land surveyor responsible to assure that all unit holders were dealt with in a consistent and equitable manner.

¶ 53 I am also satisfied that it is in the best interests of the 9 two-storey unit owners to have the question resolved equitably. First, it will allow sales without the controversy about the current Unit Entitlement Schedule. Second, it will eliminate the possibility that the theory advanced by Mr. Taylor is correct and that any areas not designated as "habitable" should no longer be used as habitable space and that the owners of two-storey units should no longer occupy much of the space on the lower level of their units. Third, if the advice received from the Office of the Superintendent of Real Estate is correct and replacement insurance would not cover the replacement of improvements on the lower areas of the two-storey units, then a change in Unit Entitlement would eliminate that possibility.

¶ 54 The fact that the District of Nanaimo has allowed occupation of all of the area within the two-storey units allows me to conclude that the argument is not available to the owners of the two-storey units that there is any zoning or municipal regulation prohibiting habitation. The fact that the Superintendent of Real Estate approved the current Unit Entitlement Schedule does not determine the matter for all time as the Legislature has now granted the Court the ability to amend the Unit Entitlement Schedule in appropriate circumstances.

¶ 55 I am satisfied that it is necessary to recalculate the Unit Entitlement in order that the calculation is consistent and equitable and is in accordance with the Act and Regulations. While this will mean a substantial increase in the monthly amount to be paid by those who own two-storey units, there is no evidence before me which would indicate that such an increase would be a financial burden that cannot be borne by the owners of two-storey homes.

¶ 56 While the space taken up by garages has been included within the habitable space of each unit so that all units within the Development have been dealt with equally and consistently, this inclusion is contrary to Policy Statement No. 4 and the Regulations and I am satisfied that this error should be rectified so that all garage space is excluded as this exclusion is mandated by the power made available to the Supreme Court under s. 246(8)(a) of the Act.

¶ 57 The Schedule of Unit Entitlement will be amended, in accordance with the Regulations, to accurately

reflect the habitable area or square footage of a strata lot. The Schedule will be amended to take into account all habitable area whether or not an area in the lower level of the two-storey units can be inhabited at the present time. While this will necessarily include space which is presently occupied by the furnaces and water tanks for each two-storey unit, the inclusion of these areas is fair taking into account that the Unit Entitlement of the one-storey units includes space which is similarly occupied. The Schedule of Unit Entitlement will also be amended to eliminate the inclusion of garage space. If the parties need Directions from the Court in this regard, I will remain seized of any such application.

¶ 58 The effect of this Order will be suspended until all of the requirements under the Act have been met and until there has been registration in final form in the Land Title Office.

¶ 59 Even though the Petitioners have been successful in obtaining what was requested in the Petition, I am satisfied that the awarding of costs to the Petitioners would only result in there being further divisions within the Development. Accordingly, all parties will bear their own costs.

BURNYEAT J.

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