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East Barriere Resort Limited v. The Owners, Strata Plan KAS1819, 2016 BCSC 1609 (CanLII)

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *East Barriere Resort Limited v. The Owners, St rata Plan KAS1819,* 2016 BCSC 1609

Date: 20160830
Docket: 51951
Registry: Kamloops

Between:

East Barriere Resort Limited, Joyce Sylvia Michaud, R 420 Holdings Ltd., J. Bouwmeester Investment Corp., and Waterfront Development Corporation

Petitioners

And

The Owners, Strata Plan KAS1819

Respondent

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Petitioners: J.G. Frame

Counsel for the Respondent:	W.A. Baker, Q.C.
Place and Date of Hearing:	Kamloops, B.C. April 8, 2016
Place and Date of Judgment:	Kelowna, B.C. August 30, 2016

Introduction

[1] The petitioners seek various declarations and orders in respect of the respondent's governance of a phased strata development that is located at the west end of East Barrier Lake. All of the relief relates to efforts by the respondent to control rental by owners, the use of a dock and boat slips that are common property and moorage in the adjacent bay.

Background

[2] The bare land strata development is known as Shuswap Highlands. It has been developed in four phases. Phase 1 was registered in October 1996, phase 2 in January 1998, phase 3 in June 2001, and phase 4 in December 2014.

[3] The strata corporation was created in 1996. Commensurate with phase 1, two disclosure statements were created. Each indicated the intended use was a resort with buildings intended for rental for vacation / recreation use and not as principal residences.

[4] The original owner and developer was Brackendale Resorts Ltd. ("Brackendale"). Prior to the strata subdivision, there had been a resort on the land consisting of a lodge and cabins. Brackendale converted the lodge to a residence before the subdivision and it was sold as a vacation home in phase 2.

[5] A restated disclosure statement was released September 5, 1997, which described the development as a "commercial and residential phase strata development".

[6] Brackendale owned the lands which ultimately became phase 4 until 2005 when the petitioners obtained the land through foreclosure proceedings.

[7] Declarations filed in the Land Titles office with the Strata Plan describe phases 1 and 3 as residential, phase 2 as residential/commercial. No such declaration was filed with phase 4.

[8] Phases 1, 2 and 4 are within areas zoned "C-4 recreational, commercial" and phase 3 is zoned "CR-1 country residential". There are 24 lots in total. Some lots are divided into shared partial interests, making a total of 52 interests.

[9] There has never been a rental pool and no resort or commercial development has been operated by the strata corporation. Owners have constructed detached single-

family homes used as vacation residences. Some owners rent their units some of the time, but all have been developed and used as residential lots since 1996.

[10] The strata previously proposed a bylaw amendment to preclude commercial rentals. No such amendment was approved.

[11] The strata corporation has a 156 foot dock into the bay of the lake from common property. It is removed from the lake in winter. It is T-shaped and is designed to create 22 boat slips. It was constructed in or about 2007 and 2008.

[12] In December 2007, the respondent sent to each owner notification of a January 31, 2008, deadline for owners to request a license for a slip. A $1,500 license fee was created and those funds were used to partially fund the construction of the dock. Nineteen 20-year licenses were created using that system. The 19 holders of licenses secured their right to a slip each year during the term of the license but each year the specific slip to which they are entitled is the subject of an assignment process and is, as I understand it, random. Three slips are retained and are not licensed and are available for use by other owners.

[13] In 2002, the respondent introduced a bylaw that prohibits anchoring of any watercraft in the bay overnight without prior written approval of the strata council. That bylaw was unanimously approved.

[14] A representative of one of the petitioners placed 11 buoys in the bay in April 2015. The respondent responded by notifying all owners that if any of them anchored overnight it would enforce the bylaw through the imposition of fines. The buoys were later removed.

Issues and positions of the parties

Classification of lots as residential or nonresidential

[15] The petitioners seek declarations that the lots in phases 1, 2 and 4 are not residential and that those in phase 3 are residential. They then seek declarations that s. 128 of the *Strata Property Act*, S.B.C. 1998, c. 43, should operate to require separate three-quarter majority votes for proposed bylaw amendments. The petitioners seek other consequential orders.

[16] They rely primarily on Thompson Nicola Regional District zoning bylaws and disclosure statements issued by the developer of the property to support the assertion that such declarations are appropriate.

[17] They say the disclosure statements prepared for phase 1 of the development indicated it was to be a "commercial phase strata development". A restated disclosure statement on September 3, 1997, described the development as a "commercial and residential phase strata development".

[18] The petitioners say the zoning bylaws place phases 1, 2 and 4 in zone “C-4 recreational, commercial” and phase 3 in zone “CR-1 country residential”.

[19] The petitioners say that the only phase of the strata development which was indicated to be for residential purposes was phase 3. In the result, the petitioners say that since June 26, 2001, when phase 3 of the strata development was filed with the Kamloops Land Title Office, s. 128 of the *Strata Property Act* required and requires separate votes for bylaw amendments with three-quarter majorities from each of the residential representatives and the commercial representatives being necessary.

[20] The respondent acknowledges the zoning bylaws and the disclosure statements but says that, in fact, the strata lots have been developed and used as single-family homes. It says that since 1996 none of the strata lots have been used for nonresidential purposes. The respondent's bylaws do not make any distinction between any of the strata lots as being commercial or residential.

[21] It says that there is no evidence that the petitioners relied on the disclosure statements at the time their units were acquired and, at that time, exclusive residential use was patently obvious and long-standing.

[22] The respondent also says that the disclosure statements are no longer relevant since all units have been sold and the developer is no longer associated with the project.

[23] Similarly, it says that the zoning bylaws are not relevant. Whatever the zoning is, it says, it is the actual use that should govern the application of s. 128 of the *Strata Property Act*.

Boat slips

[24] The petitioners say the manner of assigning licenses of the slips in a dock offends s. 76 of the *Strata Property Act*, which limits the respondent's ability to license exclusive use of the slips to less than or equal to one year.

[25] The respondent says that s. 76 does not apply or, if it does, the system of rotating which of the 19 licensed owners has access to which slip each year brings the policy in line with s. 76 of the *Strata Property Act*.

Bylaw prohibiting overnight moorage

[26] The petitioners say the 2002 bylaw regarding use of property that prohibits overnight anchoring in the bay is invalid. They say that the respondent's authority over common property and assets does not extend to controlling what occurs in or on East Barrier Lake and, particularly, moorage in the bay.

[27] The respondent says that s. 119(2) of the *Strata Property Act* allows for such a bylaw. It says that the purpose of the bylaw is to enhance water safety in what can become a busy part of the lake and to preserve the aesthetic beauty of the bay for all owners. It notes that the bylaw was approved unanimously and has been complied with by owners since first being put in place.

Analysis

Classification of lots as residential or nonresidential

[28] The declarations sought by the petitioners require an interpretation of s. 128 of the *Strata Property Act*. It reads as follows

> 128 (1) Subject to section 197, amendments to bylaws must be approved at an annual or special general meeting,
>
> (a) in the case of a strata plan composed entirely of residential strata lots, by a resolution passed by a 3/4 vote,
>
> (b) in the case of a strata plan composed entirely of nonresidential strata lots, by a resolution passed by a 3/4 vote or as otherwise provided in the bylaws, or
>
> (c) in the case of a strata plan composed of both residential and nonresidential strata lots, by both a resolution passed by a 3/4 vote of the residential strata lots and a resolution passed by a 3/4 vote of the nonresidential strata lots, or as otherwise provided in the bylaws for the nonresidential strata lots.

[29] Fundamentally, the question is how to determine whether a lot is a residential or a nonresidential strata lot. Section 1 of the *Act* defines a "residential strata lot" as "a strata lot designed or intended to be used primarily as a residence". There is no definition of "nonresidential lot" and thus such lots are all those that are not residential.

[30] In *Jiwan Dhillon & Co. Inc. v. Gosal*, 2010 BCCA 324 (CanLII), the court summarized the law on statutory interpretation in this way:

> [15] ... It is well known that the unifying principle of statutory interpretation, as approved by the Supreme Court of Canada, is described in E.A. Driedger, *The Construction of Statutes* 2nd ed. Toronto: Butterworths, 1983:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament
>
> See *Rizzo& Rizzo Shoes (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27; *Bell Express Vu v. Rex*, 2002 SCC 42 (CanLII), [2002] 25 L.R. 559.

[31] Before proceeding with the application of these principles, I will review the authorities dealing with the *Strata Property Act* referenced by counsel in their submissions.

[32] Section 128 was considered in *Azura Management (Kelowna) Corp. v. The Owners, Strata Plan KAS 2428*, 2010 BCCA 474 (CanLII). The issue before the court was whether s. 164 of the *Act* could be used to overcome the effect of s. 128 on the basis that the proportion of residential to nonresidential lots made the effect of s. 128 unfair. In giving its decision it said this of s. 128:

> [16] … Section 128 recognizes that different uses of lots within a Strata Corporation may invoke different interests, and that those interests must be separately recognized for the purposes of voting on proposed bylaw amendments. In *Butterfield v. The Owners Strata Plan LMS 1277*, 2000 BCSC 1110 (CanLII), Mr. Justice Preston recognized that one of the purposes of s.128 was to "protect" residential and nonresidential groups from each other.

[33] After disposing of the question related to s. 164, the court addressed the classification of lots for purposes of s. 128. The court took into account the actual use of the lots. It noted that the bylaws had never recognized any different classification of strata lots. It also referenced the fact that disclosure statements that had been filed had changed over time in their description of the numbers of residential and nonresidential lots within the development. Zoning was referenced, as was a standard form agreement of purchase and sale that incorporated the disclosure statement. The trial court had concluded that all but four of the 500 lots were residential. That was consistent with the actual use. The appeal of that finding was dismissed.

[34] Various other authorities were referenced for their observations and conclusions as to what constitutes residential use. I am unable to find anything in them that would require my conclusions as to the classification of lots to be based on either or both of the zoning or disclosure statements. That evidence is relevant but not determinative and must be considered within the overall factual matrix.

[35] I return then to the legislation and the law on statutory interpretation.

[36] Section 128 is in Part 7 of the *Act* that deals with bylaws and rules. It delineates the permissible nature and scope of bylaws and rules, the various mechanisms for enforcement and the procedures for amendment.

[37] I note that the definition of "residential strata lot" references only design and intention. It does not incorporate any other considerations such as zoning or disclosure statements. It does not clarify whether the intention referenced is that of the original developers or the owners.

[38] A disclosure statement clearly is evidence of the intention of the developer. In this case, the disclosure statements were created in 1996 and 1997. As noted in para. 7 above, the strata plans filed with the Land Title Office are to a significant degree inconsistent with those disclosure statements but not entirely so.

[39] The uncontradicted evidence is that the actual use of all of the lots has been residential. Clearly, residential use has been the intention of the owners for an extended period of time.

[40] Given the circumstances of this case, it is my view the section must recognize the intention that is manifestly apparent from the actual use over an extended period of time. To look to the original intentions of a developer who is long removed from the development would defeat the purpose of the section. There is no evidence here that the petitioners relied on the disclosure statements.

[41] The peculiar facts of each case must be considered and the facts here are compelling in this regard.

[42] There is limited evidence directly on the question of design. This is a bare land strata. Some of the structures existing when the developer acquired the property were commercial but all of those have been converted to residential use. It is apparent that the design of the lots themselves is at least consistent with residential use. It would seem, however, that from a design perspective it is equally consistent with commercial rental use; that is to say, owners could easily rent their units. There is no direct evidence on this point.

[43] The Court of Appeal's comments in *Azur*, including its reference to Preston J. in *Butterfield v. The Owners Strata Plan LMS 1277*, 2000 BCSC 1110 (CanLII), are instructive as to the intention of the drafters of the legislation. It was to ensure varied interests have a voice.

[44] Taking into account all of the circumstances of this case, it is my view that to accede to the petitioners' position would be to in fact defeat rather than serve the purpose of s. 128. It would require separate votes where use of lots has not been different. Here we have only one group (to use the term adopted by Preston J. in *Butterfield*) and it is residential. Some of that group seek to be nonresidential based on zoning that prohibits residential use. To classify their lots as nonresidential would essentially create a group that has not in fact existed for many years.

[45] There is a distinction to be drawn between the hopes and aspirations of certain owners, in this case the petitioners and the actual nature and use of the lots.

[46] The fact of certain zoning could result in action by local governments which would have to be responded to is a separate issue. It is to be noted that there has been no such action, although the use of some of the lots has been inconsistent with zoning for an extended period.

[47] The purpose of s. 128 is to protect the democratic process by allowing owners who have put their lots to different use (or whose lots are otherwise properly classified differently) and thus have different interests to have a voice in bylaw amendments. Its purpose is not to allow those who have different aspirations or wishes to invoke change to gain or obtain a disproportionate voice in that democratic process.

[48] Accordingly, the application for declarations that the strata lots within phases 1, 2 and 4 are not residential strata lots for the purposes of s. 128, or otherwise, is dismissed. Similarly, any argument that amendments to bylaws passed being invalid on the basis that separate votes under s. 128 have not been carried out is rejected.

Boat slips

[49] There is no question that the dock and the slips which are part of it are common property. Section 76 of the *Act* provides as follows:

> 76 (1) Subject to section 71, the strata corporation may give an owner or tenant permission to exclusively use, or a special privilege in relation to, common assets or common property that is not designated as limited common property.

> (2) A permission or privilege under subsection (1) may be given for a period of not more than one year, and may be made subject to conditions.
>
> (3) The strata corporation may renew the permission or privilege and on renewal may change the period or conditions.
>
> (4) The permission or privilege given under subsection (1) may be cancelled by the strata corporation giving the owner or tenant reasonable notice of the cancellation.

[50] Here, the boat slip license agreements are for a period of 20 years. The respondent's argument that the rotating assignment annually of which owner with a license receives which slip takes the license agreements out of the scope of s. 76 has, in my view, no merit. It is the clear intention of the legislation to constrain a strata corporation in its ability to give exclusive use. Here, the desired common property is the collection of boat slips, not individual slips. To accede to the respondent's argument would, in my view, defeat the objective of the legislation.

[51] In its argument, the petitioners reference s. 164 of the *Act* as a mechanism by which significant unfairness can be addressed. In the petition, the order sought is a declaration that the strata corporation does not have the legal authority to issue licenses for exclusive occupation of boat slips for periods exceeding one year. I am prepared to make the declaration sought. Having done so, I do not find it necessary to make an order under s. 164. If, however, the petitioners are of the view that such relief is specifically necessary even in light of the declaration, they are at liberty to have that specific issue brought back before me.

[52] In response to this particular issue, the respondent asserts in its written argument simply, "[t]he Strata Corporation submits that s. 76 of the *Strata Property Act* is inapplicable to the boat slip licenses. The issuance of the licenses was not a temporary or short-term use decision relating to the common property, subject to the provisions in s. 76." No specific explanation for that proposition is set out and I reject it.

Bylaw prohibiting overnight moorage

[53] Clearly the strata corporation may make bylaws that provide for the control, management, maintenance, use and enjoyment of the strata lots, common property, and assets of the strata corporation and for the administration of the strata corporation. While the aim of the bylaw may have been to enhance the safety of water vessel entry and egress into the bay adjacent to the property and/or to preserve the aesthetic beauty of the bay, the lake is not common property or a common asset.

[54] It may be that there has been no dispute regarding the bylaw because all owners are of the view that it is well-intentioned and appropriate. That does not provide the strata corporation with any authority over the lake. Counsel for the strata corporation was unable to point to any basis upon which control of activity on the lake was within the scope of authority of the strata.

[55] Accordingly, I am prepared to make the declaration sought by the petitioners that the strata corporation does not have the legal authority to impose fines relating to

overnight moorage on East Barrier Lake, save and except where such moorage takes place at or within 20 meters of the strata corporation's dock.

Conclusions

[56] For the reasons set out above, the orders sought in the petition under paragraphs 7, 8 and 9 are allowed.

[57] I have not heard from the parties with respect to costs and, given the orders made, I invite the parties to appear before me for purposes of arguing that issue if they are unable to agree.

"Betton J."