SC 542 Owners of Strata Plan 226 v City of White Rock, AA14 and PAAB

Link to Property Assessment Appeal Board Decision

OWNERS OF STRATA PLAN 226
v.
CITY OF WHITE ROCK
ASSESSOR OF AREA 14 – SURREY/WHITE ROCK and
PROPERTY ASSESSMENT APPEAL BOARD

SUPREME COURT OF BRITISH COLUMBIA (S101364) Vancouver Registry

Before the HONOURABLE MR. JUSTICE GRAUER
Date and Place of Hearing: June 7, 2010, Vancouver, B.C.

N.R. Hughes for the Appellant
M.C. Woodward for the Respondent, City of White Rock
J.A. McLachlan for the Respondent, Assessor of Area 14 – Surrey/White Rock

Strata Lots – Restrictive Covenant – Split Classification

The properties are strata lots in a complex called the Ocean Promenade All Suites Hotel in White Rock. The owners appealed the decision of the Property Assessment Appeal Board ("the Board") which found that a restrictive covenant prohibited any personal use of the strata lots by their owners, thereby disentitling the strata lots from split classification for property tax purposes under section 1(a)(iii) of the Prescribed Classes of Property Regulation*, B.C. Reg. 438/81.*

The Board accepted the City's argument that the 39 strata lots did not qualify for split classification because a covenant registered against their titles under section 219 of the Land Title Act *(the "section 219 covenant") prohibited the owners from using the strata lots for any purpose other than "public rental residential use".*

HELD: Appeal Allowed.

This Court concluded that the standard of review on the appeal was correctness and that the Board's interpretation of clause 2(a) of the section 219 covenant amounted to an error of law.

The case turned on the interpretation of clause 2(a) in the section 219 covenant. The Court found clause 2(a) to be ambiguous due to the lack of proper punctuation (e.g., commas). To resolve that ambiguity, the Court considered the greater context in which the section 219 covenant was negotiated and concluded that the covenant did not provide an absolute prohibition of use by the owners. Clause 2(a), properly interpreted, requires no more than that for at least 50% of the year, the Lands shall be used only for public rental residential use, and shall be offered for rent or rented as overnight accommodation for periods of less than 7 days.

The Court ordered the original decision on the classification of the strata lots (splitting the classification between class 1 - Residential and Class 6 – Business and Other) to be restored.

Reasons for Judgment September 27, 2010

INTRODUCTION

[1] This is an Appeal by Stated Case from a decision of the British Columbia Property Assessment Appeal Board (the "Board") rendered January 13, 2010, in the matter of *City of White Rock v. Assessor of Area #14 – Surrey/White Rock and Owners of Strata Plan 226,* Appeal No. 2009-14-00015.

[2] As will be seen, central to this appeal is the interpretation of a provision in a restrictive covenant registered on title to each of the strata lots in Strata Plan 226. This strata complex is operated as the Ocean Promenade All Suites Hotel in White Rock, B.C. In allowing White Rock's appeal from the decision of the Assessor of Area #14, the Board construed the restrictive covenant as prohibiting any personal use of the strata lots by their owners, thereby disentitling the strata lots from split classification for property tax purposes under s. 1(a)(iii) of the *Prescribed Classes of Property Regulation,* B.C. Reg. 438/81 (the *"Regulation").*

[3] The issue of interpretation hinges upon the interesting question of how far the legal draftsman may proceed without employing punctuation, eschewing even that familiar tool of clarity, the comma, before his or her product succumbs to ambiguity.

THE RESTRICTIVE COVENANT

[4] The particular provision of the restrictive covenant at issue is clause 2(a), which must, of course, be viewed in its context. That context is as follows:

2. THE DEVELOPER COVENANTS AND AGREES with the Municipality that:

   (a) the Lands and any buildings or structures erected or placed on or to be erected or placed on the Lands and all Units on the Lands shall be used only for Public Rental Residential Use and for no other use and shall be offered for rent or rented for periods of less than 7 days to persons or a person as overnight accommodation for at least 50% of the 12 month period ending on October 31 in each year;

   (b) all of the Strata Lots must be managed by the same Management Company;

   (c) the Developer shall cause the Management Company to submit quarterly reports of rental and occupancy break down to the Municipality for the periods ending on January 31, April 30, July 31 and October 31 of each year, within 30 days of such date;

   (d) no more than 51 Units may be used at one time;

   (e) the Developer will, at the expense of the Developer, do or cause to be done all acts reasonably necessary to grant priority to this Agreement over all charges and encumbrances which may have been registered against the title to the Lands in the Lower Mainland Land Title Office save and except those specifically approved in writing by the Municipality or in favour of the Municipality; and

   (f) the Developer will pay to the Municipality, immediately after execution of this Agreement, the legal fees incurred by the Municipality in the preparation and registration of this Agreement.

[5] The restrictive covenant incorporated the following relevant definitions:

1.3 "Public" means all persons other than the Strata Lot Owner;

1.4 "Public Rental Residential Use" means use of the Unit for commercial rental to the Public for tourists', visitors' and travellers' transient accommodation ...

THE ISSUE

[6] Ever since the development was conceived, the operating terms have permitted owners of hotel units or their guests to use their units for up to 42 nights a year, provided that appropriate reservations are made, and that set rental fees are paid to cover the operational costs. The issue is whether the restrictive covenant in fact allows the owners of these hotel strata lots to occupy their own units on a transient pay-as-you-go basis.

[7] If the answer is "yes", then the original decision of the Assessor of Area #14 was correct. The development is entitled under the *Regulation* to split classification, being classified for part of the year in "Class 1, Residential". This follows from the owners exercising their ability to use their units for 7 or more days in the 12-month period ending June 30 in the preceding year as set out in the *Regulation.*

[8] If the answer is "no", then the Assessor's decision was incorrect, and was properly overturned by the Board. Under the *Regulation,* the result of the owners being prohibited from using their own units would be classification of the development in "Class 6, Business and Other", for the entire year.

THE DECISION UNDER APPEAL

[9] The relevant findings of the Board are set out in its Notice of Stated Case as follows:

> Board's Findings
>
> 9. The Board found that a plain reading of the Covenant does not allow the strata unit owners to occupy their units. The Board found that while context is always useful, it does not assist in the interpretation of the words of the Covenant. The Board found the words of the Covenant were not ambiguous. The Board found that the Covenant was intended to prohibit the usage of the units by their owners.
>
> 10. The Board found it did not have jurisdiction to consider whether the Covenant was invalid and unenforceable.
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> 11. The Board found that the effect of the Covenant is that if the owners do not have the right to use the units for seven or more days in a 12 month period ending June 30 as required by section 1(a)(iii)(A) of the Regulation. The Board found the units do not qualify for a split classification including Residential class and must be classified as Class 6 - Business and Other.

[10] The Board's Panel Chair, who decided the appeal, had no difficulty in concluding that the restrictive covenant prohibited the owners from any occupation of their units. In his reasons, he said this:

> [10] The City says that a plain reading of the Covenant prohibits the owners from occupying their units.
>
> [11] The City is correct in its interpretation of the Covenant. A plain reading of the Covenant does not allow the strata unit owners to occupy their units. The words of the Covenant are clear. Section 2(a) allows for use "only for Public Rental Residential Use and for no other use". This use, according to the definitions in the Covenant of *Public Rental Residential Use* and *Public* excludes the owners.
>
> [12] The owners, in their submissions, take a long and broad view of the history of the regulatory regime which resulted in the Covenant and the *Regulation;* they ask that it informed the interpretation of the Covenant.
>
> [13] Regarding the interpretation of the Covenant itself, the owners take the position that the phrase:
>
> > "(F)or at least 50% of the 12 month period ending on October 31 in each year"
>
> independently modifies each of the phrases

> "the Lands shall be used only for Public Residential Rental Use and for no other use"

and

> "shall be offered for rent or rented for periods of less than seven days to persons or a person as overnight accommodation".

[14] They assert that through this meaning, the units can be used by the owners. This is an interpretation that the words of the Covenant cannot bare *[sic].* It distorts the natural meaning of the words beyond what any reasonable interpretation permits.

[15] The owners also assert that these same words must be interpreted to mean that for at least 50% of the period, the owners were permitted to occupy the units. Again, this is not an interpretation that withstands examination. The phrase, interpreted within the context of the full sentence in which it is set, means that short-term rental to the public must be available for 50% of the year. It does not say and does not imply that the units are available to owners during the balance of the year. The 50% restriction implies, instead, that for the other 50% of the year, the units can be offered for rent or rented for periods of greater than 7 days.

[16] Alternatively, the owners submit clause 2(a) of the Covenant is sufficiently ambiguous that it should be interpreted in the owners' favour. This argument fails. Despite the best attempts of the owners to make these words dance, there is nothing ambiguous about them.

THE STATED CASE

[11] The following questions of law are stated for determination by the Court:

1. Did the Property Assessment Appeal Board (the "Board") err in law in finding that the strata lots (the "Strata Lots") that were the subject of the appeal were not entitled to split classification under section 1(a)(iii) of the *Prescribed Classes of Property Regulation,* B.C. Reg. 438/81 (the "Regulation") by misinterpreting section 2(a) of a restrictive covenant (the "Restrictive Covenant") registered on title to the Strata Lots in favour of the City of White Rock (the "City") as prohibiting the owners of each of the Strata Lots from using their respective strata lots;

2. In interpreting section 2(a) of the Restrictive Covenant, did the Board err in law in failing to adequately consider the objective factual matrix in existence at the time of entering into the Restrictive Covenant;

3. In interpreting section 2(a) of the Restrictive Covenant, did the Board err in law by failing to interpret the section in accordance with the intention of the parties the Restrictive Covenant;

4. In interpreting section 2(a) of the Restrictive Covenant, did the Board err in law when it found that section 2(a) of the Restrictive Covenant was not ambiguous in respect of prohibiting the owners' use of their respective Strata Lots;

5. In interpreting section 2(a) of the Restrictive Covenant, did the Board err in law by failing to consider the conduct of the parties after the Restrictive Covenant had been entered into;

6. In interpreting section 2(a) of the Restrictive Covenant, did the Board err in law by failing to construe the terms in section 2(a) strictly against the City;

7. Did the Board err in law by refusing to consider whether section 2(a) of the Restrictive Covenant was invalid or unenforceable based on the restrictions on owners use therein not been authorized by the resolution of the Council of the City of White Rock (the "City") that authorized the City to register a restrictive covenant on title to the property and that authorized the Mayor and Director, Corporate Administrative Services to execute a restrictive covenant on behalf of the City; and

8. In interpreting section 2(a) of the Restrictive Covenant, did the Board err in law by failing to adopt an interpretation of section 2(a) that would result in section 2(a) being valid as opposed to being invalid.

[12] It will be observed that the first question sets out the issue in omnibus form. The subsequent questions set out where, in essence, the Appellant submits that the Board erred.

[13] The parties are also united in stating that the question of the proper interpretation of the restrictive covenant is one of law, and that the standard of review is that of correctness. In the circumstances, I agree; see, for instance, *British Columbia (Assessor of Area No. 27 - Peace River) v. Burlington Resources Canada Ltd.,* 2005 BCCA 72; and *Assessor Area #01 - Capital v. Portland Cement Limited,* 2010 BCSC 193.

BACKGROUND

[14] There are few hotels in White Rock. This project came to the city's attention in early 2001.

[15] At that time, in response to a decision of the B.C. Court of Appeal *(British Columbia (Assessor of Area No. 01 - Saanich/Capital) v. Hardt* (1992), 88 D.L.R. (4th) 183), the relevant classification regulation had been amended to ensure that in certain circumstances, strata lots in strata hotels would be exempt from *Class 1 - Residential.* By 2001, s. 1(a)(iii) of that regulation provided that the exemption applied to:

> (iii) 20 or more strata lots that are
>
> (A) on one parcel or contiguous parcels,
>
> (B) used or available for overnight accommodation,
>
> (C) controlled or managed by persons, or a person, who control or manage 85% or more of the strata lots on the parcel or contiguous parcels referred to in clause (A) that are used or available as referred to in clause (B), and
>
> (D) offered for rent, or rented, for periods of less than seven days to persons, or a person, as overnight accommodation for at least 50% of the 12 month period ending on October 31 of the year previous to the taxation year for which the assessment roll is completed ...

[16] In a memorandum dated May 31, 2001, to the chief administrative officer concerning the strata hotel project, the city planner raised a property tax classification issue and addressed it in the following way:

> In researching similar strata hotel projects in resorts such as Whistler and Kelowna (Big White) it is apparent that there have been problems for municipalities respecting the management of the strata hotel and subsequent assessment appeals that have resulted in the individual strata lots being reclassified from commercial to residential. This can have a significant and unforeseen impact on municipal tax revenues.
>
> Hotels are considered to be commercial operations, and it is in the best interests of the City to ensure that re-classification does not occur with this development. In order to ensure this, a number of "loopholes" in the existing assessment regulations should be addressed, as follows:
>
> - All strata lots of the building should be managed by no more than one management company. Buildings that are managed by more than one management company can be re-assessed to residential use.

- All strata units must be offered for rent or rented for short-term rental (less than 7 days) for at least 50% of the calendar year. Longer-term rentals may result in the reclassification to residential.

- Management will be required to submit rental and occupancy break down to the city on the quarterly basis. This will enable the City to ensure that the hotel is being run in accordance with the conditions of the covenant.

The developer has agreed to each of these points.

[17] These points were then incorporated into the restrictive covenant that White Rock required to be registered.

[18] Whatever White Rock may have thought, it is quite clear from the developer's disclosure statements issued in 2001 and 2002, from the provisions of the Hotel Use Covenant entered into between the developer and the Hotel Management Corporation and registered on January 29, 2003, and from the Hotel Management and Rental Pool Agreement adopted by the strata unit owners on October 1, 2005, that both the developer and the owners always proceeded on the assumption that owners were able to use their units for seasonal vacation use as long as that use did not exceed 42 days in any year. Of those 42 days, not more than 28 days were to be in the winter period, and not more than 14 days in the summer period. Owners were to pay a daily rental fee for this use. The hotel was openly operated on this basis for a number of years without comment by White Rock.

[19] In accordance with the Classes of Property Regulation as it then read, the strata units were ineligible for *Class 1 - Residential* classification, and were assessed accordingly as *Class 6 - Business and Other.*

[20] That changed in 2007, when the legislation was amended in a manner that significantly altered the approach to the classification of units in strata hotels for assessment purposes. The new scheme created a split classification regime based on actual occupancy and use. It added a new definition to the *Assessment Act,* R.S.B.C. 1996, c. 20, as follows:

> **"strata accommodation property"** means a strata lot in respect of which the following requirements are met:
>
> (a) the strata lot is in a strata plan that, with or without contiguous strata plans, includes 20 or more strata lots;
>
> (b) the strata lot is rented or offered for rent as overnight accommodation for periods of less than 28 days for at least the prescribed percentage of the 12-month period ending June 30 of the year previous to the taxation year for which the assessment roll is completed.

[21] The regime further altered s. 1(a)(iii) of the *Prescribed Classes of Property Regulation* to provide that the exemption from *Class 1 - Residential* would now apply to:

> (iii) a strata accommodation property except, subject to subparagraph (iii.1), if
>
> (A) the owner of the strata accommodation property has the right to use the property for 7 or more days in the 12-month period ending June 30 of the year previous to the taxation year for which the assessment roll is completed,
>
> (B) either
>
> (I) the owner exercises the owner's right to use that property, or
>
> (II) in respect of more than 50% of the strata accommodation properties in the strata plan or contiguous plans, the owners exercising a right to use their property for 7 or more days in

the 12-month period ending June 30 of the year previous to the taxation year for which the assessment roll is completed, and

(C) the owner of that property supplies the information as required under section 11 in respect of the property,

the property is included in class 1 but not in respect of that part of a year equal to the number of days, if any, by which the number of days reported under section 11(a) for the property exceeds 36 days.

[Emphasis added]

[22] These amendments came into force on June 21, 2007. The result at the Oceanside Promenade All Suites Hotel was that, to the extent the owners exercised their right to use their units for seasonal vacation use in accordance with their Hotel Management and Rental Pool Agreement, then they would be entitled to a split classification between *Class 1 - Residential* for part of the year, and *Class 6 – Business and Other* for the rest. This would reduce White Rock's tax revenue from this strata hotel. If, however, the owners were in fact prohibited from exercising those rights by the terms of the restrictive covenant, then nothing would change despite the amendments. Hence this litigation.

DISCUSSION

[23] The Board Chair was in no doubt at all about how to interpret clause 2(a) of the restrictive covenant. He found that there was nothing whatsoever ambiguous about the words, and that the interpretation for which the owners contended distorted "the natural meaning of the words beyond what any reasonable interpretation permits".

[24] The learned Chair does not appear to have considered anything beyond the natural meaning of the words in clause 2(a), which clearly struck him as plain and obvious.

[25] How words such as these strike us, however, is not really the point. That approach gives rise to the risk of arbitrary results, and constitutes an error of law. The fact that the Assessor, from whose decision White Rock appealed to the Board, had come to the opposite conclusion, was perhaps a first clue that a more contextual approach was called for. As Cromwell J. stated in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways),* 2010 SCC 4, [2010] 1 S.C.R. 69:

> [64] The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context.

[26] White Rock argued that such an approach would support the interpretation of the Board Chair, maintaining that its intent was twofold: first, to ensure that the development would be used only for public rental residential use, and secondly, that for at least half the time, that public rental residential use would be for rental periods of less than seven days. In this regard, White Rock relied on *Harrison Hot Springs (Village) v. Forsite Developments Inc.,* 2007 BCSC 833. But there is no evidence of any such intent. It certainly does not arise from the City Planner's memorandum that ultimately formed the basis of the restrictive covenant. To say that it is evident from clause 2(a) itself depends, of course, on how one interprets it. The *Harrison Hot Springs* case dealt with a different covenant that the judge found required the individual strata units in question to be continuously available and offered for occupancy to the public. Whether this restrictive covenant does the same is another matter.

[27] Consider the following edits to clause 2(a), one of which adds a single comma, while the other adds two:

... the Lands and any buildings or structures erected or placed on or to be erected or placed on the Lands and all Units on the Lands shall be used only for Public Rental Residential Use and for no other use, and shall be offered for rent or rented for periods of less than 7 days to persons or a person as overnight accommodation for at least 50% of the 12 month period ending on October 31 in each year;	... the Lands and any buildings or structures erected or placed on or to be erected or placed on the Lands and all Units on the Lands shall be used only for Public Rental Residential Use and for no other use, and shall be offered for rent or rented for periods of less than 7 days to persons or a person as overnight accommodation, for at least 50% of the 12 month period ending on October 31 in each year;

[28] Either version, I venture to suggest, would eliminate the interpretive issue. The first would have the effect for which White Rock contends, while the second would support the owners' interpretation. Neither distorts the natural meaning of the words. Given the complete absence of commas in the original, which interpretation should be preferred?

[29] Two factors suggest themselves. The first is the structure of the section as a whole; that is, the contextual structure. It will be observed that if the interpretation relied upon by White Rock is correct, clause 2(a) would differ structurally from clauses 2(b) through (f) in containing two separate covenants: to use the land for only one particular use, and to offer the units for short-term rental for half the time. All of the other sub-clauses contain one covenant per sub-clause. If the interpretation for which the owners contend is correct, then clause 2(a) would follow the same pattern as its mates, with each sub-clause containing one covenant. That is also the pattern followed in the City Planner's memorandum. It makes more sense.

[30] The second is one of consequence. If White Rock is correct, then it follows from the Board Chair's interpretation that owners can never occupy their own units, even if they rent them like any other hotel guest. Counsel for White Rock submitted that no one would go so far as to suggest such a result, but that is precisely what follows from his client's position and the Board Chair's interpretation. It is surely a result to be avoided unless one is compelled to accept it. It makes no commercial sense.

[31] The context in which the restrictive covenant was negotiated was a property tax regime that did not require an absolute prohibition of use by owners in order to address the concerns that White Rock then had. Commercially, the development was thereafter operated in a manner inconsistent with such a prohibition having been contemplated. A change in the tax regime then occurred designed to encourage owners to invest in such developments. White Rock's suggested interpretation goes very much against that flow.

[32] I conclude in all of the circumstances that when clause 2(a) of the restrictive covenant is considered in harmony with the rest of the developer's covenants therein set out, and in light of the restrictive covenant's commercial and planning context, the Board Chair's interpretation cannot be supported. Clause 2(a), properly interpreted, requires no more than that for at least 50% of the year, the Lands shall be used only for public rental residential use, and shall be offered for rent or rented as overnight accommodation for periods of less than 7 days.

[33] Accordingly, the appeal is allowed, and the decision of the Assessor is restored. It is not necessary for me to consider the owners' alternative position that if the Board correctly interpreted the restrictive covenant, then the covenant is invalid and of no force or effect.