IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Valley's Edge Park Ltd. v. Holden,* 2024 BCSC 377

Date: 20240304
Docket: S6907
Registry: Golden

Between:

Valley's Edge Park Ltd.

Petitioner

And

Moira Holden and Denis Holden

Respondents

Before: The Honourable Justice Armstrong

Reasons for Judgment

Counsel for the Petitioner:	D. Murphy
The Respondents, appearing on their own behalf:	M. Holden D. Holden
Place and Date of Hearing:	Cranbrook, B.C. August 31, 2023
Place and Date of Judgment:	Cranbrook, B.C. March 4, 2024

Introduction

[1] The respondents are the owners of Lot 5, a bare land strata property in a recreational resort in Edgewater, BC. Their primary residence is a cabin located on Lot 5 and in August 2022, they constructed a deck adjacent to their cabin. This was contrary to a statutory building scheme (the "SBS") registered against their lot pursuant to s. 220 of the *Land Title Act*, R.S.B.C. 1996, c. 250. The SBS requires owners to obtain approval from an administrator of the SBS before undertaking any construction or improvements.

[2] The petitioner is the Administrator of the SBS. It seeks a mandatory injunction to enforce the SBS by way of an order compelling the respondents to remove the deck within 30 days.

[3] The petitioner contends the respondents constructed this improvement on Lot 5 without obtaining the written approval of the Administrator as required by the SBS. The petitioner has demanded the respondents remove the improvement; the respondents have refused to do so.

[4] The respondents oppose the petition and say the deck does not interfere with any other owners' quiet enjoyment of the resort. Further, the removal of the deck will be time consuming, costly and of no practical benefit to the resort as a whole. They contend the request for an injunction should be refused, in light of the factors set out by this Court in *Foy v. 0933164 B.C. Ltd.*, 2022 BCSC 2046 at para. 112.

Background

[5] The petitioner conceived of the plan for a 49 lot strata development which became the Valley's Edge Resort (the "Resort") in 2006. In February 2021, the respondents acquired Lot 5 subject to the SBS that was registered in June 2006. The petitioner retains a right of first refusal to purchase any of the Resort strata lots that could be offered for sale.

[6] Glen Ortt is the president of the petitioner. He says that when he first developed the Resort, he limited construction to styles and scales respectful of the

Resort's natural setting. The vision was for resort owners to live in a controlled setting in harmony with nature and one another.

[7] The terms of the SBS include the following:

> 2.2 No improvement shall be undertaken, constructed, erected or placed on any Strata Lot unless or until plans of specification showing compliance in all respects with these restrictions showing elevations, siting, size, set backs, exterior colour scheme, landscaping and all materials to be used have been submitted to and approved in writing by the Administrator.
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> 2.3 The Administrator shall have the sole right and power to approve or to reject such plans and specifications in its discretion. All decisions of the Administrator shall be final and binding.
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> 2.4 It is the intention of this Building Scheme and Design Guidelines that all Improvements are to be controlled as to their design for the benefit of the Strata Lots and the development known as the Valley's Edge Park as a whole.
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> 2.5 The Administrator shall receive and consider plans and specifications in a timely manner, and either approve or reject the plans and specifications, or make further recommendations for alterations of the plans and specifications.
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> 2.6 No Improvement shall be constructed or placed on a Strata Lot in a manner that impedes the views or sight lines of adjacent Strata Lots. In addition to the foregoing, Improvements must be constructed or placed in accordance with set back requirements of the Regional District of East Kootenay.
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> …
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> 5.13 No owner will allow any breach of any covenants contained herein to continue for more than (30) days after notice [in] writing delivered to the owner of the Strata Lot by the Administrator requesting the owner to remedy such breach, and if the owner allows such breach to continue the Administrator may cause such work as may be necessary to cure the breach to be performed and the cost thereof including the administration of legal costs shall be a debt owing by the owner, payable upon delivery to the owner of such Strata Lot of an invoice for such work or services.
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> 5.14 The restriction set out in this Building Scheme shall be in addition to and not in derogation of the bylaws from time to time of the Regional District of East Kootenay, the bylaws of the Strata Corporation and the obligations and liabilities imposed by statute or common law upon the owners and occupiers from time to time of the Strata Lots, all of which shall be duly observed and complied with.
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> 5.15 Valley's Edge Park Ltd. will act as the Administrator of the Building Scheme until Valley's Edge Park Ltd. elects, in its sole discretion, to cease to act as Administrator, at which time the function of Administrator will be transferred to the strata corporation.

[8] The SBS also requires owners to provide detailed plans and site drawings to the petitioner for proposed improvements their strata lots. Decisions of the Administrator regarding the acceptance or non-acceptance of proposed improvements are final and binding on owners. The SBS limits the building and siting of improvements, management of vehicular access, permissible cottage exteriors, grading and landscaping, fencing, patios and driveways, and construction practices.

[9] There is little disagreement concerning the background to this dispute. The petitioner alleges and the respondents concede that the development is subject to the SBS and that at sometime in August 2022 the respondents constructed a new deck on Lot 5 without the written permission of the Administrator.

[10] Denis Holden deposed that he sent a hand-drawn plan to Ken Aylesworth, the president of the strata council in July 2022 with a notation, "Lot 5 Requests – Approval for added deck". This plan contained measurements of the pre-existing deck, railing and dimensions of the residence, as well as outbuilding and surrounding features.

[11] Notwithstanding Mr. Holden's assertion that he sent a plan in July 2022, it appears that it was not until September 5, 2022 that Mr. Aylesworth sent Mr. Holden's email to Mr. Ortt enclosing the diagram of proposed improvements on Lot 5, well after the deck had been completed. Mr. Holden attached a copy of the July 2022 plan sent to Mr. Aylesworth in his July 31, 2023 affidavit. However, the plan received by Mr. Aylesworth was different; I accept that the plan sent by Mr. Aylesworth to the petitioner in September 2022 (given to him in July 2022) is the plan attached as Exhibit B which reflects "Lot 5 Requests – Approval for added deck".

[12] Mr. Aylesworth confirmed to Mr. Ortt that he had informed the respondents that strata council did not have any jurisdiction over his request and that he would deliver the diagram to Mr. Ortt for review and comment.

[13] On September 8, 2022, Mr. Ortt wrote back to Mr. Aylesworth with a testy response. He said that the sketch submitted by Mr. Holden did not have the "required Deck Approval Request attached" and the request was not capable of approval without it. He also indicated a ground-level deck had already been built.

[14] On November 19, 2022, Mr. Ortt sent a letter to the respondents notifying them that under s. 5.13 of the SBS, the deck was not in compliance with the approved plans and there had never been a request for approval of this deck. The respondents were given 30 days to remove the deck, following which the petitioner advised it would take legal steps to enforce the terms of the SBS.

[15] On November 26, 2022 Mr. Holden sent another email to Mr. Ortt containing the hand-written plan with a request that Mr. Ortt "please bring this drawing to court when you start your action".

[16] On December 3, Mr. Ortt emailed the respondents and asked if their previous email was intended to be an application for approval of the deck. If it was, the application was incomplete and rejected.

[17] The respondents have declined to remove the deck.

[18] The substance of the respondents' position is that an order requiring them to remove the deck due to their failure to obtain written approval is a drastic remedy beyond what is warranted. They contend the deck does not interfere with anyone's use or enjoyment of the Resort, and removing the deck will be costly and time consuming without any benefit to the Resort as a whole.

[19] In essence, the petitioner argues that it is against the interests of all owners in the Resort if owners are allowed to ignore the SBS and seek forgiveness after the fact instead of seeking permission before undertaking new and unapproved improvements.

Analysis

[20] In the petitioner's affidavits, the only reason given for rejecting the placement of the respondents' deck is that there was approximately four feet of difference in elevation between the existing deck and the new one. Mr. Ortt deposed, "the additional deck does not tie-in to the existing deck, such that it now looks like an afterthought; a tagged-on appendage".

[21] There was clearly discord between the respondents and petitioner concerning some other issues relating to governance of the strata, a defamation action against Mr. Holden filed by Mr. Ortt and other issues concerning other lots in the resort. Mr. Holden referred to some direction he had received earlier from Mr. Ortt that he was not permitted to communicate directly with Mr. Ortt.

[22] I do not propose to review any of those issues because they lack relevance to the issues on this application. It is uncontroverted that the respondents constructed the deck on Lot 5 without obtaining prior approval in writing from the petitioner. Moreover, after construction of the improvements, the respondents' application for approval was denied.

[23] Statutory building schemes reflect a broad concern for community interests in the rules and regulations pertaining to this type of residential development, including owners and developers: see *Peachland Heights Properties Ltd. v. Wilson*, 2006 BCSC 936 at paras. 9–11.

[24] Although mandatory injunctions are the normal remedy for breach of building schemes, equitable damages can also be ordered in lieu: see *Arbutus Park Estates Ltd. v. Fuller* (1976), 74 D.L.R. (3d) 257 at 260 and 265, 1976 CanLII 1118 (B.C.S.C.) [*Arbutus Park Estates*].

[25] Here, the petitioner seeks a mandatory injunction requiring the respondent to remove the deck. As noted by Justice Crerar in *Foy* at paras. 112–113, although injunctions are a usual remedy for breaching statutory building schemes, equitable damages can be awarded and are "generally calculated on the basis of what might

'*reasonably have been demanded by the covenantee as a 'quid pro quo' for relaxing the covenant*'" (emphasis in original).

[26] The questions concerning the appropriate remedy in this case were discussed in *417489 B.C. Ltd. v. Scana Holdings Ltd*., [1998] B.C.J. No. 140, 1998 CanLII 6770 (S.C.), the defendant addressed the Court on the question of equitable damages, in lieu of an injunction:

> [8] The general considerations which are relevant on applications to enforce restrictive covenants or building schemes are discussed in V. Di Castri, The Law of Vendor and Purchaser, 3d ed., Vol. 1 (Toronto: Carswell, 1988) at pp. 12-28, para. 423 as follows:
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> > An injunction is the usual remedy sought for a breach of a restrictive covenant. Prior to a breach or a threatened breach, the person entitled to the benefit of a restrictive covenant has no cause of action...
> >
> > The factors for consideration are: (1) the character of interest to be protected; (2) the relative adequacy to plaintiff of injunctive relief in comparison with other remedies; (3) delay, if any, in bringing an action; (4) misconduct, if any, of the plaintiff; (5) relative hardship likely to result to defendant if injunction granted and to plaintiff if it is denied; (6) interest of third persons and of the public; and (7) practicability of framing and enforcing the order or judgment.
> >
> > To summarize, when one party uses a legal right to invoke a court's equitable jurisdiction as a weapon of oppression rather than in defence of a just claim, the court may recognize circumstances that justify refusing to enforce the legal right.
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> [9] It is of course so, that in cases of this sort, the court may award equitable damages in lieu of a mandatory injunction in the exercise of the court's jurisdiction under Lord Cairn's Act 1858 (Imp.) c. 27: Arbutus Park Estates Ltd. v. Fuller [1977] 1 W.W.R. 729 (B.C.S.C.).
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> [10] Still, as Di Castri points out, an injunction is the usual remedy and upon a consideration of the factors he sets out, I have no difficulty concluding that these plaintiffs are fully entitled to the fruits of their judgment, that is: the effective enforcement of the terms of the building scheme.
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> (See also: *Foy*.)

[27] In this case, the thrust of the petitioner's submissions focus on the speculative impact on other owners in the Resort should the at-issue deck remain in place. The petitioner says that if the respondents are allowed to construct improvements without prior written approval, this will send a message that the rules will not be enforced.

[28] The petitioner's reason for refusing to approve of the deck appears to be thin. Under the SBS, the Administrator has the sole right to approve or reject plans and specifications in its discretion. However, the Administrator is required to receive, and consider plans in a timely manner, and either approve or reject those plans, or make further recommendations for alterations of the plans and specifications. Section 2.6 of this scheme indicates that improvements should not impede views or sightlines of adjacent lots. With specific reference to cottage exteriors and patios, the only concern in this case would be the materials used for walkways and use of specific materials. The petitioner's rejection of the plan on the basis that it looked like an afterthought or tag-on appendage does not suggest that the improvement has any significant impact on other property owners, other than the fact the work was done without prior approval.

[29] The issue before the Court on this petition deals only with the respondents' construction of the deck improvement on Lot 5 without prior approval. Although the SBS grants the Administrator broad powers to approve or reject plans, its decisions are final and binding without any mechanism for review or appeal of such decisions.

[30] While no claim was made for equitable damages, I am satisfied an order of this sort can be made if the circumstances warrant them: *Arbutus Park Estates* at 265.

[31] This is not a case in which the respondents' deck improvement interferes with the use or enjoyment of any other strata lots in the Resort. Instead, the petitioner is focused on developing a precedent that the SBS cannot be ignored or breached.

[32] In *Arbutus Park Estates*, the property owner constructed a house and part of a garage without obtaining approval of the vendor. The question, whether to order the garage be torn down because of that breach, was resolved by an award of equitable damages in lieu of the mandatory injunction requested. The Court said at 265:

> Clause 6 is distinguishable from an "as of course" type of restrictive covenant because cl. 6 does not spell out what the covenantor must do or not do. Clause 6 does not tell the covenantor what size, shape, type or colour the

> garage is to be or not to be. I venture to say that if cl. 6 had imposed a restriction on peaked roofs or had limited the height to a maximum of 12 ft. that I would be bound to order the garage dismantled down to the required size.

[33] The SBS in this case is similar in effect to Clause 6 in *Arbutus Park Estates*. In both cases, the rule prohibited construction or installation until plans and specifications had been approved in writing. In *Arbutus Park Estates*, the SBS permitted construction of a dwelling and a detached garage but the owners failed to obtain the approval of plans. After learning about the requirement for approved plans, the defendant continued to build the final 25% of the garage. Justice Toy concluded that demolition of the offending garage was not appropriate given the circumstances.

[34] In this case, there are no guidelines in the SBS, Schedule of Restrictions, or Design and Development Guidelines that could have informed the respondents' choices on any design issues. Moreover, the petitioner did not provide any guidance or information on how the respondents' plans could have been adjusted to satisfy its requirements .

[35] The petitioner indicated that one reason for refusing the respondent's request for approval was that the "deck approval request form" was required and had not been provided by the respondents.

[36] In my view, the petitioner is bound to exercise its discretion reasonably in approving or rejecting plans. As discussed by Justice Hood in *Hemani v. British Pacific Properties Ltd.* (1992), 70 B.C.L.R. (2d) 91 at para. 138, 1992 CanLII 575 (S.C.), aff'd (1993), 86 B.C.L.R. (2d) 378, 1993 CanLII 2300 (C.A.):

> In my opinion the defendant can neither unreasonably approve nor unreasonably reject plans, and I would imply such a term or terms in the subject restrictive covenant if it were necessary to do so. I am satisfied that when the Building Scheme was developed and development got under way, if the officious bystander had suggested that in exercising its discretion the defendant would have to consider not only the interests of the lot owner submitting the plans, but also those of lot owners who might be affected by the construction, and that it could not do so unreasonably, the common answer of the defendant and the lot owners, or perhaps the future lot owners, would have been "oh, of course!"

[37] In *Griffiths v. Sun Peaks Resort Corporation*, 2008 BCSC 640 at para. 26 the Court commented further on decisions made by administrators:

> [26] Although the test for judicial interference in a decision by the administrator to approve a development is high, the right and power given to the administrator is not unfettered, but confined by the community of interest and reciprocity of obligation. The test which should be applied to an administrator in exercising its discretion to approve or reject plans should be that of objective manifest reasonableness (***Hemani v. British Pacific Properties Ltd.*** (1992), 70 B.C.L.R. (2d) 91).

[38] This aspect of the petition and response was not explored at this hearing nor is it determinative of the petitioners claim; nevertheless, it merits comment in light of Mr. Justice Toy's comments in *Arbutus Park Estates.*

[39] There is no mention in the SBS requiring a specific form for making a request to make improvements to a strata lot in the Resort. The petitioner suggested there was a website which contained a form of approval request but no evidence was tendered about the website nor was a copy of the request for approval form included in either party's evidence.

[40] In this case, albeit after-the-fact, the form of plan sent by the respondents to Mr. Aylesworth and from Mr. Aylesworth to the petitioner bears the hallmarks of an application for approval.

[41] Moreover, in the petitioner's December 3, 2022 letter to the respondents, it indicated the application was incomplete and rejected without disclosing what part of the application was incomplete. As early as November 19, the petitioner had informed the respondents that their non-compliance stemmed from placing an improvement on the property that was not approved.

[42] There was no explanation for the delay between July 2022, when the respondents gave Mr. Aylesworth their plan for the new deck, and the petitioner's failure to respond to that request directly and in a timely way, as required under s. 2.5 of the Schedule of Restrictions.

[43] It is quite understandable that the petitioner seeks the mandatory order to remove the new deck, in part as a message to all other owners in the Resort that serious consequences will result from careless or deliberate disregard for the SBS. It is not clear that the respondents' plans to build a deck would have been refused absent changes that might have been requested by the petitioner. On a cursory review of the photographs of the new deck there appears to be little if any visual impact on other strata lot owners and nothing that appears out of character with the house, the upper deck surrounding the house or the Resort in general.

[44] Conversely, there is no evidence the respondents made any request to the petitioner for guidance or assistance in preparing plans that could have been acceptable to the Administrator. Although there has been a fractious relationship between the parties in the past, each of them had a duty and responsibility to abide by the SBS and address any corresponding adjustments to the improvement that could address the petitioner's objections. The November 26, 2022 plan that the respondents emailed to the petitioner was minimally different than the plan sent September 5, 2022 and sent on by Mr. Aylesworth to the petitioner. It could have invited the petitioner to address changes that would have met its approval. The petitioner's response also contained no effort to identify changes that might have been met with approval from the petitioner.

[45] As noted in *Arbutus Park Estates* at 264–265*,* the remedy of equitable damages can be awarded in appropriate circumstances when a restrictive covenant does not spell out specific restrictions as to out what the property owner can or cannot do under an SBS.

[46] Here, the covenant breached by the respondents did not specify any specific actions that were restricted or permitted and thus did not create an "as of course" type of restrictive covenant. As Toy J. observed in *Arbutus Park Estates*, if the scheme had imposed restrictions on specific aspects of the construction, a mandatory injunction would have been granted.

[47] Mandatory injunctions may be appropriate where the breaches of building schemes involve specific works or specific construction requirements that are prohibited unless requisite approvals have been granted. Placing an improvement on Lot 5 did not involve breaches of any specified building restrictions other than the requirement to obtain approval of any proposed improvements before construction. As noted in in *Hemani*, the administrator's decision concerning approval of plans must be reasonable.

[48] On the other hand, if the respondents had built contrary to specific restrictions concerning improvements, the Court would likely be bound to order the deck removed. Thus, the option of awarding equitable damages remains available.

[49] The respondents did not provide any evidence concerning the cost of removing the new deck on Lot 5.

[50] Taking into account the character of the interest protected by the SBS and the adequacy of injunctive relief in comparison with other remedies, I am persuaded that the injunctive relief sought should not be granted. I am not satisfied that the breach of the obligation to obtain approval of plans will significantly impact the interests of the other owners in the Resort.

[51] Other factors I take into account include the petitioner's failure to adequately address the respondent's request for approval received from the strata council president in September 2020. In this case, the decision to reject the respondent's application appears to have been arbitrary without taking into account the possibility of assisting the respondents in modifying the deck to accommodate any concerns.

[52] Then again, the respondents constructed the new deck on Lot 5 knowing they did not have approval from the petitioner and without taking steps to ascertain more clearly the administrator's response to their request or the basis that their plan was rejected.

[53] There was no evidence that the respondents' new deck interfered in any way with the use and enjoyment of other properties in the Resort. This underscores the

petitioner's purpose to enforce the SBS as a matter of principle and to discourage property owners from acting unilaterally without approval for the creation of improvements on other lots.

[54] Accepting that a mandatory order to remove the deck would result in some costs thrown away by the respondents, the question of equitable damages was not raised and there is no evidence concerning the measure of damages that could be ordered in the alternative to a mandatory injunction.

[55] This case is unlike the circumstances in *Foy* where equitable damages were neither appropriate nor practicable due to unique features of the property at issue.

[56] On all of the evidence, I find that this is not an appropriate case to order removal of the new deck. I have considered the option of ordering the respondents to pay damages in a sufficient amount that will operate as a disincentive to all others who may wish to flaunt the SBS. the petitioner's claim for a mandatory injunction has not been made out and I am satisfied that enforcement of the SBS by way of a damages order can still protect the community interests of all owners in the Resort against creeping or incremental violations of the SBS.

[57] The respondents did not argue in favour of a remedy in equitable damages rather than the mandatory injunction. Although there are no pleadings on this issue, I am satisfied that this would be an appropriate case to permit the petitioner to amend its pleadings to seek equitable damages in the alternative. Further submissions on the question of damages can be made once the petitioner has had an opportunity to review these reasons and address the issue of pleadings.

[58] The petitioner has been successful on this petition and would ordinarily be entitled to costs. If either party wishes to make further submissions on costs, they may do so when they appear on the question of damages and in any event within 30 days of these reasons.

"Armstrong J."