IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Watermark Developments Ltd. v. Kelowna (City),* 2024 BCSC 2188

Date: 20241203
Docket: S140333
Registry: Kelowna

Between:

Watermark Developments Ltd.

Petitioner

And

The City of Kelowna

Respondent

2024 BCSC 2188 (CanLII)

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Petitioner:	A. Memory L. Sorge
Counsel for the Respondent:	B.S. Williamson
Place and Dates of Trial/Hearing:	Kelowna, B.C. October 8-9, 2024
Place and Date of Judgment:	Kelowna, B.C. December 3, 2024

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Overview

[1] On May 8, 2024, Watermark Developments Ltd. ("Watermark") filed a petition (the "Petition") seeking certain relief as against the City of Kelowna (the "City").

[2] The Petition concerns certain real property with a municipal address of 395-425 Academy Way, Kelowna, BC, legally described as the North 1/2 of the South East 1/4 of Section 3, Township 23, ODYD, except Plans KAP88257, EPP33993 and EPP53793, PID: 013-779-745 (the "Lands").

[3] This Petition has been brought by Watermark on a substantially undisputed factual foundation, which I will articulate, as required, in further detail. The core of the foundation is that the Lands, which are located near the University of British Columbia Okanagan ("UBCO") campus and the Kelowna International Airport ("YLW"), have been subjected to two "no-build" restrictive covenants under s. 219 of the *Land Title Act*, R.S.B.C. 1979, c. 250 [*LTA*] since on or about January 7, 2009 (the "No-Build Covenants").

[4] For the benefit of the record, the relief sought in the Petition, together with the registration particulars, is as follows:

> 1. An Order that the section 219 restrictive covenants registered in the Kamloops Land Title Office under charge numbers LB270388 and LB270389 (collectively, the "[No-Build Covenants"]) be cancelled and discharged from title to the lands legally described as the North 1/2 of the South East 1/4 of Section 3 Township 23 ODYD except Plans KAP88257, EPP33993 and EPP53793 [Lands].
> 2. An Order directing the Registrar of the Land Titles at the Kamloops Land Office to cancel and discharge the [No-Build Covenants] from the [Lands] upon presentation of a certified copy of the Order sought and to modify the Land Title records accordingly.
> 3. Such further and other relief as counsel may advise and this Honourable Court permit.

[5] As will be apparent, a period just shy of 16 years has elapsed between the time of the registration of the No-Build Covenants and the hearing of the Petition. This is not due to a lack of judicial resources or litigation foot-dragging by either

party. Instead, the period of time it took for the Petition to come to Court for resolution is intrinsically related to the nature of the issues in dispute.

[6] Going back in time in the chronology in this regard, when the No-Build Covenants were registered in January 2009, it was premised on the basis that the Lands subject to the No-Build Covenants would be required entirely, or at least substantially, for the purpose of building what was then known as the Central Okanagan Multi-Modal Corridor (“COMC”). The COMC has had somewhat different acronyms to describe it and, importantly, as I will address, different iterations. However, it is common ground that the COMC as it existed in January 2009 generally describes certain strategic transportation planning which contemplated a future roadway to stretch from West Kelowna over a second Okanagan Lake crossing to UBCO (or closely thereabouts).

[7] Over time, the COMC has been broken down into what is now described as the “Clement Avenue Extension” or the “Clement Extension”. It has, as I will again address in due course, multiple segments.

[8] Watermark’s position is that evidence supports the conclusion that the Clement Avenue Extension is not currently planned to go further than McCurdy Road, which for context is a municipal roadway located in the Rutland district of the City, several kilometers away from the Lands.

[9] On this basis, Watermark submits that it is appropriate for No-Build Covenants to be removed from the title of the Lands, pursuant to s. 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377 [*PLA*], on the basis that the No-Build Covenants are obsolete, impede Watermark’s reasonable use of the Lands without practical benefit to the City and that the removal of the No-Build Covenants would not injure the City.

[10] In its petition response filed July 16, 2024, the City opposes all the relief sought by Watermark.

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[11] The crux of the City's opposition is that until such time as the City makes a conclusive decision about the future design of Segment 3 of the Clement Extension it would be prejudicial to the City to order the discharge of the No-Build Covenants. The City maintains it has not yet made that decision and potentially may, in the future, conclude that Segment 3 is still a viable part of the Clement Extension project, thus confirming the need for the No-Build Covenants.

[12] The City also asserts that the cost of removing any buildings or structures that may be constructed within the portion of the Lands subject to the No-Build Covenants in the event the No-build Covenants are cancelled could significantly increase the cost of any future road construction project undertaken by the City which require said portions of the Lands.

[13] As is almost always the case in contested litigation, costs are also in issue. However, the practical reality is that any costs awarded pursuant to the *Supreme Court Civil Rules* for the Petition, which was very efficiently argued by counsel, are *de minimis* as compared to use/and or potential use of the Lands by Watermark or the City.

<u>Preliminary Evidentiary Issues</u>

Summary Determination

[14] As I addressed above, the core factual background underlying the Petition is essentially uncontroversial. Despite the significance of the dispute to the parties, it is thus generally well suited for summary determination under the *Rules*.

[15] I am accordingly not going to engage in a detailed analysis of this issue and shall proceed accordingly. Importantly, neither party made submissions to the contrary or suggested a hybrid petition hearing process as contemplated in *Cepuran v. Carlton*, 2022 BCCA 76.

[16] There are, however, three portions of the evidentiary record which I conclude are not appropriately before the Court and I have elected to deal with this at the

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outset so it is clear that my substantive reasons are based upon the balance of the Petition record. The relevant portions of the record are as follows:

a) Affidavit #1 of David Cullen sworn April 11, 2024:

   i. The affidavit of Mr. Cullen is objected to in its entirety by the City. I am not going to include its contents verbatim. The affidavit of Mr. Cullen was tendered as expert evidence on behalf of Watermark. Mr. Cullen, who is currently employed as a transportation engineer and senior project manager, after having worked as a civil engineer in the Okanagan for more than 40 years, certainly meets the criteria of an expert. To summarize the substance of Mr. Cullen's affidavit, it contains an interpretation of various public documents such as planning documents published by the City and the Ministry of Transportation as it relates to the COMC;

b) Affidavit #1 of Ryan Smith sworn July 12, 2024, at para. 14, in which Mr. Smith deposes as follows:

> The COMC is a multi-stage project, with the first section from downtown to Kelowna to Spall Road having been constructed in 2014. Further sections of the project (described more recently as the Clement Ave Extension) are from Spall to Highway 33 (Segment 1), from Highway 33 to McCurdy Road (Segment 2) and from McCurdy to UBCO (Segment 3). Segment 1 (construction) Segment 2 (land acquisition) are included in the City's 20-Year Servicing Plan, the 2040 Official Community and Transportation Master Plan. Although Segment 3 is not currently provided for in the 20-year Serving Plan or the Transportation Master Plan, I consider it would not be prudent from a land use planning perspective to release the Covenant from title to the Property until such time as the City has established that it will definitely not require the portion of the Property encumbered by the Covenant for future highway development (emphasis added).;

and

c) Affidavit #1 of Michael Holzhey sworn May 1, 2024, at para. 38, where Mr. Holzhey deposes as follows:

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> Recently, Watermark sold 525-541 Academy Way, a lot legally described as Lot 7 Section 3 Township 23 ODYD Plan EPP53793 (PID: 029-783-101) ("Lot 7"), which is adjacent to the Property and encumbered by a nearly identical restrictive covenant, described as CA5022340. References to Lot 7 can be seen in a variety of the Exhibits. In addition, two appraisals were obtained in respect of this sale of Lot 7. Both appraisals attributed a nil value to the portion of the Lot 7 land encumbered by the restrictive covenant.

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[17] First, addressing the affidavit of Mr. Cullen, I accept the position of the City that Mr. Cullen's affidavit is inadmissible expert opinion evidence on the basis that it purports to supplant the role of the Court and thus exceeds the boundaries of a proper expert report.

[18] In this regard, the decision in *Li v. British Columbia*, 2019 BCSC 1819 at para. 18, aff'd 2021 BCCA 256, stands for the proposition that an expert's evidence may not supplant the role of the Court in interpreting government documents. Mr. Cullen's affidavit offends that proposition.

[19] Further, Mr. Gordon Foy's affidavit, sworn July 12, 2024, at para. 11 and Mr. Smith's affidavit at para. 14, both tendered on behalf of the City, effectively confirm the very purpose for which the affidavit of Mr. Cullen was tendered for; namely, the question of whether the use of the Lands is presently contemplated in the City's strategic planning until at least 2040. The answer is clearly "no" and Mr. Cullen's affidavit is not required to reach that conclusion.

[20] Secondly, with respect to the affidavit of Mr. Smith, the inadmissible portion of the affidavit is limited. For context, Mr. Smith is in the somewhat unique position of having been a long-time employee of the City in the various capacities, including the planning department and planning-related departments. Mr. Smith now holds the position of Divisional Director, Planning and Development Services for the City. Mr. Smith was directly involved in the approval of Watermark's subdivision application in respect of the original property as the then approving officer for the City and his affidavit contains an informative factual narrative. Where Mr. Smith's affidavit strays outside of the rules of admissible evidence is limited to the underlined portion of para. 14. This is opinion evidence from a non-expert: see *White Burgess*

Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23 at para. 14. This conclusion is not meant to impugn Mr. Smith's qualifications—it simply recognizes that Mr. Smith provides his evidence in his capacity as an employee of the City versus as an independent expert. The City is also a named party with a vested interest in the outcome of the Petition, which means even if Mr. Smith was giving expert evidence, it needs to be approached with caution: see *White Burgess* at paras. 32 and 49.

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[21] Finally, with respect to the affidavit of Mr. Holzhey, para. 38 is a bald assertion with no factual grounding given that Watermark made the intentional strategic decision for the purposes of the Petition not to tender any admissible supporting evidence in this regard. I accept Lot 7 was sold and quite obviously the City is aware of the ultimate sale price of Lot 7 as that is publicly available information obtainable through a simple Land Title Registry search. Watermark though cannot expect this Court to determine that the sale of Lot 7 for an unidentified price was discounted due to the portion of Lot 7 being subject to a nearly identical restrictive covenant simply based solely upon Mr. Hozley's statement. It is speculation based on inadmissible opinion evidence from a non-expert.

Section 219 Restrictive Covenants

[22] Section 219 of the *LTA* provides, in part, as follows:

> (1) A covenant described in subsection (2) in favour of the Crown, a Crown corporation or agency, a municipality, a regional district, the South Coast British Columbia Transportation Authority, or a local trust committee under the *Islands Trust Act*, as covenantee, may be registered against the title to the land subject to the covenant and is enforceable against the covenantor and the successors in title of the covenantor even if the covenant is not annexed to land owned by the covenantee.
>
> (2) A covenant registrable under subsection (1) may be of a negative or positive nature and may include one or more of the following provisions:
>
> (a) provisions in respect of
>
> (i) the use of land, or

(ii) the use of a building on or to be erected on land;

(b) that land

(i) is to be built on in accordance with the covenant,

(ii) is not to be built on except in accordance with the covenant, or

(iii) is not to be built on;

(c) that land

(i) is not to be subdivided except in accordance with the covenant, or

(ii) is not to be subdivided;

(d) that parcels of land designated in the covenant and registered under one or more indefeasible titles are not to be sold or otherwise transferred separately.

[23] The purpose of a s. 219 restrictive covenants like the No-Build Covenants has been described as follows:

> Section 229(2)(b) expressly permits a municipality to enter into covenants which govern circumstances in which land can be developed.

See *Natura Developments Ltd. v. Ladysmith (Town),* 2015 BCSC 1673 at para. 90.

Factual Basis

[24] Returning back to the core facts underling the relief sought in the Petition.

[25] The No-Build Covenants cover approximately 13 acres of the Lands.

[26] There is ample documentary exhibits in the Petition record demonstrating the location of Lands and the portions subject to the No-Build. This is best visually illustrated, however, in the map generated by the City which attached as Exhibit "C" to the affidavit of Mr. Holzhey. A copy of that map is attached as Schedule "A" to these reasons for judgment.

[27] Prior to the No-Build Covenants being registered, I accept the City had expressed *bona fide* intentions to keep its options open regarding possible routes for the COMC.

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[28] When Watermark approached the City for approval to subdivide and re-zone portions of a then 284-acre property (the "Original Property") located in the vicinity of UBCO from agricultural to single family residential, the City took the opportunity to ensure that its options to build the COMC were maintained as part of the application process. There was a quite obvious *quid pro quo* between the City and Watermark in moving forward with rezoning and subdivision approval.

[29] Using the description of the transaction as *quid pro quo* arrangement does not suggest anything untoward. As per *Black's Law Dictionary* the definition of *quid pro quo* is "an action or thing that is exchanged for another action or thing or more or less equal value; a substitute": *Black's Law Dictionary*, 12 ed., sub verbo "*quid pro quo*". With the passage of time and intervening events, the "more or less equal value" portion of that definition becomes virtually impossible ascertain in this case. The key aspect of the *quid pro quo* analysis in this factual matrix is based on the larger point that consideration was provided by each Watermark and the City as a result of the transaction. The question before the Court is whether now, some 16 years later, Watermark is entitled to obtain a discharge of the No-Build Covenants which were an essential part of the consideration provided to the City as part of the overall subdivision application and rezoning process. I return to this point in due course.

[30] The No-Build Covenants were also, however, not the only consideration provided by Watermark as part of the transaction. In this regard, approximately 35 percent of the Original Property was dedicated for parkland to the City and for the benefit of a private school located in the general vicinity of UBCO. I was not presented with formal survey evidence as to the exact percentage but I accept that approximately 20 percent of the Original Property was dedicated to the City and 15 percent was dedicated to the benefit of the private school. Moreover, while the formal registration of the transfer of the portions of the Original Property dedicated to the City and the private school were not formalized in the Land Title Office until several years after the No-Build Covenants were registered, it is not suggested that Watermark delayed or obstructed in fulfilling its obligations in this regard. It simply

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appears, as best as can be gleaned from the evidentiary record, to have taken some necessary time to come to fruition.

[31] Ultimately, significant portions of the Original Property have since been subdivided and developed, including developments on Academy Way, Vint Road, Acadia Street, Yorkville Street, and Concordia Street. All of these developed portions of the Original Property are, again broadly stated, in the general vicinity of UBCO.

[32] Returning to the portion of the Lands in dispute in the Petition, it is common ground that No-Build Covenants expressly prohibit building on certain areas of the Lands without the consent of the City. That is, as described above, the intention and purpose of a s. 219 restrictive covenant.

[33] The No-Build Covenants do, I accept, impact the use of other portions of the Lands unencumbered by the No-Build Covenants which do not have access to the existing roadways. Construction of alternate roadways is possible but expensive and difficult. This was, I find, an acknowledged possibility by Watermark when it agreed to the No-Build Covenants. Watermark knew that the COMC was part of the long-term strategic planning by the City and there was no specific commitment from the City in 2009 as to how exactly that plan would, or would not, be implemented or the anticipated timeline.

[34] Lastly, the No-Build Covenants are, importantly, not road reservation covenants, which are distinct from s. 219 covenants like the No-Build Covenants.

Watermark's Requests to Discharge the No-Build Covenants

[35] On or around July 15, 2021, Watermark sent a request to the City requesting the No-Build Covenants be discharged (the "First Request"). That was approximately 12 years after the No-Build Covenants were registered on title to the Lands.

[36] On or around August 10, 2021, the First Request was denied by the City on the basis that the Official Community Plan and the Transportation Master Plan were

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still under review. The representative of the City who responded to the First Request suggested that Watermark resubmit the request after the Official Community Plan Bylaw was adopted but made no representations.

[37] The 2040 Official Community Plan (Bylaw 12300), was adopted approximately five months later on about January 10, 2022.

[38] The 2040 Official Community Plan does not, on its face, include a plan to build a roadway near or on the Lands.

[39] Shortly thereafter, on or about January 14, 2022, Watermark submitted another request to the City asking for release of the No-Build Covenants (the “Second Request”).

[40] The Second Request was responded to by the City on or about February 8, 2022. That correspondence, found at Exhibit “O” of the affidavit of Michael Holzhey, denied the request stating “[a]fter review we are unable to approve the releases as they relate to the future COMC”.

[41] At this point I return to the important fact that the concept of the COMC has changed over time. It was first incorporated into the City’s Official Community Plan in 1986. Suffice to say that the development of the City and the requisite strategic plan associated with same has evolved considerably since 1986—some 38 years ago.

[42] The evidence shows that by or around 1996, there were two proposed routes for the COMC, an “East Alignment”, which is the route that would pass through the Lands, and a “West Alignment”, which would go through a portion of the Original Property that was dedicated to the City by Watermark which I referred to above.

[43] Up to what I find to be in or about October 2019 the concept included a second bridge crossing and a route through the Lands. I am using the phrasing “in or about” very intentionally because there is, in the petition record, evidence of what Rafael Villareal presented on October 28, 2019, on behalf of the City at a City of Kelowna Council Meeting (the “October Meeting”). It is quite obvious from the slides

contained within that presentation that there was considerable work put in by Mr. Villareal and it was not cobbled together a day or two prior. In a similar vein, nothing turns on exact timing in this regard as the First Request was not made by Watermark to the City until July 15, 2021, in any event.

[44] Presently, the City refers to this concept, which has been reduced in scope, as the Clement Extension as noted above. In the course of the materials contained in the petition record the parties have used somewhat different language to describe the various segments of the Clement Extension. I conclude it is most helpful to describe them as follows:

a) Segment 1 running from Spall Road to Highway 33;

b) Segment 2 running from Highway 33 to McCurdy Road; and

c) Segment 3 (the segment at issue in the Petition) running from McCurdy Road to John Hindle Drive passing through the Lands.

[45] The crux of Watermark's argument in the Petition is that Segment 3 has effectively been abandoned and will never be built. In the alternative, Watermark argues that if Segment 3 is merely a remote possibility as it has not been planned or budgeted and may very likely be formally abandoned prior to its implementation.

[46] In reliance of this submission, Watermark relies on the City's 2040 Official Community Plan and the City's 2040 Transportation Master Plan, which was endorsed on January 24, 2022 (collectively, the "2040 Plans").

[47] To put the 2040 Plans into legislative context, I was referred to s. 473(1) of the *Local Government Act*, R.S.B.C. 2015, c. 1, which states:

> **473** (1) An official community plan must include statements and map designations for the area covered by the plan respecting the following:
>
> . . .
>
> (e) the approximate location and phasing of any major road, sewer and water systems;
>
> . . .

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[48] The 2040 Plans, I accept, do not include plans for a second bridge crossing. More specifically, the 2040 Transportation Master Plan contemplates a long-term vision for the Clement Extension to connect Clement Avenue to McCurdy Road (namely Segments 1 and 2 of the Clement Extension which I have defined above). Segment 3 is not included as part of 2040 Plans, but is not yet specifically identified as being formally abandoned.

[49] Notably, the 2040 Transportation Master Plan states the following regarding the Clement Avenue Extension:

> No longer envisioned as a freeway, this project includes a two-lane, at grade arterial road initially developed to Highway 33 with the long-term vision to extend the road to McCurdy Road. The Okanagan Rail Trail would run adjacent to the new road, though realignment may be necessary along many segments.

[50] Further study, in partnership with the Ministry of Transportation and Infrastructure, was recommended prior to implementation.

[51] Even under the 2040 plans, Segment 2 of the Clement Extension is not projected to be completed until 2035. That is still more than a decade from the present date.

[52] However, Watermark accepts that the City does have a *bona fide* intention to proceed with Segment 2 and has to plan and budget accordingly for such a major infrastructure project. Watermark's position, as I articulated above, is that Segment 3 is not actually going to be built or it is such a remote possibility of ever being built that the No-Build Covenants no longer serve a useful purpose as there are no confirmed plans, related proposed budgets or capital funding initiatives to proceed.

[53] Now, returning back to the chronology of requests by Watermark that the No-Build covenants be discharged.

[54] On or about March 3, 2022, Watermark sent another letter to the City requesting the release of the No-Build Covenants (the "Third Request").

[55] In a letter dated March 17, 2022, Ryan Smith, on behalf of the City, denied the Third Request, stating that the Central Okanagan Integrated Transportation Strategy ("COITS"), a study commissioned by the British Columbia Provincial Government, was currently underway and that it was premature to remove the No-Build Covenants.

[56] The first version of the COITS report was released on September 19, 2023. A revised version of the COITS report was released shortly thereafter on October 5, 2023 ("COITS Final Report").

[57] I accept, upon review, that the COITS Final Report does not discuss any plans by the Province of British Columbia to build a roadway near or on the Lands. This factual conclusion avoids me having to consider Watermark's argument that only the City, and not the Province of British Columbia, has a beneficial interest in the Lands and as such the COITS Final Report is not relevant as to whether the No-Build Covenants should remain on title to the Lands.

[58] On September 7, 2023, Watermark sent its final request to the City to remove the No-Build Covenants (the "Fourth Request"). The Fourth Request made clear that if the request was not granted, counsel expected to receive instructions to file a petition seeking relief under s. 35 of the *PLA*.

[59] On November 16, 2023, the City's legal counsel responded to Watermark's counsel and denied the Fourth Request with a lengthy letter outlining the City's position. This position effectively mirrors the City's subsequent response to the Petition filed by Watermark.

City's Position on Watermark's Requests to Discharge No-Build Covenants

[60] In accordance with my above observation about the Petition being suitable for summary determination, the City does not substantially dispute much of the evidence underlying Watermark's submissions.

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[61] Most significantly, the City concedes that Segment 3 of the Clement Extension is not included in the 2040 Plans.

[62] However, the City's primary position is that the City is committed to certain components of the COMC/Clement Extension within the 20-year horizon contemplated by the 2040 Plans. The fact that there are components of the COMC/Clement Extension that extend beyond that 20-year horizon is not an indication that the City has abandoned the goal of building out the remainder of the COMC. It is simply a recognition that the 20-year planning horizon does not capture the longer-term components of the COMC, namely Segment 3 of the Clement Extension.

[63] The City further asserts that it would be imprudent for the City to release any covenants or highway reserves securing the route of the COMC from lands north of McCurdy Road as this would compromise the City's eventual realization of a continuous road parallel to Highway 97 North to UBCO and YLW.

[64] As a final point, the City asserts that its ongoing commitment to the Clement Extension is not contingent on the Province of British Columbia making a commitment to proceed with a second crossing or to any other provincial initiative(s) along the Highway 97 corridor. A second crossing of Okanagan Lake is "unnecessary" in this timeframe according to the City.

[65] To put the City's position, as described above, into some further context relative to Watermark's submissions, Watermark asserts that the evidence which the City relies upon which pertain to the portion of the Clement Extension which would pass through the Lands, that being Segment 3, either pre-date the October Meeting where Watermark asserts that Segment 3 was effectively abandoned as a feasible project, or was produced after litigation was contemplated between the parties.

[66] On the latter point, the argument by Watermark is not that the City has fabricated documents in support of its position in respect of the relief sought in Petition. It is very common practice to assemble evidence in contemplation of

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litigation, including expert evidence, and litigation privilege allows the same to be cloaked unless privilege is waived. Where privilege is waived, Watermark's argument as to timing is fair in respect of how the Court ultimately decides to weigh the evidence as the trier of fact.

Overview of the Law

[67] Section 35 of the *PLA* provides as follows:

> **35** (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:
>
> . . .
>
> (e) a restrictive or other covenant burdening the land or the owner;
>
> . . .
>
> (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
>
> (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
>
> . . .
>
> (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
>
> . . .

[68] The Court of Appeal confirmed in *Connick v. Owners, Strata Plan VIS7092*, 2022 BCCA 52 that s. 35 of the *PLA* is a comprehensive code permitting modification or cancellation of registered charges, including covenants such as the No-Build Covenants, and sets out an exhaustive list of the grounds upon which a court can make such an order: see *Connick* at paras. 33 and 46 and *Skene v. Ucluelet (District)*, 2019 BCSC 2051 at para. 30.

[69] The Court only needs to find that one of the five grounds set out in s. 35(2) of the *PLA* is met in order to remove a covenant and the onus is on Watermark, as the

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petitioner, to satisfy the Court that relief should be granted: see *BC Transportation Financing Authority v. Rastad Construction Ltd.*, 2020 BCSC 2064 at para. 19.

[70] Turning to basic principles, covenants are contracts, subject to the ordinary judicial principles for contractual interpretation. To interpret a covenant, the Court will begin with a careful examination of the wording of the covenant and the whole of the document and will frequently consider evidence of the surrounding circumstances at the time the covenant was entered: see *Connick* at para. 33.

[71] The test to discharge a covenant pursuant to section 35 of the *PLA* was concisely articulated by Justice Lamb in *Vida (Re)*, 2021 BCSC 1444 at para. 41 [*Vida*], citing the earlier decision of Justice Greyell in *676604 B.C. Ltd. (Re)*, 2010 BCSC 1624 at para. 22, aff'd 2011 BCCA 447:

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

Hurdle One: Is the Petition Premature?

[72] The City takes the preliminary position is that the Petition is premature; albeit not vigorously.

[73] "Premature" means that anticipated circumstances have not yet materialized or that there are existing reasons to defer the application: see *Murrayfield Developments Ltd. v. Brandon*, 8 B.C.L.R. (3d) 364, 1995 CanLII 1589 (S.C.) at para. 18.

[74] In my view, Watermark is correct in submitting that the Petition is not premature.

[75] As I have articulated in my factual overview, the No-Build Covenants have been registered on title to the Lands for just shy of 16 years and no use of the Lands is proposed by the City under the 2040 Plans. Plans beyond 2040 have not yet

materialized and realistically may never materialize and thus the City cannot, beyond opposing the relief sought in the Petition generally, articulate reasons to defer the Petition to some finite date or upon the happening of some future defined event.

[76] This is consistent with the conclusion reached by Justice Lamb in *Vida* at paras. 45 and 46.

Hurdle Two: Are There Grounds to Cancel the No-Build Covenants?

(i) Are the No-Build Covenants Obsolete? (PLA s. 35(2)(a))

[77] The primary ground relied on by Watermark is s. 35(2)(a) of the *PLA*, namely that because of changes in the character of the land, the neighbourhood or other circumstances this Court considers material, the No-Build Covenants are obsolete.

[78] The Court in *Vida* summarized the law on obsolete covenants:

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

[79] Stated another way, a covenant becomes obsolete when it has ceased to have currency because of a change in circumstances, or due to disuse.

[80] Whilst dated, the case of *Maple Ridge Projects Ltd. v. British Columbia*, 1997 CanLII 3643 [*Maple Ridge Projects*], referred to by Watermark is factually similar in some key respects to the case at bar.

[81] In *Maple Ridge Projects*, the petitioner owned lands situated within 800 metres of an intersection on Lougheed Highway in the lower mainland region. In 1993, a restrictive covenant was granted in favour of the Province of British Columbia in order to obtain approval for rezoning of a portion of the petitioner's land. The "no-build" covenant was intended to protect a 60-meter-wide corridor for the

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development of a future six-lane, divided freeway. In due course, the appropriate representative of the Province of British Columbia, the responsible Minister, wrote to the relevant municipality to advise that the government was unable to establish the capital funding necessary to acquire the corridor property in the foreseeable future. Thereafter, the relevant municipality amended its official community plan to permit townhouse development on the land at issue and did not provide for any transportation corridor in the area.

[82] The petitioner in *Maple Ridge Projects* subsequently made several requests to have the covenant removed. The requests for removal were refused on the basis of future highway development. However, the Court released the covenant on application by the petitioner because it was invalid, and further held, in the event the Court erred in deciding that the covenant was invalid, the covenant could also be cancelled on the basis that it was obsolete and its removal would not injure the Ministry.

[83] Leaving aside the distinguishing primary ground of invalidity (not argued by Watermark here), it is persuasive that the Court concluded that a similar restrictive covenant was obsolete approximately four years after it had been registered, stating:

> [41] … [The covenant] was not intended to deprive the petitioner, possibly forever and in the unfettered discretion of the Minister, of the capability of developing its land. …
>
> [42] It is not sufficient to claim that the purpose of the covenant was broader such that it extended to a non-approved, unfunded, possible highway interchange which might connect with a crossing of the Fraser River in a location which has not been endorsed by other ministry planning and for which no environmental assessment has been completed or initiated in any event.

[84] In *Skene,* Justice Jackson found that the District of Ucluelet’s abandonment of the development of what was originally intended to be a “unified single resort enterprise” in favour of development in a “patchwork fashion” was a material change which rendered the statutory right of way granted for the creation of a boardwalk obsolete: see *Skene* at para. 57.

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[85] I was also referred by Watermark to the decision of Justice G.P. Weatherill in *Emil Anderson Construction Co. Ltd. v 0977415 B.C. Ltd.*, 2017 BCSC 957 [*Emil Anderson*], wherein he found that certain charges were obsolete because there was only a remote possibility that certain amenities would one day be built and therefore could fulfill the charge's purpose to allow other owners to have access to such amenities. Specifically, as stated by Weatherill J.:

> [60] I am satisfied that [the respondent's] concern that future amenities will be constructed is based on a hypothetical possibility only. It could only occur if [the petitioner's] plans for development of Lot 2 change …

[86] In opposition to the relief sought, the City relies on the case of *Shannon Woods Development Ltd. v. British Columbia*, [1996] B.C.J. No. 2869 (S.C.) [*Shannon Woods*].

[87] *Shannon Woods* is not a case decided pursuant to s. 35 of the *PLA*. It was a petition seeking judicial review of a decision not to approve a preliminary subdivision layout plan on the basis of the need to protect a proposed highway corridor which would, if built, pass through a portion of the petitioner's lands proposed to be subdivided for residential construction. Albeit in *obiter*, the Court in *Shannon Woods* did consider the long timeframe for the conception and planning of highway projects as follows:

> [31] It is not disputed that the corridor has been an issue with the Ministry for approximately twenty years. The petitioner argues that the plans for such a corridor are vague, consisting only of the nebulous plans or studies described in Mr. Puhallo's affidavit. The required funds are not available from the Transportation Financing Authority. There is now a six month freeze on government spending for capital works. The petitioner says there is simply insufficient foundation in the evidence to establish a factual underpinning for non-approval of the P.L.A. on grounds of public interest.
>
> [32] The petitioner argues that the respondents ought not be permitted to protect a "possible future highway corridor. Since it is not presently needed, the petition submits it is an improper public interest concern.
>
> …
>
> [35] I find that while the corridor proposal is not immediate, it is not speculative. It may not be built for 5 or 10 years, but Mr. Puhallo's job involves assessing demands for future and current growth. Continued development in the Okanagan Valley restricts the amount of land available and the feasibility of continued upgrades to existing highways. The Okanagan

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> Valley has experienced rapid growth over the past 20 years [1976-1996], and very rapid growth in the last five or six [1990-1995/1996].

[88] In my view, and upon consideration of the above cited law, I am satisfied that Watermark has proven that the No-Build Covenants are obsolete pursuant to s. 35(2)(a) of the *PLA.*

[89] As the 2040 Plans establish, any hypothetical plan for Segment 3 of the Clement Extension would mean that construction of such a roadway would not even commence for at least 16 or more years, if at all. This exceeds the "long timeframe" which was referenced by the Court in *Shannon Woods*.

[90] Moreover, I conclude that this case is much closer to being on all fours with the decision in *Maple Ridge Projects*. The conclusive decision not to proceed with the highway corridor is distinguishable from the case at bar, but the underlying principle that restrictive covenants are obsolete when the purpose of said covenants may never or will never be fulfilled is apt. Further, I do not consider it to be balancing the interests of the parties, something not permitted under s. 35(2)(a) of the *PLA,* to note that the City's pure speculation that Segment 3 of the Clement Extension might be built and that the eventual plans for the same may require use of the portions of the Lands subject to the No-Build Covenants effectively gives the City unfettered discretion to determine if Watermark is realistically capable of developing the Lands for the long foreseeable future.

[91] Additionally, similarly to the decision in *Skene*, the City's effective abandonment of the historical vision of the COMC in favour of a patchwork extension of Clement Avenue from downtown Kelowna to McCurdy Road is, I conclude, a material change which renders the No-Build Covenants obsolete.

(ii) Do the No-Build Covenants Impede the Reasonable Use of the Property (PLA s. 35(2)(b))

[92] Having concluded that the No-Build Covenants are obsolete pursuant to s. 35(2)(a) of the *PLA,* I technically can proceed directly to hurdle three of the s. 35 analysis set out in *Vida*.

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[93] However, I am going to consider Watermark's alternative argument that the reasonable use of the Lands will be impeded, without practical benefit to others, if the No-Build Covenants are not modified or cancelled pursuant to s. 35(2)(b) of the *PLA*. In this case, Watermark seeks cancellation as no proposed modifications were submitted for judicial consideration. It is an all or nothing proposition—the No-Build Covenants stay on title or they are discharged.

[94] Justice Newbury, writing for the Court in *Wallster v. Erschbamer*, 2011 BCCA 27, outlined the requirements for relief pursuant to s. 35(2)(b) as follows:

> [17] … While s. 35(2)(b) is not worded felicitously, the question for the court seems clear enough: if the encumbrance is not modified, will the reasonable use of the appellant's property be impeded without practical benefit to, in this case, the respondents? Put another way, does the encumbrance as it now exists provide a practical benefit to the respondents? This is not the same as asking whether the denial of a specific modification will provide a practical benefit, although the difference is very subtle.

[95] Applying this test to the case at bar, Watermark argues that reasonable use of the Lands will be impeded, without practical benefit to the City, if the No-Build Covenants are not cancelled on the basis that:

a) the No-Build Covenants encumber over 13 acres of the Lands, which has prevented or at least significantly hindered further development of the remaining portion of the Lands to date;

b) the City does not have a concrete and budgeted plan to build a roadway through the Lands; and

c) there is nothing more than a remote possibility that Segment 3 of the Clement Extension will ever be planned, budgeted, or built.

[96] There is, as will be apparent, notable overlap between Watermark's argument for cancellation under s. 35(2)(a) of the *PLA* and cancellation under s. 35(2)(b) of the *PLA*.

[97] In my view, the arguments advanced by Watermark are more properly considered in the obsolescence analysis where the issue of benefit to the City is not a component of the test to be applied.

[98] Specifically, under s. 35(2)(b), it is necessary to establish both that the No-Build Covenants constitute an impediment to Watermark's reasonable use of the Lands and that the impediment is without practical benefit to the City.

[99] I accept that the No-Build Covenants constitute an impediment to Watermark's reasonable use of the Lands. Watermark has already successfully developed significant portions of the Original Property. But for the No-Build Covenants, development of the Lands would, I accept, at least have commenced. It has not, because, as articulated above, key portions of the Lands unencumbered by the No-Build Covenants do not have access to the existing roadways and construction of alternate roadways is possible but expensive and difficult.

[100] The impediment to the reasonable use of the Lands subject to the No-Build Covenants is not, however, without practical benefit to the City. The fact that I have concluded that Segment 3 of the Clement extension has been effectively abandoned rendering the No-Build Covenants obsolete does not mean it is not to the City's practical benefit to maintain said covenants for some speculative future road construction that might be envisioned beyond 2040. Simply stated, having the No-Build Covenants on title gives the City more options for future transportation strategic planning than if they are not pursued.

[101] For these reasons, I would not cancel the No-Build Covenants pursuant to s. 35(2)(b) of the *PLA*.

(iii) Removal of the No-Build Covenants Would Not Injure the City (PLA s. 35(2)(d))

[102] Again, having concluded that the No-Build Covenants are obsolete pursuant to s. 35(2)(a) of the *PLA,* I technically can proceed directly to hurdle three of the s. 35 analysis set out in *Vida*.

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[103] However, I am also going to consider Watermark's further alternative argument that the cancellation of the No-Build Covenants will not injure the City (the "person" entitled to the benefit of the covenants) pursuant to s. 35(2)(d) of the *PLA*.

[104] In this regard, Watermark again relies on the decision *Maple Ridge Projects* where the Court concluded that the cancellation of the restrictive covenant would not injure the Province because there was no concrete plan in place to build an interchange over the encumbered portion of the land. The Court stated at para. 44 of *Maple Ridge Projects*:

> [44] The current state of planning in respect of any possible use of a portion of the land in conjunction with an interchange is so preliminary and conceptual that no reasonable possibility of injury exists. …

[105] In this case, Watermark's submission largely echoes its submission under s.35(2)(b) which, as noted, overlaps with its submission under s. 35(2)(a). Namely, Watermark argues that the removal of the No-Build Covenants would not injure the City because there are no plans to build Segment 3 of the Clement Extension or any other roadway through the Lands until possibly some date after 2040, if at all.

[106] As such, Watermark submits that the current state of planning for any possible use of the Lands for a future roadway is, as it was in *Maple Ridge Projects*, "so preliminary and conceptual that no reasonable possibility of injury exists."

[107] At para. 71 of *Emil Anderson*, the Court confirmed that the balancing of parties' interests is permitted under s. 35(2)(d). Accordingly, even if there is a remote possibility that Segment 3 of the Clement Extension (or some revised version thereof) would be built through the Lands at some date beyond 2040, the City has already constructed or definitively planned three alternate routes from downtown to UBCO since the No-Build Covenants were registered. Those being the routes via John Hindle Drive, Hollywood Road and Rutland Road. The removal of a fourth alternate route thus, it is asserted, will not injure the City. In comparison, Watermark would continue to suffer injury if its ability to develop the Lands is impeded.

[108] In this regard, I accept Watermark's submission. As articulated, I accept that there is some practical benefit to the City to maintaining the No-Build Covenants on the Lands. However, that practical benefit is modest and based on speculation of possible very long-term future strategic planning. In contrast, the impediment to Watermark's ability to develop the Lands is acute and objectively identifiable. With access to the portions of the Lands presently subject to the No-Build Covenants, Watermark can build access roads which will allow for the development of significant portions of the Lands in a manner consistent with the prior development of the other portions of the Original Property.

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[109] For these reasons, I would also cancel the No-Build Covenants pursuant to s. 35(2)(d) of the *PLA*.

Hurdle Three: Should the Court Use its Discretion to Remove the No-Build Covenants?

[110] Once the Court has determined whether the Petition fulfills one of the five criteria set out at subsections (a) through (e) of s. 35(2) of the *PLA*, as I found here, the Court turns to the final step of the analysis.

[111] At this third hurdle, the Court may consider whether or not it would be equitable to discharge the No-Build Covenants when assessing how to exercise its discretion: see *Burmont Holdings Ltd. v. Chilliwack (District)*, 1994 CanLII 3326 (B.C.S.C) [*Burmont*].

[112] It is under this step of the analysis that my description of the transaction involving *quid pro quo* between Watermark and the City is important because courts have concluded that it is inequitable to cancel a registered charge where it would deprive the respondent of value because the petitioner is attempting to avoid the *quid pro quo* of the parties' agreement. Examples of such cases include:

a) *Burmont: Burmont* concerned a petitioner who bought property from the District of Chilliwack, with a restrictive covenant in place requiring it to remain a golf course. It was a term of the contract of purchase and sale

that the restrictive covenant could be removed if the petitioner paid an amount equal to the increased value in land should the restrictive covenant be removed. The petitioner applied to have the restrictive covenant removed without paying the agreed upon sum. The relief sought was dismissed. The crux of the Mr. Justice Cohen's reasoning in this regard is contained in the following passages:

> I agree with Respondent's counsel that, regardless of whether the Petitioner can bring itself within any of the conditions in s. 31 (2), the relief sought by the Petitioner in this application should be rejected. I accept his submission that the Petitioner has taken the benefit of the agreement between the parties, of which the Covenant and the Assumption Agreement are an integral part, and that by bringing this application the Petitioner seeks to avoid the *quid pro quo*.
>
> …
>
> … Here, the Respondent would be deprived of value if the Covenant were cancelled. The parties had an agreement that if the Petitioner wanted the Covenant removed, it would pay an amount equal to the increased value of the land as a result of the discharge of the Covenant. In my opinion, to cancel the Covenant, after the Petitioner has taken the benefit of the agreement between the parties, would prove inequitable.

b) *Canitalia Estates Ltd. v. The Old Carriage House Parking Ltd.*, 2010 BCSC 1324 [*Canitalia*]: *Canitalia* concerned an easement. The petitioner accepted an easement in exchange for a lease of some 18 parking spaces. When the lease expired, the petitioner sought to have the easement removed, even though the easement was still of use to the respondent. After concluding that that the application to cancel the easement did not come within any of the enumerated grounds of s. 35(2) of the *PLA*, Justice Wedge held:

> [33] Finally, even if one or more of the criteria had been satisfied, I have concluded it would be inequitable to cancel the easement. The parties in this proceeding reached a compromise. The petitioner agreed to accept the easement on title in exchange for, at a minimum, a lease agreement granting him several years of guaranteed parking for his hotel. The easement was the quid pro quo for the parking lease. The petitioner argued that because the lease has now expired, he is free to come to court and have the easement cancelled. In my view, it would be inequitable to permit the petitioner to have the

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> advantage of his part of the bargain and then seek to cancel the easement once that benefit no longer exists.; and

(c) *Parker v. Kamloops (City)*, 2012 BCSC 61: *Parker* concerned a restrictive covenant prohibiting further subdivision. The restrictive covenant was granted in favour of the City of Kamloops in exchange for granting permission to the owners of two adjacent properties to increase the size of one lot and decrease the size of the other lot. The purpose of the restrictive covenant was to protect the water supply. One of the petitioner's arguments was that the restrictive covenant could be removed because the concern for the water supply could be addressed in the approval process for future subdivision. Justice Holmes (as she was then) found it was not appropriate for the Court to decide that the City of Kamloops should solve its ongoing issues with water supply in a way other than restricting subdivision of certain properties as that would amount to the court usurping the proper function of a municipal council.

[113] Contrary to what the City submits, I conclude that the mere existence of consideration at the time of granting the No-Build Covenants does not make it inequitable to cancel them some 16 years later. This case is very close to being on all fours with *Maple Ridge Projects* in this regard. In that case, as I have described, the restrictive covenant was clearly granted in exchange for a change in zoning, and the Court still found it appropriate to grant a discharge of the covenant. The amount of time between registration and cancellation was considerably shorter, although there was a definitive conclusion that the highway corridor initially contemplated would not be proceeding.

[114] Further, I accept Watermark's submission that because restrictive covenants are contracts per *Connick*, specifically para. 33 as quoted above, all restrictive covenants require some consideration to be valid. If the mere existence of some *quid pro quo* between the parties when the No-Build Covenants were registered on title made a subsequent attempt to remove the charges inequitable, the ability to

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seek relief pursuant s. 35 of the *PLA* would be severely diminished where the underlying validity of the covenant is not challenged (as is the case here).

[115] Moreover, the public nature of a charge does not change how the Court should balance the equities when determining how to exercise its discretion in this regard: see *Skene* at para. 62. I consider this analysis again more on point than the discussion of public interest and the possible usurpation of the role of municipal councils in *Parker*.

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[116] Staying with *Skene*, it that case the Court exercised its discretion to grant the discharge of a statutory right of way which gave the District of Ucluelet the right to build the boardwalk on the basis that no benefit would be lost due to the discharge of the charge because the District had not actually made a commitment to build the boardwalk. Specifically, Justice Jackson stated at para. 63:

> [63] Even if I viewed the public nature of the SROW to be a relevant factor, its consideration would not affect my conclusion that this case is not one where it is appropriate to exercise my discretion not to cancel the SROW. The District has made no commitment to actually build a boardwalk network, so there is not necessarily any public benefit being lost. Further, it is clear more details regarding any boardwalk on the Property, such as those details involving maintenance and safety contained in the New Statutory Rights of Way, still need to be addressed. Therefore, cancellation of the SROW is not the only impediment to the creation of a boardwalk network. In addition, cancellation of the SROW does not mean the boardwalk network can never proceed. The District remains free to negotiate with the Petitioners and other successors in title in order to pursue the boardwalk network initiative. Finally, the public nature of the interest at stake cuts both ways. Public authorities such as the District have options that are not available to most private entities: *Community Charter*, S.B.C. 2003, c. 26, s. 31. Thus even if the SROW is cancelled, the District is not without options.

[117] This conclusion is consistent with the older authority in *Parmenter v. British Columbia*, 1993 CanLII 1351 (B.C.S.C.) which stands for the proposition that for a discharge of a covenant to be inequitable, the respondent must be losing something of actual value. In *Parmenter* the Court cancelled a charge under *PLA* s. 35(2)(b) and (d) because the reasonable use of the land by the petitioner would be impeded, without practical benefit to others and the cancellation would not injure the

respondent. The Court rejected the respondent's argument that it would lose something of value if the charge was cancelled, stating at para. 13:

> The argument on value seemed to me to be an extension of the Descartes philosophy of "I am therefore I exist". In this case, "I exist therefore I am of value." I reject the notion that this covenant has any value merely because it exists. As there is no evidence of value, apart from the increase in land value if the covenant is removed, I decline to make any order in that regard.

[118] I do recognize that Justice Cohen declined to follow *Parmenter* in *Burmont*. However, in my view that arises from the distinguishable facts in the two decisions. In *Parmenter*, there was "overwhelming evidence" that the land subject to the restrictive covenant was unsuitable for agricultural purposes, and that there were no future events which might alter the essential character of the property so that it might become suitable for farming. That is entirely different than *Burmont* where the petitioner had the option to change the use of the subject land from a golf course simply upon the payment of additional consideration. A contractual term the petitioner expressly agreed to.

[119] Therefore, I conclude it would be equitable for the Court to exercise its discretion to discharge the No-Build Covenants. Consideration was provided by both Watermark and the City at the time that the No-Build Covenants were registered on title. Watermark has not interfered with or impeded the ability of the City to proceed with the COMC or the Clement Extension. The City has simply not done so to date and has no firm strategic plans to do so until at least 2040. Even possible planning beyond 2040 is highly speculative. It is thus not a scenario where Watermark took the benefits of transaction with the City and now seeks to inequitably avoid its obligations for its own benefit. Watermark appropriately seeks the cancelation of the No-Build Covenants on the basis which I have articulated herein.

Conclusion on the Application of the s. 35 Analysis

[120] To reiterate, *Vida* stands for the proposition that in order for Watermark to be successful in obtaining relief pursuant to s. 35 of the *PLA*, *Watermark* must demonstrate that:

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a) the application is not premature;

b) that the application fulfils one of the five criteria set out in subsections 35(2)(a) through (e) of the *PLA*; and

c) considering all of the circumstances, the Court should exercise its discretion in favour of granting the relief sought.

[121] Applying that framework to the evidence contained within the petition record and with reference to the caselaw cited herein, I have concluded that:

a) Watermark's application is not premature;

b) Watermark's application satisfies the criteria set out in subsection 35(2)(a) of the *PLA* and, in the alternative, satisfies the criteria set out in subsection 35(2)(e) of the *PLA*; and

c) Upon a consideration all of the circumstances, the Court should exercise its discretion in favour of granting the relief sought by Watermark.

Costs

[122] Costs are awardable at the discretion of the presiding justice.

[123] Subject to said judicial discretion, the general principle is that costs are awarded to the successful party: *Rules*, R. 14-1(9). This is the same for trials, summary trials and petitions.

[124] In *Tisalona v. Easton*, 2017 BCCA 272, the Court of Appeal stated the law regarding costs as follows:

> [71] … [Rule 14-1(9)] grants unqualified discretion to depart from the *prima facie* rule that the successful litigant should be awarded its costs.
>
> [72] This discretion must of course be exercised judicially, not arbitrarily or capriciously. An error in principle in an order departing from the usual rule will justify intervention by this court: *Brito (Guardian ad litem of) v. Woolley*, 2007 BCCA 1. Subject to such an error, the discretion is very broad.

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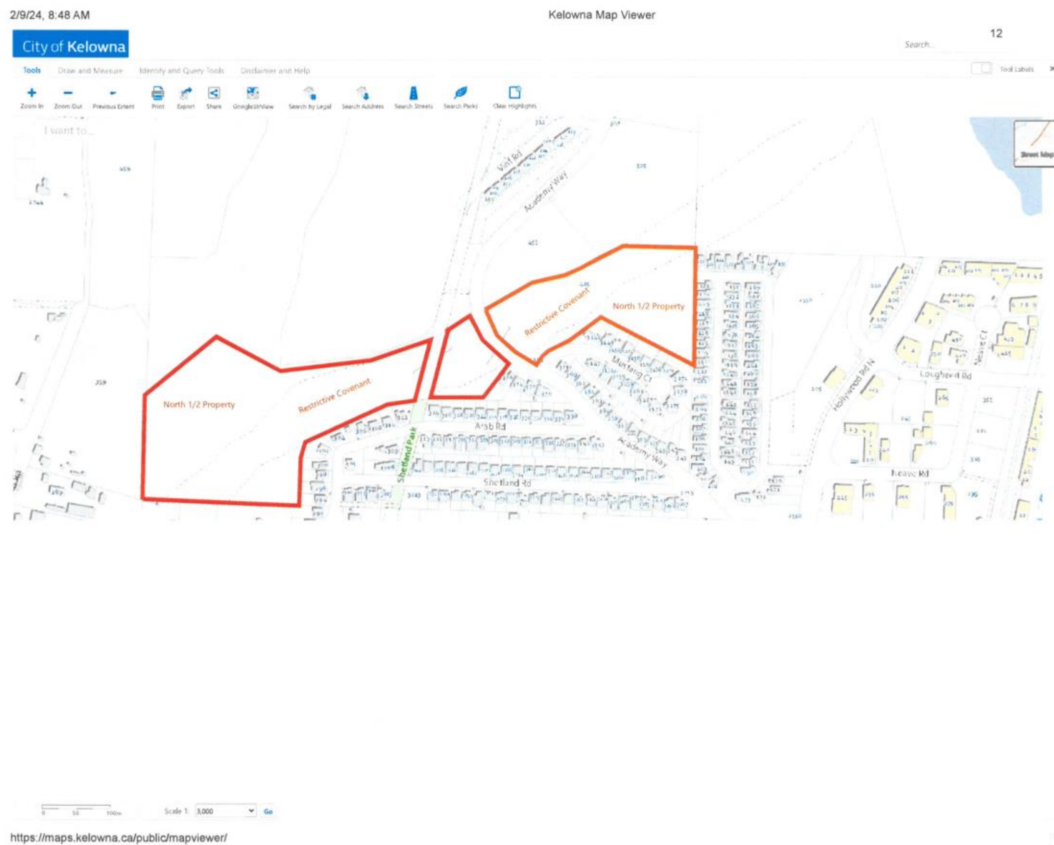
[125] Having obtained the relief sought in the Petition, Watermark has been the successful party.

[126] I further see no reason in the circumstances to deny Watermark the benefit of a costs order.

[127] Accordingly, I order that Watermark is entitled to its costs of the Petition on the basis of it being of ordinary difficulty pursuant to Appendix B of the *Rules*.

"Hardwick J."

Schedule “A”



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