SUPREME COURT OF YUKON

Citation: *The Hotsprings Road Development Area Residents Association v. Takhini Hot Springs Ltd.*, 2020 YKSC 43

Date: 20201210
S.C. No. 17-A0043
Registry: Whitehorse

BETWEEN:

THE HOTSPRINGS ROAD DEVELOPMENT AREA RESIDENTS ASSOCIATION

PLAINTIFF

AND

TAKHINI HOT SPRINGS LTD., 45666 YUKON INC., and GOVERNMENT OF YUKON

DEFENDANTS

Before Madam Justice E.M. Campbell

Appearances:

Stephen Walsh	Counsel for the Plaintiff
Richard A. Buchan	Counsel for the Defendants, Takhini Hot Springs Ltd. and 45666 Yukon Inc.
Julie DesBrisay	Counsel for the Defendant, Government of Yukon
Vincent Larochelle	Counsel for the Applicants, Northern Sustainable Development Ltd. and Yukon Condominium Corporation No. 256

REASONS FOR JUDGMENT
(Application to Add Parties)

INTRODUCTION

[1] This is an application by Northern Sustainable Development Ltd. ("NSD") and Yukon Condominium Corporation No. 256 ("CC256") to be added as defendants to this legal action. This action stems from an ongoing dispute arising from the Government of Yukon's approval or conditional approval of applications to subdivide a number of lots

located near the Takhini Hotsprings, which are located approximately 30 kilometers northwest of Whitehorse, into condominiums.

[2] The applicant, NSD, which operates under the trade name Evergreen Homes and Construction, is a developer and a home builder in the Yukon. It holds title to 10 of the 19 bare land condominium units that were created by the subdivision of one of the lots at issue (Lot 1576) into a condominium plan.

[3] The applicant, CC256, is the condominium corporation that was created by the operation of the *Condominium Act*, R.S.Y. 2002, c. 36, (the "*Act*"), as amended, upon the registration of a condominium plan and a declaration for one of the lots whose subdivision is at issue (Lot 1576).

[4] The plaintiff, the Hotsprings Road Development Area Residents Association, is a society, which was incorporated on April 25, 2016. One of its stated purposes is:

> a) to work towards ensuring that the use and development of land within the Hotsprings Road development area conforms with the terms of the Hotsprings Road Local Area Plan and related enactments including, but not limited to, the *Hotsprings Road Area Development Regulations* (para. 2a of the Fresh Amended Statement of Claim).

[5] Takhini Hot Springs Ltd. ("THSL") is a corporation, which owns or has an interest in much of the land at issue in this case. THSL is one of the named defendants in this matter.

[6] 45666 Yukon Inc. is a corporation. It is or was the registered owner of a lot, which was specifically identified in the original Statement of Claim (filed on May 31, 2017) as one of the lots at issue (Lot 1536). 45666 Yukon Inc. is one of the named defendants in this matter.

[7] THSL and 45666 Yukon Inc. support NSD's and CC256's application to be added as defendants in this matter.

[8] The Government of Yukon is the territorial government and one of the named defendants in this matter. It took no position with respect to this application.

FACTS

A) Context of this legal action

[9] This is the second legal action filed by the plaintiff regarding the Government of Yukon's approval of THSL's, and others', residential development project near the Takhini Hotsprings.

[10] In 2016, the plaintiff filed its first legal action against the Government of Yukon ("YG") challenging the validity of a development agreement YG had entered into with THSL. Pursuant to the development agreement, the residential development potential of some of the lots owned by THSL in the Hotsprings Road area, which were to remain undeveloped, was to be transferred to other lots owned by THSL in the same area, which were designated for development. The development agreement allowed for the construction of more than "the maximum of two residences per lot" permitted under the provisions of the Hotsprings Road Local Area Plan ("Local Area Plan") on the lots designated for development. At the time, the *Hotsprings Road Development Area Regulation*, O.I.C. 1996/136, as amended, stated that the use and development of the land in the area was subject to the Local Area Plan (s. 17(2) of the *Regulation*).

[11] On March 14, 2017, Madam Justice Maisonville ruled in favour of the plaintiff in determining that the development agreement was inconsistent and in conflict with the *Hotsprings Road Development Area Regulation*, O.I.C. 1996/136 and the Local Area

Plan as there had been no consultation regarding the proposed development or proper rezoning (*The Hotsprings Road Development Area Residents Association v. Yukon (Government of)*, 2017 YKSC 14). Furthermore, Maisonville J. ruled that the agreed upon development would be prohibited until the requirements for proper consultation and rezoning, pursuant to s. 17(2) of the *Hotsprings Road Development Area Regulation,* O.I.C. 1996/136, were met. However, Maisonville J. declined to declare the development agreement void because she found that third parties, THSL and potentially others, were involved and that there was no evidence before the court regarding how their rights and interests would be affected by such a declaration. In addition, Maisonville J. noted that no application had been brought in respect of the third parties in that case.

[12] On May 31, 2017, the plaintiff filed the action before the Court. Initially, the action challenged, among other things, the validity of YG's approval of 45666 Yukon Inc.'s application to subdivide a specific lot (Lot 1536) into a condominium plan comprised of, among other things, three single detached residential dwellings. The plaintiff named YG, THSL, 45666 Yukon Inc. and the Takhini Hot Springs Owners Association ("Owners Association") as defendants to this action.

[13] In 2018, the Commissioner in Executive Council issued Order-in-Council 2018/119 ("O.I.C. 2018/119"), entitled "*Regulation to amend the Hotsprings Road Development Area Regulation (2018)*" and Order-in-Council 2018/120 ("O.I.C. 2018/120") entitled "*Second Regulation to amend the Hotsprings Road Development Area Regulation (2018)*" with the stated intent of amending the existing *Hotsprings Road Development Area Regulation* (see s. 1 of both O.I.C.s).

[14] O.I.C. 2018/119, if valid, contains provisions which create new zoning designations for designated parcels of land within the Hotsprings Road area.

[15] O.I.C. 2018/120, if valid, amends O.I.C. 2018/119 by, among other things, adding a clause to the "Special Provisions" applicable to the new zoning designations, which reads as follows:

> Despite the definition "lot" in section 2 of this Regulation, the zoning requirements set out in this Schedule do not apply to a lot created by the registration of a condominium plan but instead apply to the land, as a whole, contained within the boundaries of the condominium plan.

[16] This provision, if valid, has the effect of consolidating the residential potential of lots covered by the new zoning designations if contained within the boundaries of a condominium plan. The lots that THSL, and others, are currently developing and those it wants to develop are covered by the new zoning designations and special provisions.

[17] The plaintiff has amended its Statement of Claim a number of times since 2017 in order to add allegations and to seek specific relief regarding the 2018 O.I.C.s as well as YG's approval or conditional approval of THSL's applications to subdivide Lots 1576, 1577, 1578 and 1579 into bare land condominium units. More specifically, with respect to Lot 1576, the plaintiff alleges that, in July of 2018, YG received and approved an application to subdivide Lot 1576 into a condominium plan comprised of 19 bare land units.

[18] I note that, in September of 2018, the plaintiff withdrew from its Statement of Claim the allegations regarding the subdivision of Lot 1536 into a condominium plan. The plaintiff's last amendments to its Statement of Claim were filed on January 7, 2020.

[19] The relief sought by the plaintiff has also evolved since 2017. More specifically, the plaintiff now seeks a number of declarations with respect to O.I.C. 2018/119 including that it does not meet the requirement for "rezoning" as per Maisonville J.'s decision; and that the provisions of O.I.C. 2018/119 that allow for more than "a maximum of two residences per lot" are inconsistent with the provisions of the Local Area Plan, and are, therefore, of no force and effect.

[20] In addition, the plaintiff seeks a declaration that the proposed subdivision of Lots 1576, 1577, 1578 and 1579 into bare land condominium units do not conform with the Local Area Plan, and, therefore, that these lots may not be subdivided as proposed and that any such subdivision is invalid and of no force and effect.

[21] Finally, I note that, on July 18, 2019, the plaintiff consented to its claim against the named defendant, Owners Association, being dismissed, with costs to that defendant in the amount of $4,000.

SUPREME COURT OF YUKON, *RULES OF COURT*

[22] The Supreme Court of Yukon *Rules of Court*, provide that the court may, at any stage of a proceeding, and on application by any person, add a party to a proceeding.

[23] More specifically, subrules 15(5)(a)(ii) and (iii) provide that:

> 15(5)(a) At any stage of a proceeding, the court on application by any person may
>
> …
>
> (ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectively adjudicated upon, be added or substituted as a party, and

> (iii) order that a person be added as a party where they may exist, between the person and any party to the proceeding, a question or issue relating to or connected
>
> > (A) with any relief claimed in the proceeding, or
> > (B) with the subject matter of the proceeding,
>
> which, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

POSITIONS OF THE PARTIES

a) The Applicants

[24] NSD and CC256 submit that they meet the test to be added as defendants both under subrule 15(5)(a)(ii) and subrule 15(5)(a)(iii). However, at the hearing, counsel for the applicants focussed on the application of subrule 15(5)(a)(iii).

[25] The applicants submit that the generous language of subrule 15(5)(a)(iii) provides a broad discretion to add a party to a proceeding in order to ensure that all interested parties are before the court when a proceeding raises a question or issue that may affect them.

[26] The applicants submit that, contrary to what the plaintiff claims, this action is more about neighbours being unhappy about residential development around the Takhini Hotsprings than it is about the actions of YG. In addition, the applicants submit that this action is about those neighbours seeking a declaratory relief instead of an injunction, which would be the appropriate way to proceed, to try to stop the development.

[27] The applicants submit that the relief sought by the plaintiff, more particularly:

i) the declarations that the provisions of O.I.C. 2018/119 that allow for more than “a maximum of two residences per lot” are of no force and effect; and

ii) that the approved subdivision of Lot 1576 into 19 bare land condominium units is invalid and of no force and effect,

materially affect their interests.

[28] The applicants submit that CC256 was formed and exists pursuant to the condominium plan registered for Lot 1576, and that a declaration that the condominium plan is invalid would threaten CC256's very existence. The applicants also submit that this ongoing proceeding and the declarations sought by the plaintiff create uncertainty not only with respect to CC256's legal status but also with respect to CC256's and the condominium unit holders' legal obligations pursuant to the *Act*.

[29] With respect to NSD, the applicants submits that NSD has expended significant resources towards the development of Lot 1576, including the ongoing construction of a single family dwelling on each of its five residential bare land units and of a guest cabin on each of its five commercial bare land units. The applicants submit that it is unclear what would happen to the ownership and development of Lot 1576 if the targeted provisions of the 2018 regulations and/or the condominium plan were declared invalid and of no force and effect. Such declarations could potentially lead to NSD not being a unit holder, which would result in significant financial losses for NSD. In addition, even if NSD were to remain a unit holder, notwithstanding a declaration of invalidity, the value of its units could be greatly diminished or reduced to nothing because of the legal uncertainty surrounding the effects of the declarations sought by the plaintiff.

[30] In addition, the applicants submit that their interests with respect to the issue of title to Lot 1576 may well differ from THSL's interests, as THSL was the previous owner of that lot.

[31] The applicants submit that the uncertainty created by this ongoing proceeding has already had a negative financial impact on NSD in that NSD has incurred higher than usual financing costs for the development of its bare land units. In addition, the applicants submit that the difficulty NSD experienced in obtaining financing and permitting, as well as the uncertainty regarding the legal status of the condominium plan, have delayed the development of its bare land units and has resulted in a number of job losses over the past three years.

[32] The applicants point out that the declaratory relief sought by the plaintiff is a discretionary relief. As such, the applicants submit that there is a real possibility that the court may decline to grant the relief sought by the plaintiff if the applicants do not participate in this proceeding. According to the applicants, this would likely cause further delay and not serve the best interest of justice.

[33] The applicants contend that, as a result, it is just and convenient to add them as defendants to this matter pursuant to subrule 15(5)(a)(iii).

[34] The applicants acknowledge that the threshold to be added as a party is higher under subrule 15(5)(a)(ii), as the question raised under that test is one of necessity. However, they submit that considering the discretionary nature of the relief sought by the plaintiff and the impact the relief may have on their rights and interests, their participation in this proceeding is necessary to ensure that the court adjudicates all matters in issue in this action.

b) The Plaintiff (Respondent in this application)

[35] The plaintiff submits that NSD and CC256's application is premature and that it should be adjourned until the plaintiff has had the opportunity to amend its fresh

amended Statement of Claim to reflect the material change in circumstances that have occurred since February of 2020. The plaintiff alleges that in February of this year, YG issued a Public Notice of Land Subdivision in relation to an application made by THSL and NSD to survey 11 additional bare land units for CC256 (Lot 1576).

[36] In addition, the plaintiff submits that the applicants do not meet the test to be added as a party under subrule 15(5)(a)(ii). The plaintiff submits that the applicants did not demonstrate that they either:

(i) "ought to have been joined as a party"; or that

(ii) their "participation [as defendants] in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon".

[37] The plaintiff recognizes that the test under subrule 15(5)(a)(ii) is disjunctive and that the applicants are only required to satisfy one of the two aspects of that subrule to be added as a party to this proceeding.

[38] However, the plaintiff submits that the test set out in subrule 15(5)(a)(ii) goes to the court's jurisdiction and that it does not engage the exercise of the court's discretion.

[39] The plaintiff submits that the court must find that the addition of the applicants as defendants in this matter is required or necessary in order to effectively adjudicate the issues before the court between the existing parties. The plaintiff submits that the applicants have not discharged their burden in that regard.

[40] The plaintiff submits that the applicants' argument that their addition as defendants is necessary in order to convey their perspective on the possible

implications of the relief sought by the plaintiff is not persuasive and does not meet the requirement of necessity under subrule 15(5)(a)(ii).

[41] Furthermore, the plaintiff submits that the applicants have not set out how their position on matters at issue may be different from the position of the defendant THSL. The applicants should therefore be required to file a draft Statement of Defence to substantiate their broad assertion in that regard before this court contemplates adding them as parties to this proceeding.

[42] The plaintiff further points out that THSL and 45666 Yukon Inc. were simply named as nominal defendants in this matter as a result of Maisonville J.'s decision. In addition, the plaintiff submits that it does not make any reference to NSD or CC256 in its Statement of Claim nor does it advance any claims against or seek any relief against them. According to the plaintiff, the addition of the applicants as defendants to this action is not necessary because the relief claimed by the plaintiff is exclusively against YG. As a result, the issues raised by the plaintiff's action can be effectually adjudicated between the plaintiff and the defendant YG.

[43] With respect to subrule 15(5)(a)(iii), the plaintiff agrees that the rule involves the exercise of the court's discretion.

[44] However, the plaintiff submits that the applicants' bare assertion that their yet undisclosed position with respect to the relief sought by the plaintiff may well be different than that of THSL does not meet the threshold established by subrule 15(5)(a)(iii). In support of its position, the plaintiff points out that the applicants did not file a draft Statement of Defence to demonstrate how their position could differ from that of THSL.

[45] The plaintiff submits that the applicants have failed to identify or establish that there is "a question or issue" relating or connected to any relief claimed or subject-matter of the proceeding to be determined between them and a party to the proceeding.

[46] In addition, at the hearing of this matter, counsel for the plaintiff submitted that it would not be just and convenient to permit a member of the Owners Association to be added as a party after the plaintiff had agreed to have its claim dismissed with costs against the Owners Association back in 2019.

[47] Counsel for the applicants responded that he was not privy to the proceedings that took place in this matter prior to his clients' application and that, in any event, his clients were not part of the Owners Association.

[48] As there was no evidence before me regarding the role of the Owners Association and its membership, I directed that counsel provide written submissions on the issue. Written submissions and supporting affidavits were provided by both parties. The materials filed by the parties included the Certificate of Incorporation and Articles of Incorporation of the Owners Association; the Takhini Hot Springs Resort Lands Declaration of Covenants, Conditions and Restrictions; and By-Law No. 1 of the Owners Association.

[49] The plaintiff submits that the documents filed by the parties demonstrate:

- that the members of the Owners Association include every person (individual or corporate) who owns a Hot Springs lot;
- that membership in the Owners Association is automatic;
- that other titled lots or condominium units may be brought under the terms of the Owners Association's Declaration by contract;

- that the records maintained at the Land Titles Office confirm that the Owners Association's Declaration is recorded as an encumbrance on the common property certificate of CC256;
- that the applicant NSD (Evergreen) has been a member of the Owners Association since prior to the commencement of this action; and
- that, at all material times, Joe Glynn, one of the owners of NSD and a director of CC256, has been and continues to be a member of the Owners Association.

[50] The plaintiff submits that it only named the Owners Association as a nominal defendant in its original Statement of Claim (filed on May 31, 2017) as a result of Maisonville J.'s decision. The plaintiff further submits that only later did it add a claim regarding the requirement that the Owners Association register as an extra-territorial organization.

[51] The plaintiff submits that, as a result, it would be neither just nor convenient that, after seeking and obtaining a consent dismissal with costs against the Owners Association, individual members of that association be allowed to participate in this litigation. Furthermore, the plaintiff submits that adding the applicants as nominal defendants would further and unnecessarily delay a determination of its claims against YG.

[52] Finally, the plaintiff submits that the applicants have failed to meet their burden under subrule 15(5)(a)(iii) and that their application should be dismissed.

c) Response by the applicants

[53] The applicants maintain that the Owners Association has never represented the interests of the owners of Lots 1576 to 1579, which are the only lots specifically mentioned or referred to in the Statement of Claim; that the owners of Lot 1576 are not covered by the mandatory membership in the Owners Association, as per the Owners Association's Articles of Incorporation; and that the owners of Lot 1533 to 1539 are the only ones covered by mandatory membership.

[54] The applicants acknowledge that Joe Glynn, who is one of the owners of NSD and a director of CC256, privately owns a condominium unit, associated with Condominium Corporation 237 ("CC237"), on a lot which was formerly designated as Lot 1539. The applicants do not dispute that, as a result, Joe Glynn is a member of the Owners Association. However, they submit that, as corporations, they are legal entities separate from Joe Glynn, and that their interests, in the former Lot 1576, are distinct from Joe Glynn's personal interests in the former Lot 1539. Also, the applicants reiterate that their interests are distinct from those of the Owners Association, THSL and 45666 Yukon Inc.

[55] Finally, the applicants submit that, contrary to what the plaintiff contends, the declaration registered by the Land Titles Office as an encumbrance on CC256's certificate of title has nothing to do with membership in the Owners Association. Instead, the encumbrance identified by the plaintiff is the standard encumbrance registered against every condominium corporation in the Yukon. The applicants added that they are seeking costs of this application.

ANALYSIS

The addition of defendants under subrule 15(5)(a)(iii)

[56] Pursuant to subrule 15(5)(a)(iii), the court may add a person as a party to a proceeding where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with any relief claimed in the proceeding, or with the subject-matter of the proceeding, which, in the opinion of the court, it would be just and convenient to determine as between the person and the party.

[57] The parties agree that a determination under subrule 15(5)(a)(iii) involves the exercise of the court's discretion.

[58] The applicants are CC256, a condominium corporation created pursuant to ss.10(1) of the *Act* following the registration of THSL's condominium plan and declaration for Lot 1576; and NSD, a corporation which owns the majority of the bare land units (10 out of 19) formed as a result of the subdivision of Lot 1576 as per a condominium plan. NSD owns five residential bare land units and five commercial bare lands units on what was formerly known as Lot 1576.

[59] NSD is also a developer. It is in the process of building a single family home on each of its residential bare land units and a guest cabin on each of its commercial bare land units. I note that the evidence before me does not conclusively establish who or what entity/entities own(s) the balance of the condominium units for Lot 1576.

[60] Pursuant to the *Act,* CC256 is responsible for the control, management and administration of the common elements of the property formerly known as Lot 1576 (s. 10(5)). The objects of CC256 are to manage the property of the owners and any assets of the corporation (s. 10(4)).

[61] In addition, CC256 holds a certificate of title in relation to the property (s. 4(2)(a)). Finally, CC256 is the corporate entity that:

> 10(11)…may sue and be sued, and in particular may bring an action with respect to the common elements and may be sued in respect of any matter connected with the property for which the owners are jointly liable.

[62] The plaintiff seeks a number of declarations with respect to the validity and/or effect of O.I.C. 2018/119:

(i) that it does not constitute an amendment nor does it have the effect of amending the Local Area Plan;

(ii) that it does not meet the requirement for "rezoning" as ordered by Maisonville J. in 2017; and

(iii) that its provisions which purports to allow for more than a "maximum of two residences per lot" are inconsistent with the Local Area Plan and of no force or effect.

[63] Flowing from the declarations sought with respect to O.I.C. 2018/119 (and O.I.C. 2018/120), the plaintiff seeks a declaration that the subdivision of the land at issue (including Lot 1576) into a number of bare land condominium units does not conform with the provisions of the Local Area Plan and, as a result, may not be subdivided as approved, and that any such subdivision is invalid and of no force and effect.

[64] While, strictly speaking, the plaintiff may be seen as seeking declaratory relief solely against YG, I cannot ignore that this action and the declarations sought in this action materially affect the interests of those, such as NDC, who own condominium units that were created and exist because the government approved the subdivision of

the land at issue (including Lot 1576) into condominium plans; and who have already invested in the development of their condominium units. The evidence before me is to the effect that NSD currently owns 10 out of the 19 bare land units created as a result of the subdivision of Lot 1576. Additionally, it has already incurred significant expenses for the construction of single family dwellings on its residential bare land units as well as guest cabin accommodations on its commercial bare land units. Further, NSD has incurred higher financing costs for its development due to the uncertainty created by the litigation in this matter.

[65] In addition, I am of the view that the declarations sought by the plaintiff in this action, materially affect the interests of CC256 because it is the entity responsible for the management of the common property identified in the condominium plan for Lot 1576 and for managing the property of the owners of the condominium units. Pursuant to the *Act*, CC256's existence as a corporate entity and the extent of its legal obligations are directly linked to the validity of the government's authorization to subdivide Lot 1576 into a condominium plan. A declaration that the subdivision of Lot 1576 into bare land condominium units is invalid would at least call into question CC256's legal status.

[66] Declaratory relief is discretionary. As such, even if a plaintiff is in a position to prove their allegations, the court may still consider whether it should issue the declaration sought. As Maisonville J. pointed out in her 2017 decision, the impact of a declaration on third parties is a factor that the court may take into consideration when determining whether to exercise its discretion to grant the application. In the absence of evidence of how third parties' rights are affected by a declaration, a court may decline to

grant it. This is exactly what happened in 2017 when Maisonville J. refused to declare YG's and THSL's development agreement void.

[67] Counsel for the plaintiff acknowledges that THSL and 45666 Yukon Inc. were named as defendants to address the issue of third parties' interests raised by Maisonville J. in her decision. Nonetheless, the plaintiff insists that it does not seek any relief against THSL and 45666 Yukon Inc. and that they are named as nominal defendants only. However, I am of the view that by naming THSL and 45666 Yukon Inc. as defendants in this action, the plaintiff acknowledged that the court may again refuse to grant some or all of the declaratory relief it seeks if affected third parties are not involved in this proceeding. That said, I am mindful of the fact that the legal instrument at play in this action is a regulation (O.I.C. 2018/119) rather than a development agreement, as was the case in the previous action. However, I do not find this distinction conclusive in this case, as I am of the view that an action seeking to invalidate the government's regulations that allow for the subdivision of lots located in a specific area into condominium plans, and its decisions to approve the subdivision of specific lots, including Lot 1576, located in that area, into condominium plans, materially affect the interests of those owning and developing the lots as subdivided.

[68] Having said that, I agree with the plaintiff that in many cases a draft Statement of Defence will be required by the court before it considers whether to add a third party as a defendant to a proceeding pursuant to their own application. However, I do not find the filing of a draft Statement of Defence necessary in this case as the interests of NSD and CC256 in parts of the land at issue are clearly set out in Joe Glynn's Affidavit #1.

[69] NSD and CC256 are corporate entities that are separate and apart from one another and from THSL and 45666 Yukon Inc. THSL was the previous owner of Lot 1576. It is my understanding that it is THSL that applied to subdivide Lot 1576 into bare land condominium units *as per* a proposed condominium plan. While it was mentioned during the hearing that THSL may own one or more condominium units created as a result of the approved subdivision of Lot 1576, THSL no longer owns Lot 1576 in its entirety. Also, it does not appear that 45666 Yukon Inc. holds or previously held any interest in Lot 1576. The evidence before me is to the effect that NSD currently owns 10 out of the 19 bare land units on Lot 1576 and that it has already incurred significant expenses in developing its units. As indicated earlier, CC256 was created by the operation of the *Act* as a result of the registration of a condominium plan and declaration for Lot 1576. As such, while all corporate entities have an interest in defending the validity of the approved subdivision of Lot 1576, I am of the view that their property and financial interests are distinct, and that the impact the declarations sought by the plaintiff would have on them differ. As such, it is reasonable to expect them to have diverging positions on a number of issues, including ownership of Lot 1576, if, for example, its subdivision into 19 bare land units were to be declared invalid.

[70] At the hearing, the plaintiff submitted that the applicants and Joe Glynn, one of the owners of NSD and a director of CC256, were, at all material times, members of the Owners Association and that it would be unfair to allow individual members of that association to be added as defendants when the plaintiff agreed, back in July 2019, to a consent dismissal, with costs, of its action against the Owners Association.

[71] However, after review of the additional materials filed, including the Takhini Hot Springs Resort Lands Declaration of Covenants, Conditions and Restrictions (the "Declaration"), and the Articles of Incorporation of the Owners Association, I find that the automatic and mandatory membership into the Owners Association only applies to the owners of the lots described as Lots 1533 to1539 at the time of incorporation (February 18, 2015). My determination is based on the recitals of the Declaration, which state that the Declaration applies to the lots listed at Schedule 1 of the Declaration. Lots 1533 to Lots 1539, inclusive, are the only lots listed in Schedule 1. In addition, the Articles of Incorporation stipulate that the voting members of the Owners Association are the owners of the individual lots described in the schedule to the documents, namely Lots 1533 to 1539, inclusive. The Articles of Incorporation also describe a second class of members without voting rights. However, the only member of that class is not identified as a lot owner but as a "Developer Member", and there is no evidence before me that CC256 or NSD would qualify as being the "Developer Member".

[72] In his Affidavit #7, Gary Umbrich, president of THSL and 45666 Yukon Inc., deposes that Lot 1576 was created as a result of the amalgamation of Lot 1540 and Lot 1095, which, while originally comprised within the larger Takhini Hot Springs Resort Lands, were never covered by the automatic and mandatory membership in the Owners Association. In addition, Gary Umbrich deposes that the resulting Lot 1576, which was then subdivided into a condominium plan, was not and is not covered by that mandatory membership.

[73] Furthermore, Gary Umbrich deposes that CC256 and NSD are not now, nor have they ever been members of the Owners Association, as the lot with which they are

associated (Lot 1576 and/or Lots 1540 and 1095, which were amalgamated to create Lot 1576) is neither subject to the Declaration, nor among the lots specified in the Owners Association's Articles of Incorporation.

[74] None of the documents filed by the plaintiff in support of its position demonstrates otherwise.

[75] I recognize that the Yukon Hot Springs website pages, filed by the plaintiff, do identify THSL as a member of the Owners Association in its capacity as, among other things, owner of Lots 1540 and 1095. I am also mindful of the fact that the website refers to NSD, under its trade name Evergreen, not as an owner but as the builder of a number of homes on Lot 1095. However, I do not find this information conclusive in the absence of any contract or agreement which would bring Lot 1576 and/or Lots 1540 and 1095 under the terms of the Declaration or within the ambit of the Owners Association. I note that nowhere in the documents filed with the court is Lot 1576 included in the lots covered by the Owners Association, nor are the owners of what was formerly known as Lot 1576 identified as members of the Owners Association.

[76] Furthermore, in support of their position, the applicants filed an affidavit from Joanne Oberg, a real estate conveyancer practicing in the Yukon. In her affidavit, Ms. Oberg deposes that: "Condominium Corporation title searches always return a "declaration" and "bylaws" encumbrance, registered to client #100001136". Therefore, the encumbrance appearing on CC256's and CC237's certificate of title associated with client #100001136 is not indicative of their participation in the Owners Association as argued by the plaintiff. Instead, the encumbrance represents the condominium

corporation bylaws and declaration, which are registered upon the creation of a condominium corporation.

[77] In addition, I note that CC237's certificate of title reveals that a separate encumbrance was registered against CC237's title in favour of the Owners Association. No similar encumbrance appears to have been registered against CC256's title.

[78] The applicants acknowledge that Joe Glynn, as the owner of a condominium unit with respect to CC237, is a member of the Owners Association. However, CC256 and NSD are corporate entities distinct from Joe Glynn. As such, despite Joe Glynn's professional involvement and interests in CC256 and NSD, his personal interests in CC237 is separate and apart from CC256's and NSD's interests in what was previously known as Lot 1576.

[79] Based on the affidavits and materials filed by the parties, I find that NSD and CC256 are not and were not, at all material times, members of the Owners Association.

[80] Overall, I find that the applicants have met their burden to demonstrate that it would be just and convenient to add them as defendants in this action, pursuant to subrule 15(5)(a)(iii), as there may exist, between them and the other parties to the proceeding, a question or issue relating to or connected with the subject-matter or any relief claimed by the plaintiff in this proceeding, in particular, but not restricted to, the following declarations:

(i) that the provisions of O.I.C. 2018/119 that allow for the development of more than "the maximum of two residences per lot" are inconsistent with the Local Area Plan and of no force or effect, and

(ii) that the subdivision of Lot 1576 into 19 bare land condominium units do not conform with the provisions of the Local Area Plan and, as a result, may not be subdivided as approved, and that any such subdivision is invalid and of no force and effect.

[81] As I have decided in favour of the applicants with respect to their application under subrule 15(5)(a)(iii), I do not find it necessary to determine whether they could also be added as a party under subrule 15(5)(a)(ii).

CONCLUSION

[82] NSD and CC256 are added as defendants to this proceeding. The style of cause shall be amended accordingly.

[83] The parties may address the issue of costs of this application in case management, if necessary.

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CAMPBELL J.