SUPREME COURT OF YUKON

Citation: *The Hotsprings Road Development Area Residents Association v. Yukon (Government of),* 2017 YKSC 14

Date: 20170314
S.C. No. 16-A0047
Registry: Whitehorse

Between:

THE HOTSPRINGS ROAD DEVELOPMENT AREA RESIDENTS ASSOCIATION

PLAINTIFF

And

SCOTT KENT in his capacity as Minister of Energy, Mines and Resources, and as the representative of the Government of Yukon,
And the GOVERNMENT OF YUKON

DEFENDANTS

Before Madam Justice M. Maisonville

Appearances:
Stephen Walsh — Counsel for the plaintiff
Michael Winstanley — Counsel for the defendants

REASONS FOR JUDGMENT

I. INTRODUCTION

[1] The Yukon Takhini Hotsprings are famous throughout Yukon and known in Canada as one of our rare treasures. They are located at the end of the Hotsprings Road just outside of Whitehorse, Yukon, and have historically been the unique feature of the Hotsprings Road Community.

[2] The plaintiff, The Hotsprings Road Development Area Residents Association (the "Residents Association") is a society formed under the provisions of the *Societies Act*, R.S.Y. 2000, c. 206.

[3] The Government of Yukon is the defendant. Scott Kent, the former Minister of Energy, Mines and Resources, is also a defendant.

[4] In 1999, approximately two dozen investors formed Takhini Hotsprings Ltd. which purchased the Takhini Hotsprings Complex. At the time, the Takhini Hotsprings Complex included four lots totalling 99 hectares.

[5] A number of the original investors had wanted to build their own residences on the Takhini Hotsprings Complex on a single lot as part of a “co-housing” arrangement.

[6] One of the original investors, Alison Reid, in an affidavit before the Court on this application, deposed that the purpose behind the Residents Association’s plan to build their own residences as part of a co-housing arrangement was to minimize their environmental footprint. Ms. Reid also deposes that there was never any intention on the part of the original investors, including herself, to extend the co-housing arrangement beyond a single lot.

[7] In late 2007 and early 2008, a number of the original investors sold their interest in the Takhini Hotsprings Complex to the current owners of Takhini Hotsprings Ltd. and the objective of the co-housing arrangement of the original investors was abandoned.

II. BACKGROUND

A. The Hotsprings Road Local Area Plan

[8] Residents of the Hotsprings Road area and the Government of Yukon engaged in a planning process towards a development of a land-use plan to help manage the land use and resources in the Hotsprings Road area. Following the purchase of the Takhini Hotsprings Complex by investors in 1999, Ms. Reid was involved in the

community planning process from time to time, which was guided by the steering committee of the Plan.

[9] In approximately 2002, the Hotsprings Road Local Area Plan (the "Plan") was created as the result of the planning process. The Plan was then formally approved by the Government of Yukon. There is no French language version of the Plan.

[10] At the time the Plan was adopted, the Special Provision was intended to facilitate the objective of the co-housing arrangement, according to Ms. Reid. She deposes that it was to accommodate the investors' objectives of establishing the co-housing complex. The Takhini Hotsprings properties were the only properties, anywhere in Yukon at that time, which enjoyed the Special Provision's flexibility with respect to the maximum residences permitted on the properties designated as CMT - Commercial Mixed Use/Tourist Accommodation Zone ("CMT Zoning"). The Special Provision provides that "[l]andowners of several contiguous properties zoned Commercial Mixed Use/Tourist Accommodation" may be able to consolidate the residential development potential (i.e. two residences per lot) "**in a single lot**, subject to the **conditions** addressed within the Hotsprings Road Local Area Plan ..." [Emphasis added].

[11] The Plan confirms in Policy 5.16 that:

> For properties designated *as Commercial - Mixed Use/Tourist Accommodation*, **a maximum of two residences per lot are permitted**.

[12] The Plan sets out that the ability of landowners of several contiguous properties zoned as CMT Zoning to consolidate the residential development potential of their properties in a single lot is expressly subject to specific conditions set out in Policy 5.17 of the Plan which includes as follows:

> Landowners of several contiguous properties designated as *Commercial - Mixed Use/Tourist Accommodation* may be able to transfer their residential development potential to a single lot, subject to the following conditions:
>
> - residential units may be in the form of a single family dwelling, duplex, or multiple family dwelling;
> - residential units are subject to applicable legislation and regulations on housing densities and septic systems; and
> - **Any additional residential units beyond what is permitted in this designation would be subject to community consultation, rezoning and site plan approvals.**
>
> [Emphasis added]

B. The Hotsprings Road Area Development Regulations

[13] The Regulation governing development in the Hotsprings Road area was passed in 1996 as the *Hotsprings Road Area Development Regulations,* O.I.C. 1996/136 (the "*Regulation"*). In approximately October 2004, the Government of Yukon's Commissioner in Executive Council, acting under the authority of s. 3 of the *Area Development Act*, R.S.Y. 2002, c. 10, adopted Order-in-Council 2004/201 entitled "*Regulation to Amend the Hotsprings Road Area Development Regulations*". Schedule A to the *Regulation* was replaced by Order-in-Council 2004/201, and then amended by Order-in-Council 2016/30. The title of the *Regulation* was changed to *Hotsprings Road Development Area Regulation* by O.I.C. 2016/17.

C. Relevant Legislation

[14] Section 1 of the *Regulation* provides:

> Purpose
>
> 1. The purpose of this Regulation is to regulate development of lands within the Hotsprings Road development area, as

> shown on Schedule B, pursuant to the *Area Development Act*, and:
> (*Section 1 amended by O.I.C. 2016/17*)
>
> (a) to divide the area into land use zones;
> (b) to prescribe uses to be permitted in each zone;
> (c) to prescribe and regulate development requirements in each zone;
>
> …
>
> (i) to describe a procedure whereby the public is consulted in matters relating to this regulation.
> (*Paragraph 1(i) amended by O.I.C. 2016/17)*

[15] Section 17(1) of the *Regulation* sets out a number of available designations for lands in the development area, including CMT Zoning.

[16] Section 17(2) of the *Regulation*, provides:

> (2) The use of any parcel of land within the Hotsprings Road Development Area shall be in accordance with the provisions set out in Schedule A and any use of buildings, structures or land not in accordance with these provisions shall be prohibited.
> (*Subsection 17(2) added by O.I.C. 2004/201*)

[17] Section 5(3) of the *Interpretation Act*, R.S.Y. 2002, c. 125, provides "shall" is to be read as imperative. The French language version notes in s. 17(2) of the *Regulation* that it is "interdit", i.e., forbidden or prohibited, to otherwise use the parcels except as set out in Annex A (Schedule A in the English language version).

[18] The French language versions of ss. 1 and 17(2) of the *Regulation* are as follows:

> **RÈGLEMENT SUR LA RÉGION D'AMÉNAGEMENT DU CHEMIN HOTSPRINGS**
>
> But
>
> 1. Le présent règlement vise à réglementer l'aménagement de terrains dans la région d'aménagement du chemin

> Hotsprings, délimitée à l'annexe B, en conformité avec la *Loi sur L'aménagement régional*, notamment:
>
> (a) diviser la région en zones;
> (b) prescrire les usages autorisés dans chacune des zones;
> (c) établir et régelementer les normes d'aménagement dans chacune des zones;
> …
> (i) décrire les modalités de la consultation publique.
>
> …
>
> 17(2) Les parcelles situées dans la région d'aménagement du chemin Hotsprings peuvent être utilisées conformément à l'annexe A; il est interdit d'utiliser autrement les bâtiments, les ouvrages ou les terrains.
> (*Paragraph 17(1) ajouté par Décret 2004/201)*

[19] Schedule A of the *Regulation* sets out a Land Use Designation referred to as ZONE: Mixed Use / Tourist Accommodation Zone - CMT. The only property to which the CMT Zoning applies is the property which makes up the Takhini Hotsprings Complex at the end of the Takhini Hotsprings Road.

D. Special Provision

[20] Schedule A of the *Regulation* contains a "Special Provision" in respect to the lands of the Hotsprings Road Development Area concerning CMT Zoning as follows:

> ZONE: Mixed Use / Tourist Accommodation Zone – CMT
> PURPOSE:
> To accommodate the development of recreational and tourism based facilities with a limited number of residential units
>
> PERMITTED USES:
>
> Principal uses:
> - Hotel or Motel
> - Resorts

- RV Park/Commercial Campground
- Indoor/Outdoor Recreation Facilities
- Eating & Drinking Establishment
- Skiing/Hiking Facilities
- Travel Guiding
- Guest Cabin Accommodation
- Equestrian Centre
- Public Utilities

Accessory Uses:

- **Two Single Family Dwelling Units** [see Footnote 1 below]
- Accessory Buildings
- Minor Agricultural Pursuits …

[Footnote 1] SPECIAL PROVISIONS:
Landowners of several contiguous properties zoned as Commercial Mixed Use/Tourist Accommodation may be able to consolidate the residential development potential **of these properties in a single lot, subject to the conditions addressed within the Hotsprings Road Local Area Plan, as amended from time to time**.

[Emphasis added]

[21] The French language of the Special Provision reads correspondingly:

ZONE : Usage commercial mixte / hébergement touristique - CMT
OBJECTIF
Cette désignation vise l'aménagement d'installations à caractère récréatif ou touristique ainsi qu'un nombre restreint d'unités résidentielles.

USAGES AUTORISÉS:

Usages principaux:

- hôtel ou motel
- centres de villéglature et de conférences
- parc pour véhicules de plaisance/ terrains de camping commerciaux
- installations de loisirs intérieurs ou extérieurs
- débits de restauration et de boissons
- installations de ski ou de randonnée pédestre
- service de guides pour touristes
- cabanes d'invités

- centre équestre
- services publics

Usage accessoires:
- deux unités d'habitation unifamiliales [see la note 1]
- dépendances
- travaux agricoles de faible envergure …

[la note 1] DISPOSITIONS SPÉCIALES:
Les propriétaires de lots contigus désignés « Usage commercial mixte/hébergement touristique » peuvent réunir les possibilités d'aménagement de ces terrains comme s'il s'agissait d'un seul lot, sous réserve des conditions contenues dans le plan d'aménagement local du chemin Hotsprings, dans sa version modifiée.

[22] Both the Residents Association and the Government of Yukon agree the "permitted uses" section of the *Regulation* is a codification of Policy 5.16 of the Plan. Similarly, footnote 1 of Schedule A of the *Regulation* is a codification of Policy 5.17 of the Plan.

E. Government of Yukon's Development Agreement With Takhini Hotsprings Ltd.

[23] On November 22, 2012, the Government of Yukon entered into an agreement with Takhini Hotsprings Ltd. entitled Development Agreement (the "2012 Development Agreement"). Schedule B of the 2012 Development Agreement sets out a listing of lots designated for residential development and those lots designated to remain undeveloped with the residential development potential transferred to lots designated for development. The 2012 Development Agreement had provided in Section 5 as follows:

SECTION 5 Residential Development

5.1 The Developer shall construct or cause to be constructed a maximum of two (2) residential dwelling units per lot at its own expense.

> 5.2 The total number of residential dwelling units that may be constructed on the nine lots shown on the Plan of Subdivision is eighteen (18). Lot 1095, Quad 105 D/14, Plan 65422 also has the potential for two residential dwelling units which brings the total residential dwelling unit potential to twenty (20) that may be clustered onto one or more lots shown on the Plan of Subdivision.
>
> 5.3 Lots designated for residential dwelling units shall be identified in Schedule "B" of this Development Agreement.
>
> 5.4 Lots designated to have their residential development potential restricted and transferred to another lot shall be identified in Schedule "B" of this Development Agreement.
>
> 5.5 Yukon acknowledges that the Developer has made best efforts to determine suitable lots on which to locate the residential capacity. Should the Developer determine that the lots identified in Schedule "B" are not for engineering, planning or other related reasons, suitable for achieving the residential capacity allowed by this Agreement, then the Developer may request Yukon to transfer the residential development potential to such lots as the Developer requests and such permission to transfer the residential development with the requisite consequential amendments to this Agreement, shall not be unreasonably refused by Yukon.

[24] There is no French language version of the Development Agreement.

[25] Additionally, the 2012 Development Agreement provides at Section 7:

> **SECTION 7 Compliance With Law**
>
> 7.1 The Developer shall at all times comply with all applicable Yukon legislation and regulations pertaining to the residential dwelling units and the affected lots.

> 7.2 Where anything provided for herein cannot lawfully be done without the approval or permission of any authority, person or board, the obligation or right to do it does not come into force until such approval or permission is obtained PROVIDED that the parties will do all things necessary by way of application or otherwise in an effort to obtain such approval or permission.
>
> 7.3 If any provision hereof is contrary to law, the same shall be severed and the remainder of this Development Agreement shall be of full force and effect.

[26] On February 17, 2015, the Government of Yukon entered into a further agreement with Takhini Hotsprings Ltd., entitled “Agreement to amend the Development Agreement for the proposed subdivision of Lot 10-48, Quad 105 D/14, Plan 61046, Yukon Territory; Lot 1094, Quad 105 D/14, Plan 65422, Yukon Territory; and Lot 1095, Quad 105 D/14, Plan 65422, Yukon Territory” (the “Amended Development Agreement”).

[27] Schedule B of the Amended Development Agreement sets out a listing of lots designated for residential development as well as those lots designated to remain undeveloped with the residential development potential transfer to lots designated for development. Under the terms of Schedule B of the Amended Development Agreement, three of the lots listed therein, namely, lots 1533, 1536 and 1095, provide for more than the maximum two residences permitted under Policy. 5.16 of the Plan. This transfer, under the terms of Schedule B of residential development potential to lots 1533, 1536 and 1095 allowing for more than maximum of two residences, had not been subject to either community consultation or rezoning, which was required under the terms of Policy 5.17 of the Plan.

F. The Statement of Claim

[28] By Statement of Claim filed June 16, 2016, the Residents Association contests the transfer of the development potential in the absence of compliance with the provisions of Plan. The Residents Association seeks declarations that:

a) the Amended Development Agreement is void and of no force and effect because the legally binding conditions precedent set out in Policy 5.17 of the Plan have not been fulfilled;

b) a declaration that those provisions of Schedule B of the Amended Development Agreement which purport to provide for the consolidation of residential potential on lots 1533, 1536 and 1095 beyond two residences per lots are in conflict with the legally binding conditions set out in Schedule A of the *Regulation* and the Plan and are consequently of no force and effect; and

c) a declaration that the development of more than the permitted maximum of two residences per lot on lots 1533, 1536 and 1095 is a use of land not in accordance with the legally binding conditions set out in Schedule A of the *Regulation* and Policy 5.17 of the Plan and is therefore prohibited by virtue of the terms of s. 17(2) of the *Regulation*.

[29] The Residents Association also seeks costs and further relief in the Statement of Claim.

[30] On the same day that the Statement of Claim was filed, a Notice to Admit was forwarded to counsel for Scott Kent, the former Minister of Energy and for the Government of Yukon.

[31] On July 7, 2016, the Government of Yukon filed a Statement of Defence stating, *inter alia*, that:

> Unless expressly admitted herein, the Defendants denies each and every allegation in the Statement of Claim and puts the Plaintiff to the strict proof thereof.

[32] In a separate document on the same date, a Reply to the Notice to Admit containing a number of admissions made was forwarded to counsel for the Residents Association.

III. THE ISSUES BEFORE THE COURT

[33] The first issue before the Court is whether, pursuant to Rule 20(26) of the *Rules of Court* of the Supreme Court of Yukon, the Statement of Defence should be struck as an abuse of the court's process given that the Reply to the Notice to Admit differs and admits certain facts whereas the Statement of Defence instead "puts the Plaintiff to the strict proof thereof".

[34] The second issue before the Court is what is the correct way to interpret Schedule A in respect of the development? Does Policy 5.17 apply to the Amended Development Agreement? If so, has there been compliance with the conditions set out in Policy 5.17 of the Plan? Should the declarations sought by the Residents Association be granted? More specifically, does the 2012 Development Agreement contemplate goes beyond the words of consolidating the development potential "in a single lot"?

IV. DISCUSSION – PLEADINGS

[35] Rule 20(26) of the Supreme Court of Yukon *Rules of Court* provides:

> Scandalous, frivolous or vexatious matters

> (26) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court, and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[36] Rule 31(2) provides that:

> Effect of notice to admit
>
> Unless the court otherwise orders, the truth of a fact or the authenticity of a document specified in the notice to admit shall be deemed to be admitted, for the purposes of the proceeding only, unless, within 21 days, the party receiving the notice delivers to the party giving the notice a written statement that
>
> (a) specifically denies the truth of that fact or the authenticity of that document,
>
> (b) sets forth in detail the reasons why the party cannot make the admission, or
>
> (c) states that the refusal to admit the truth of that fact or the authenticity of that document is made on the grounds of privilege or irrelevancy or that the request is otherwise improper, and sets forth in detail the reasons for the refusal.

[37] Counsel for the Residents Association has relied upon the decision of the British Columbia Court of Appeal in Chambers, *El-Nachar v. Alsakka*, 2002 BCCA 191, at

para. 3, in which Southin J.A. noted in response to a statement of defence asserting, among other things, "puts the plaintiff to strict proof thereof"

> … [I digress to point out the words "puts the plaintiff to the strict proof thereof" add nothing to a denial and are silly words.]

[38] Counsel for the Residents Association asked this Court to rule on the practice of putting the words "puts the plaintiff to the strict proof thereof", relying upon the decision of *El-Nachar*.

[39] I find that this argument is devoid of merit. The provisions of the *Rules* on Notices to Admit are expressly clear. Unless the Court otherwise orders the admissions are made for all purposes, I do not find that a Statement of Defence followed by a Reply to a Notice to Admit admitting what had been denied earlier is an abuse of process of this Court.

[40] To follow counsel for the Residents Association's argument to its logical conclusion would be to create a rule requiring a defendant to amend its pleadings to conform with any replies to Notices to Admit that result in admissions throughout the court process. I do not find that this is appropriate. In any event, Rule 31(2) makes it clear that the admission would prevail over the words in the Statement of Defence. Parties are entitled to reflect and change their position on facts when faced with a Notice to Admit; this is arguably one of the main functions of that Rule. Different costs consequences arise and different strategies may be employed in the litigation. I do not find this is an abuse of process.

V. THE LAW ON STATUTORY INTERPRETATION

[41] In *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, Justice Iacobucci for the Supreme Court of Canada was considering the modern approach to statutory interpretation.

[42] Justice Iacobucci commences his analysis at para. 26:

> [26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[43] Justice Iacobucci notes that other statutory interpretation principles only come into play when there is an ambiguity.

[44] Ambiguity is described by Iacobucci J. as follows:

> [29] What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte, supra,* at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, *each equally in accordance with the intentions of the statute*, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".
>
> [30] For this reason, ambiguity cannot reside in the mere fact that several courts -- or, for that matter, several doctrinal writers -- have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and *thereafter* to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, *supra*, at pp. 4-5).
> [Emphasis in original.]

[45] Consequently, the Court must first read an arguably ambiguous provision in its entire context and in its grammatical and ordinary sense.

[46] The defendants, relying on Sullivan and Driedger on the *Construction of Statutes*, 4th ed. (Canada: Lexis Nexis Butterworths, 2002), urge the Court to review the purpose statement as well at p. 300:

> A purpose statement is a provision set out in the body of legislation that declares the principles or polices the legislation is meant to implement or the objectives it is meant to achieve.

[47] As well, in respect of the French and English versions of the legislation, the defendants look to the shared meaning rule at p. 86 of the *Construction of Statutes*:

> In most cases the shared meaning is assumed to be a meaning found in each version of the bilingual text read separately, as opposed to a meaning that is constructed by reading both versions together. In *Aerie Inc. v Canada Post Corp.,* however, Ryan J. pointed out that in so far as appropriately influence the meaning of the other. The effect is to move the ordinary meaning of the two versions toward each other.

[48] And at p. 87:

> Under this approach, the ordinary meaning of the words in one language version is adjusted to take into account the other language version and the resulting interpretation is then regarded as the shared meaning.

[49] It is not argued that there is an ambiguity, however, such that one version should be preferred over another in respect of the purpose of the legislation.

[50] The defendants do, however, argue that the words in Schedule A to the *Regulation* “peuvent réunir les possibilités d’aménagement de ces terrains comme s’il s’agissait d’un seul lot” is to be translated as “may combine the development possibilities of these lands as if they were a single lot”. It is argued that this conflicts with the English language version “may be able to consolidate the residential development potential of these properties in a single lot”.

[51] The defendants concede, however, that irrespective of this, the development is subject to the Plan.

VI. APPLICATION

[52] Counsel for the Residents Association argues that Schedule A is clear—landowners of several contiguous lots may be able to consolidate the residential development potential of these properties in a single lot, subject to the conditions addressed within the Plan. Section 5.1 of the 2012 Development Agreement clearly states that the Developer is restricted to constructing a maximum of two residential dwelling units per lot. While there is provision for the development potential to be transferred, the difference between "in a single lot" or "to a single lot" is not of moment, nor does the French language version compel an interpretation of these words such that the Plan conditions are circumvented.

[53] That Plan provides in Policy 5.17 that "landowners of several contiguous properties designated as *Commercial – Mixed Use/Tourist Accommodation* may be able to transfer their residential development potential **to a single lot** subject to the following conditions", which include "community consultation, rezoning and site plan approvals".

[54] No community consultation or rezoning has occurred.

[55] Consequently, counsel for the Residents Association argues that the application of Policy 5.17 is triggered by the Amended Development Agreement, permitting residential development potential of lots 1533, 1536 and 1095 to contain more than the maximum of two residences, given that the above statutory provisions expressly incorporate the Plan. In other words, counsel for the Residents Association argues that there must be community consultation and rezoning prior to the residential development potential being transferred. As there has neither been community consultation nor

rezoning, it is argued the purported transfer of development potential to lots 1533, 1536 and 1095 is void and the Amended Development Agreement should be set aside.

[56] Counsel for the Government of Yukon argues that Schedule A of the *Regulation* has, in effect, codified Policies 5.16 and 5.17 of the Plan. That being so, the Court should look to the wording of the Special Provision in Schedule A. Counsel argues that the Special Provision which provides consolidation of the residential development potential of properties “in a single lot” is a more permissive wording than “to a single lot”. “To a single lot” is not what is being effected by the Amended Development Agreement. Counsel argues that because Schedule A of the Special Provision has codified the Policies namely, Policy 5.17, the Plan was not adopted by reference and that the conditions, including community consultation as argued by the plaintiff, is taken out of context. The Government of Yukon argues only if more than 20 residences were to be developed would the conditions, including community consultation, be triggered. This argument, however, ignores Schedule A which specifically incorporates the Plan by reference. It is argued that the three lots in question to which the residential development potential has been transferred (the transferred potential being five residences on one lot, three residences on the second lot, and two on the third lot), do not alter the total development potential here. The development potential of 20 residences remains the same. Furthermore, “in a single lot”, as I understand counsel’s argument, permits for more than one lot to receive transferred residential development potential. It is also argued that as the Special Provision in Schedule A codifies the Plan, it, therefore, takes precedence over the Plan.

[57] I find that, while it is true that the Amended Development Agreement does not contemplate going beyond 20 residences, that was not permitted in the Plan either and is not an answer to whether the conditions have been triggered.

VII. CAN IT BE SAID THESE PROVISIONS MEAN DIFFERENT THINGS?

[58] Following the suggested approach in *Bell Expressvu*, I find that it is important to read the passages in question as a whole. The Special Provision provides:

> Landowners of several contiguous properties zoned as Commercial Mixed Use/Tourist Accommodation may be able to consolidate the residential development potential of these properties in a single lot, subject to the conditions addressed within the Hotsprings Road Local Area Plan, as amended from time to time.

[59] The Plan provides at Policy 5.17:

> Landowners of several contiguous properties designated as *Commercial - Mixed Use/Tourist Accommodation* may be able to transfer their residential development potential to a single lot, subject to the following conditions …

[60] The Government of Yukon argues “in a single lot” vs. “to a single lot” is different.

[61] Counsel for the Government of Yukon submits that the Plan’s requirement to consult is not triggered because Takhini Hotsprings Ltd. will not be developing beyond 20 residences total.

[62] Counsel for the Government of Yukon also argues that because the *Regulation* in Schedule A states “in a single lot” as opposed to “to a single lot” in Policy 5.17 of the Plan, that demonstrates, because the wordings are not identical, that Policy 5.17 was not adopted by reference. The Government of Yukon argues, therefore, that the conditions which accompany Policy 5.17 were not incorporated. It argues that, as long as the development does not exceed 20 residences, the consultation provisions and

rezoning are unnecessary. To read those as a precondition to building would be unnecessary and confusing. The position of the Government of Yukon, additionally as noted, is that there is a significant difference in the wordings “in a single lot” and “to a single lot” and that difference is set out in Policy 5.17.

[63] The Special Provision contemplates being subject to the Plan. Can it be said that, by effecting a development where the development potential is spread in three ways (as the defendants contest), brings the transaction outside the policy requirement of the Plan and, thus, no consultation or rezoning is required? Can it furthermore be said that by not exceeding 20 residences, the conditions of the Plan do not apply? As I understand the argument of counsel for the Government of Yukon, the answer to that is “the conditions do not apply” because what is happening by the Amended Development Agreement is not consolidation “to a single lot”, rather it is to several lots.

[64] I find an interpretation bypassing the conditions would not be harmonious with the purpose of the *Interpretation Act* nor does it make sense. Firstly, the Plan, as the *Regulation* does, contemplates the implementation of the conditions. In my plain reading, this does not restrict the application of the conditions to a one-time development consolidation, and any further or additional consolidation would be free from the requirements of consultation and rezoning. By the use of the term “landowners”, more than one transaction is contemplated in effecting the consolidation and transfer of the residential development potential of a lot. Read plainly and simply, it cannot be said if this consolidation contemplated in the *Regulation* is restricted to one lot that would somehow not violate the Plan whereas allowing consolidation over three lots does not.

[65] Nor does it make sense to interpret footnote 1 of Schedule A of the *Regulation,* and its use of 'in' rather than 'to', as signalling a legislative understanding that it is unnecessary to consult or rezone before consolidating of residential development potential. Had the legislature not wished to reference the Plan, this would have been a simple matter to achieve. Had there been a wish to only incorporate the one condition on the number of residences, this too would have been easily achieved. Yet, the legislature, instead, incorporated the whole of the Plan.

VIII. SUMMARY INTERPRETATION

[66] I find the provisions should be read as follows.

[67] Section 5.1 of the 2012 Development Agreement between the Government of Yukon as represented by the Approving Office and Takhini Hotsprings Ltd. as represented by Garry Umbrich, president and owner of certain lots provides:

> "The Developer shall construct or cause to be constructed a maximum of two (2) residential dwelling units per lot at its own expense."

[68] The 2012 Development Agreement, however, specifically contemplates in ss. 5.3 and 5.4 that certain lots will be designated to have their "residential development potential restricted and transferred to another lot" and where this is so, they are to be identified in Schedule B. The Developer is to make best efforts to determine the suitability of lots for residential capacity.

[69] The 2012 Development Agreement expressly provides in Section 7 that the Developer is to be compliance with the applicable law and regulations.

[70] The *Regulation* provides:

> 17 (2) The use of any parcel of land within the Hotsprings Road Development Area shall be in accordance with the provisions set out in Schedule A and any use of buildings, structures or land not in accordance with these provisions shall be prohibited.
>
> (*Subsection 17(2) added by O.J.C. 2004/201*)

The French language version provides:

> (2) Les parcelles situées dans la région d'aménagement du chemin Hotsprings peuvent être utilisées conformément à l'annexe A; il est interdit d'utiliser autrement les bâtiments, les ouvrages ou les terrains.
>
> (*Paragraphe 17(2) ajouté par Décret 2004/201*)

[71] Schedule A provides:

> SPECIAL PROVISIONS:
>
> 1. Landowners of several contiguous properties zoned as Commercial Mixed Use/Tourist Accommodation may be able to consolidate the residential development potential of these properties in a single lot, subject to the conditions addressed within the Hotsprings Road Local Area Plan, as amended from time to time.

[72] The French language provision provides:

> DISPOSITIONS SPÉCIALES:
>
> 1. Les propriétaires de lots contigus désigné - Usage commercial mixte/hébergement touristique - peuvent réunir les possibilités d'aménagement de ces terrains comme s'il s'agissait d'un seul lot, sous réserve des conditions contenues dans le plan d'aménagement local du chemin Hotsprings, dans sa version modifiée.

[73] Policy 5.16 of the Plan provides that a maximum of two residences are permitted on a lot designated Commercial - Mixed Use / Tourist Accommodation. This is subject

to consolidation of residential development potential, and re-allocating development potential "to a single lot" triggers conditions:

> Policy 5.17: Landowners of several contiguous properties designated as *Commercial - Mixed Use/Tourist Accommodation* may be able to transfer their residential development potential to a single lot, subject to the following conditions:
>
> …
>
> - Any additional residential units beyond what is permitted in this designation would be subject to community consultation, rezoning and site plan approvals.

[74] I do not see any key distinction between the French language version and the English language version such that the conditions attendant upon moving the development potential "in a single lot" or "d'un seul lot" (as in the Schedule), or "to a single lot" as in the Plan, are avoided.

[75] I appreciate the Government of Yukon's submission that the French language version stating the purpose of the *Regulation* is to "vise", i.e., "viser", or "to aim" at regulating the management and development of the property. This development is contemplated, it is argued.

[76] This does not, however, relieve the Government of Yukon from complying with the conditions. In fact, the *Regulation* references at s. 1(i) a procedure of public consultation. Nor do I find that the ambiguity suggested by the defendants from the French language to the English language versions are such that the defendants could avoid the conditions required in the Plan.

[77] The *Regulation* clearly states that it is subject to the Plan. The *Regulation* by the Special Provision restricts development to two residences per lot. The Accessory uses

read “Two Single Family Dwelling Units”. The Special Provision of the *Regulation* also provides that if the development potential is consolidated “in a single lot, [it is] subject to the conditions addressed within the Hotsprings Road Local Area Plan …”.

[78] I do not agree that there is a significant difference between the wordings “in a single lot” and “to a single lot”. In my view, the wordings “to a single lot” simply express moving of the development potential in a different way rather than referring to it as moving the development potential “in a single lot”.

[79] The plain reading is that any consolidation of lot development is subject to the Plan, therefore, it must comply with the conditions of the Plan and that includes consultation and rezoning.

[80] That being so, I find that there has been a failure to consult and rezone.

IX. REMEDY

[81] The plaintiff seeks, *inter alia*, certain declarations.

[82] Third party rights are involved here. Considerations in granting declarations where third party rights are involved were considered in *Gook Country Estates Ltd. v. Quesnel (City)*, 2006 BCSC 1382:

> [22] Declaratory relief is founded in equity and as such is discretionary (*Glacier View Lodge Society v. British Columbia (Minister of Health)* (2000), 75 B.C.L.R. (3d) 373, 2000 BCCA 242, at [para.] 7. …
>
> …
>
> [26] I therefore conclude that, even if the plaintiff is able to prove some or all of its allegations, I must still consider whether the declarations it seeks should or should not be issued in the circumstances.
>
> …

> [197] However, I do not propose to decide the issue on the basis of standing because the plaintiff faces a further hurdle. This action was started in October 2003 and did not come to trial until about two years later, when the buildings had already been leased to tenants who are carrying on business in them. The tenants are not parties to this action and there is no evidence of how their interests would be affected by the declaration the plaintiff seeks.
>
> [198] During argument, I asked counsel for the plaintiff what the effect of the declaration sought would be. Would, for example, the buildings have to be torn down? Counsel's response, essentially, was that his client is entitled to the declaration sought and the consequences that flow from it would have to be decided in subsequent proceedings. He said he didn't know what the next step would be.
>
> [199] Earlier in these reasons, I referred to the fact that declaratory relief is discretionary and that impact on non-parties is a factor to consider in deciding whether to exercise that discretion. In my view, the fact that the declaration has a potential impact on parties not before the court is sufficient reason for the court to exercise its discretion and not grant the declaration, even if the plaintiff might otherwise be entitled to it.
> [Emphasis added].

[83] In *Gook Country Estates*, the court was not prepared, in the circumstances, to make the declaration sought.

[84] As in *Gook Country Estates*, third parties are involved here. There is no evidence before the Court of how their rights would be affected. *Gook Country Estates* was upheld at the British Columbia Court of Appeal where Groberman J.A., writing for the majority in 2008 BCCA 407, said:

> [10] Nothing in the court's statements in *Hornby Island Trust v. Stormwell* should cast any doubt on the general proposition that declaratory relief *per se* is discretionary. (see Sarna, *The Law of Declaratory Judgments* (3rd ed.) Toronto: Thomson Carswell, 2007, particularly at chapter 3; and Zamir, *The Declaratory Judgment* (2nd ed.) London: Sweet & Maxwell, 1993, particularly at chapter 4). When an action is brought by a plaintiff seeking a declaration, the court may deny relief on several discretionary grounds, including standing, delay, mootness, the availability of more appropriate procedures, the absence of affected parties, the theoretical or hypothetical nature of the issue, the inadequacy of

> the arguments presented, or the fact that the declaration sought is of merely academic importance and has no utility. I do not suggest that this list is exhaustive.
>
> …
>
> [18] The learned trial judge had discretion to refuse to entertain the plaintiff's action for a declaration. In determining whether or not to exercise that discretion in this case, he properly considered the possibility of adverse effects on third parties, the plaintiff's delay in bringing the matter before the court, the plaintiff's limited interest in the matter, the lack of any clear utility to a declaration, and the fact that the developments in question had already been built in reliance on the permits. All of these factors were properly taken into account by the learned trial judge. I can see no basis for interfering with his exercise of discretion.
> [Emphasis added].

[85] I find that it would not be appropriate to declare the Amended Development Agreement void.

[86] I find that the development of more than two residences per lot of lots 1533, 1536 and 1095 has not proceeded in accordance with Schedule A of the *Regulation* and Policy 5.17 of the Plan.

[87] Until there has been compliance with the requirements of consultation and rezoning pursuant to s. 17(2) of the *Regulation*, development is prohibited.

X. CONCLUSION

[88] In conclusion, there is no question that the Plan impacts upon the development and has an effect on the Amended Development Agreement. Section 5.1 of the 2012 Development Agreement provides that "the Developer shall construct or cause to be constructed a maximum of two (2) residential dwelling units per lot …". The 2012 Development Agreement, however, specifically contemplates that certain lots will be designated to have their "residential development potential restricted and transferred to another lot" and where this is so, they are to be identified: see ss. 5.3, 5.4. The

Developer is to make best efforts to determine the suitability of lots for residential capacity.

[89] The 2012 Development Agreement expressly provides further that there is to be compliance with the law and regulations. The *Regulation* provides, as noted in Section 17(2), a prohibition against any buildings or structures not built in accordance with the provisions of Schedule A.

[90] This case does not turn on the distinction between "in a single lot" and "to a single lot". I find that both phrases are of equal interpretation and mean that where a development plan contemplates a movement of the development potential, the requirements that there be compliance with the Local Area Plan are triggered. The Special Provision in Schedule A does not suggest that there is a way to consolidate without triggering the conditions in the Plan. I do not agree with the Government of Yukon's suggestion that a one-time movement of development potential avoids the conditions in the Plan.

[91] The Plan, at Policy 5.17, reiterates that owners may be able to transfer their residential development to a single lot, subject to the following condition:

> … any additional residential units beyond what is permitted in this designation would be subject to community consultation rezoning and site plan approvals.

[92] Again, pursuant to the *Regulation* and the Special Provision contained within, the Plan must be complied with. Accordingly, because there has been no compliance with the Plan, I make the following declaration in accordance with the plaintiff's application:

> That provisions of Schedule B of the Amended Development Agreement which purport to provide for the consolidation of residential potential on lots 1533, 1536 and 1095 beyond the permitted maximum of two residence per lot is inconsistent

> and in conflict with the plan requirements which require community consultation as set out in the Hotsprings Road Local Area Plan.

[93] Again, I do not declare the agreement void as third party interests have been affected and there has been no application brought in respect of those parties. Nor am I declaring the actions of the Government of Yukon in the development would be prohibited. Rather, I am ordering that any such development in suspension until there has been compliance with all provisions in the Plan.

[94] Nothing in the English version or the French version of the *Regulation* permits an avoidance of the requirements for compliance with the *Regulation* and the Plan.

[95] It is my finding that the conditions have been triggered and that the Government of Yukon must first have community consultation, rezoning and site plan approvals before permitting the Developer to consolidate residential development potential.

[96] In the event that counsel are unable to reach an agreement respecting costs, they may, within 60 days of the release of these Reasons, arrange to address costs by contacting the Registry.

[97] I dismiss the balance of the relief sought.

"MAISONVILLE J."