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BULLETIN

COURT OF APPEAL AFFIRMS ZONING DECISION ON STALLED DEVELOPMENT

Onni Wyndansea Holdings Ltd. v. Ucluelet (District), 2023 BCCA 342

In 2004, in exchange for promises of various community amenities including cash contributions and public trails, the District of Ucluelet rezoned roughly 375 acres of undeveloped land to authorize a comprehensive golf resort development. In 2020, long after the original developer had secured approval for a 30-lot bare land strata subdivision, constructed services for that subdivision, and gone bankrupt, the new owner signalled its intention to go ahead with marketing of the bare land strata lots. The District's Council responded by changing the zoning for the entire site, on the basis that the strata lots should not be developed in the absence of a new comprehensive plan. The owner argued that the District acted in bad faith or unreasonably in changing the zoning. In the alternative, the owner claimed non-conforming use. The BC Supreme Court sided with the District. The BC Court of Appeal has now dismissed the owner's appeal.

The Court of Appeal upheld the judge's conclusion that Ucluelet's Council acted reasonably, for a proper purpose, and in good faith. In particular, the Court agreed that the evidence disclosed no attempt to extract further amenities. The fact that Council acted quickly to forestall development did not demonstrate bad faith. In all the circumstances, the Court did not think it improper that Council sought to prevent a development that represented just a portion of a 16-year-old plan, which the owner itself had announced would be abandoned. When it passed the rezoning bylaw, Council considered the lack of certain promised trails and other amenities on the lands, as well as correspondence from the Ministry of Transportation and Infrastructure concerning incomplete road improvements; both matters were held to be valid concerns despite the owner's attempt to argue otherwise.

In brief, the Court of Appeal affirmed that a council decision to change zoning should not be vulnerable to allegations of bad faith or unreasonableness simply because the change might be inconsistent with the development plans or economic interests of a particular owner or owners.

The Court of Appeal also upheld the judge's finding that the owner had not established a non-conforming use. In making this finding, the Court clarified the common law doctrine of "commitment to use", which broadly means that a non-conforming use protected by the *Local Government Act* may be made out even where a structure is substantially incomplete, provided the landowner can point to a physical manifestation of their intention to use it by having carried out at least some work. The Court here usefully distinguished the circumstances in *Sunshine Coast Regional District v. Bailey* (1995), 15 B.C.L.R. (3d) 16 (S.C.), where a non-conforming use

finding was made which allowed the construction of additional cabins on a single large property operated by one corporate entity as a single undertaking. The circumstances in *Onni v. Ucluelet* involved the past installation of services to the 30 subdivided lots, which the Court found was insufficient to establish a commitment to use, both because no work had been done on the subject lots themselves and because the developer could not have committed to use the subdivision in isolation from the original – and outdated – comprehensive golf resort plan.

Aidan Andrews