YOUNG ANDERSON
BARRISTERS & SOLICITORS

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BULLETIN

APPEAL COURT FINDS "NO-BUILD" COVENANT NOT OBSOLETE DUE TO DELAY IN ROAD PROJECT

In *Kelowna (City) v. Watermark Developments Ltd.*, 2025 BCCA 382, the Court of Appeal found a chambers judge had erred in ordering that a "no-build" covenant be cancelled as "obsolete" under s. 35(2)(a) of the *Property Law Act* ("*PLA*"). The lower court's error lay in applying a "watered-down" test for determining whether a charge should be cancelled under the *PLA.*

Section 35 of the *PLA* allows the court to cancel charges against land on five grounds. Two of those grounds were engaged in the *Watermark* case: (i) the charge was obsolete, and (ii) cancellation of the charge would not injure the person entitled to its benefit. The covenant in question had been registered in 2007 as a condition of rezoning and subdivision approval and prohibited construction of buildings to protect a portion of a corridor for a future roadway project extending from Kelowna's downtown to the Okanagan campus of UBC, and comprising three segments. Construction of Segment 1 (closest to the downtown) was included in the OCP and Transportation Management Plan (TMP), both of which had 20-year planning horizons out to 2040. For Segment 2, the cost of land acquisition (but not construction) was also included in the OCP and TMP. The final leg, Segment 3, which included the portion covered by the covenant over Watermark's lands, was not included in the OCP or TMP. Watermark argued that this amounted to abandonment of that portion of the road project by Kelowna, rendering the covenant being obsolete.

The appeal court observed that the project had evolved in scope (going from a four-lane road with interchanges to two lanes) and been much delayed from its 2007 vision when it was anticipated that Segments 1 and 2 would be completed within the next 3 years; progress since had been "glacial" in the words of the Court. However, there had been no express abandonment of Segment 3. Nor had there been any actions or expressions of interest that could constitute "effective abandonment", the Court noting steps taken more recently by Kelowna to protect other portions of the road corridor in Segment 3. While acknowledging that these steps did not amount to a commitment to proceed with completion of Segment 3, and that the plan was subject to future budgeting and feasibility studies, that was "different from being abandoned" and thus did not satisfy the properly understood definition of "obsolete" under s. 35.

Addressing the chambers judge's more specific observations going to the finding of obsolescence, the appeal court stated that:

(i) the length of the timeframe for realizing the project was irrelevant, as long as "the plan remains in play", rejecting the lower court's reliance on a case where a no-build

covenant had been cancelled just 4 years after registration as establishing a benchmark for an excessive timeframe;

(ii) the fact that the eventual construction of Segment 3 was uncertain did not render its future a matter of "pure speculation" in the context of the City's sequential planning of the three segments; and

(iii) the lower court's finding that the City had abandoned the historical vision of the road project in favour of a "patchwork extension" was a palpable and overriding error; the purpose underlying the protection had not been abandoned; the three segments were always seen as sequential sections of a planned continuum.

Summing up, the appeal court accepted that planning beyond 2040, with no funding having been committed, could be described as "speculative". However, the kind of road project at issue involved "planning long into the future". So long as the prospect of proceeding with Segment 3 "remains realistically in contemplation", the protection of the corridor was not obsolete within the meaning of s. 35 of the *PLA*.

With respect to the further ground that cancellation of the covenant would not injure the City, the chambers judge was found to have erred by balancing the interests of the City with those of the landowner. Properly interpreted, s. 35(2)(d) does not involve a balancing of interests. Depriving the City of its legal right under the covenant would have serious consequences by adding significant expense to the project, equating to a real injury to Kelowna.

The Court of Appeal's decision in *Watermark* is a welcome acknowledgement of the realities facing local governments in planning for future infrastructure projects. Orderly planning and delivery of such projects would be adversely affected if protective charges could be cancelled by courts applying a watered-down standard of "effective abandonment" arising out of long timeframes for project realization.

Hopefully, the decision will assist in maintaining the effectiveness of no-build and other protective covenants as useful planning tools.

Barry Williamson