When dense makes sense: BCSC cancels obsolete building scheme to clear way for townhouses

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Modern urban development offers opportunities for community growth, aligning neighbourhoods with evolving planning priorities and the dynamic needs of expanding populations. The British Columbia Supreme Court's recent decision in *Smith v. Clearwater Park GP Inc.*, 2025 BCSC 1239 (*Smith v Clearwater*) recognizes this. It emphasizes that land use is not static, and old building schemes, designed to limit development, are not always operative.

In *Smith v Clearwater*, Squamish property owners (the Smiths) sought to prevent the development of a townhouse complex beside their home, relying on a restrictive covenant from 1959 which they say only allowed the construction of single-family homes. The issue was whether the building scheme, which left all development decisions to the discretion of a now dissolved entity, could prevent Clearwater Park GP Inc. (the Developer) from building its townhouse project.

The District of Squamish (Squamish), though ostensibly neutral through the hearing, was clear in its position that the building scheme was incompatible with the objectives of Squamish's Official Community Plan (OCP). Squamish's deliberate move toward higher-density housing fits a broader trend of urban communities seeking greater densification despite opposition from stakeholders who fight to preserve the *status quo*.

After considering all factors, the British Columbia Supreme Court decided to cancel the outdated building scheme.

What you need to know

- Section 35(2)(a) of the *Property Law Act* allows a person interested in land to apply for the modification or cancellation of a building scheme if, among other reasons, they can prove that the building scheme is obsolete.
- The land in question was subject to a building scheme registered in 1959 that, among a host of other restrictions, only allowed the construction of single-family homes if an "approving officer" designated by the original developer, Garibaldi Park Estates Limited (GPEL), authorized otherwise.

- GPEL ceased operations in 1983, and no one assumed the approving officer role.
- Caselaw holds that where a building scheme requires the grantor's approval for certain actions, but the grantor no longer exists, a property owner seeking relief from those restrictions must either secure the consent of all other benefiting owners or apply to the court under s. 35 of the *Property Law Act* to have the scheme varied or cancelled.
- The Court cancelled the building scheme on the basis that it had become obsolete.
- The Court concluded by noting that the rapid population growth of Squamish meant that public interest did not favour the position of the Smiths, despite the Court being sympathetic to the Smith's desire to preserve their neighbourhood as is.

Facts

In *Smith v. Clearwater*, the Smiths sought to prevent the construction of a four-unit townhouse project by the Developer on an adjacent property, arguing that it violated a building scheme registered in 1959.

This scheme, created by the now-dissolved GPEL, was registered against approximately 200 properties and provided GPEL with complete and comprehensive control of anything to be built or modified on the building scheme lands. In addition to restricting the development of multi-family dwellings, the building scheme provided that no construction of any kind, including construction of a fence, would be permitted without GPEL's approval.

The Developer had obtained a development permit from Squamish, which allowed the construction of a townhouse project on the building scheme lands. Squamish did not take a position at the hearing but noted that the building scheme was inconsistent with the policies and objectives of the OCP, which identified the Smiths' neighbourhood as an important location for increased diversity and density.

Analysis

1. The building scheme was obsolete because compliance was impossible

In this case, the building scheme's approval mechanism depended on an "approving officer", who had never been appointed, from a developer that had dissolved in 1983.

With no successor for GPEL and no mechanism to appoint one, any owner subject to the building scheme would need the approval of all 200 other property owners before making any modifications to their property. On this basis, the Court found that the scheme was functionally inoperable, compliance with the scheme was impossible, and the building scheme was obsolete as a result.

2. Non-compliance in the neighbourhood

The Court also considered evidence that many surrounding properties had already undergone renovations and additions inconsistent with the scheme, without objection. The Court held that it would be inappropriate to enforce the part of the scheme limiting construction to single family residences, while ignoring the remainder of the scheme that required GPEL approval for all modifications. In effect, the Court observed, this would require a rewriting of the building scheme in a manner inconsistent with its original purpose.

3. Neighbourhood character vs. public policy

The Smiths argued that the townhouse project would negatively change the character of their neighbourhood, citing privacy concerns, increased traffic, and a diminished quality of life. This, the Smiths argued, would undermine the original purpose that the building scheme continued to serve.

While the Court expressed sympathy for the Smiths, the Court gave greater weight to broader public policy considerations—particularly Squamish's rapid population growth and the municipality's deliberate move toward higher-density housing.

In the end, the Court dismissed the Smith's petition and awarded costs to the Developer.

Lessons for developers

- **Check title early**: Old covenants and building schemes can surface during due diligence. Identifying them at the outset avoids delays and unexpected costs.
- **Don't assume they're enforceable**: As Smith v. Clearwater Park shows, if approval mechanisms no longer function or if neighbourhood character has changed, a covenant may be struck down as obsolete.
- **Use s. 35 proactively**: Courts are open to cancelling outdated restrictions that frustrate reasonable, zoning-compliant development.
- **Gather evidence of change**: Demonstrating shifts in neighbourhood density, municipal planning direction, and non-compliance by others can help establish obsolescence.

BLG offers expertise in navigating complex legal issues related to building schemes and restrictive covenants. If you are a developer or a property owner involved in a similar dispute, please reach out to discuss how this case may affect your rights.

By

Matthew G. Swanson, Matthew Tolan, Les Honywill

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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