Court of Queen's Bench of Alberta

Citation: Albrecht v. Condominium Corporation No. 0411156, 2011 ABQB 53

Date: 20110131
Docket: 1001 01169
Registry: Calgary

Between:

Dean Carol Albrecht, G. Diane Albrecht, Valerie Best, Susan Lazzer, Genevieve Lefebvre, Frederick E. Olden, Lisa H. Olden, Lorraine Ann Palmer, John Alden Palmer, Alasdair James Pitt, Anita Pohl, Check Wing Sam, Joseph Shea, Beverly J. Shea, Ernest Walter Shumsky, Barbara Anne Shumsky, Michael Stone, Howard Tekhauw Tee, Joy Ventura Tee, Ted A. Wolinski, Christine M. Wolinski, Stan Wong, Angeline Wong

Applicants

- and -

Condominium Corporation No. 0411156, Stone Creek Resorts Inc. and Town of Canmore

Respondents

Reasons for Judgment
of the
Honourable Mr. Justice C.S. Brooker

I. Facts

[1] This application arises out of a dispute over a proposed "resort club", a shared usage concept, within a condominium development located in Canmore, Alberta and known as The Pinnacle.

[2] The Pinnacle is a 40-unit condominium adjacent to the Silvertip Golf Course. It consists of two buildings, each having 20 units - Phase I located at 140 Stonecreek Road and Phase II located at 150 Stonecreek Road. Utilities, HVAC, common areas and parking are shared between the two buildings.

[3] The applicants (collectively the "Applicants") are all owners in Phase I; they are 15 of the present 19 Phase I owners.

[4] The Respondent, Condominium Corporation No. 0411156 (the "Corporation"), is the condominium corporation constituted upon the registration of the condominium plan for The Pinnacle.

[5] The Respondent, Stone Creek Resorts Inc. ("Stone Creek"), is the developer and builder of The Pinnacle. Its principal is Mr. Guy Turcotte.

[6] The Respondent, Town of Canmore (the "Town"), is a municipality within the Province of Alberta and is responsible for the drafting, implementation, administration and enforcement of the Town's bylaws, including the Land Use Bylaw. The latter bylaw governs the nature of land use in Canmore.

[7] The Corporation, Stone Creek and the Town are referred to collectively hereafter as the "Respondents".

[8] The Pinnacle was built in a Residential Comprehensive Multiple Unit "R3" Zone. The Land Use Bylaw states that the purpose of R3 is to "provide for multi-family residential accommodations at medium densities on larger sites for comprehensively designed developments." It further provides that "non-residential uses or developments may be allowed in accordance with the listed 'discretionary uses' when such uses are compatible with the residential purpose of the District." "Tourist Homes", as defined in the Land Use Bylaw and discussed below, do not fall within the permitted uses or discretionary uses of the R3 zone.

[9] Construction of Phase I of The Pinnacle was completed in June 2004. The units therein sold quickly and most of the Applicants had purchased and moved into their units by late 2004. Construction of Phase II began immediately thereafter and by the summer of 2006, some of the Phase II units had been completed and at least one had been sold and occupied. However, by June 2007, Stone Creek had sold only three units in Phase II and had ceased attempts to sell. Subsequently, Mr. Turcotte repurchased two of the three units sold in Phase II. At present, therefore, Stone Creek owns 1 of 20 units in Phase I and 19 of 20 units in Phase II.

[10] Sometime in 2007, a new strategy was conceived. This strategy was to create a "resort club" using the units in Phase II. The initial proposal (the "First Proposal") was set out in a letter from Stone Creek and Mr. Turcotte to The Pinnacle's property manager on December 4, 2007. That letter indicated that the resort club would be open for individuals to purchase a membership that would allow them to occupy any of the Phase II units for up to 30, 45 or 60 non-consecutive days per year, depending on the package purchased. Members would not be required to use these days consecutively. The resort club would include a concierge service, members' lounge and maid service and there were plans to build a swimming pool and hot tub on the common property.

[11] The First Proposal included a special resolution to amend the bylaws of the Corporation as follows:

(a) Under section 118 of the Bylaws, "delete the 28 day minimum stay when leasing or granting the right to use the Unit";

(b) Under Appendix B, section 5, "to allow the 'Stone Creek Residence Club' to operate within the Pinnacle Condominiums and to permit members of the Residence Club to use the Units for periods up to 30 days"; and

(c) "Construction of the outdoor swimming pool on the North side of Pinnacle II and furnishing a fitness and lounge area into Unit 107 and the adjacent common property."

[12] Mr. Turcotte made a presentation at a meeting of the Corporation's board on December 7, 2007 to explain further the First Proposal.

[13] The Corporation's board did not vote on the First Proposal and, on December 15, 2007, received an email from Stone Creek indicating that the First Proposal was being withdrawn. The email stated that Stone Creek "has decided to back away from its approach that we have been taking about changing the bylaws at The Pinnacle at this time."

[14] On January 23, 2008, Stone Creek and Mr. Turcotte made another proposal (the "Second Proposal"), this time directly to the owners in Phase I rather than to the Corporation's board. The Second Proposal included a special resolution to separate The Pinnacle into two separate condominiums and to operate the resort club out of Phase II. The Second Proposal was voted on and was defeated, with 15 unit owners opposing.

[15] In May 2008, Stone Creek again approached the Corporation's board with a new proposal (the "Third Proposal") and offered to work collaboratively with the board. Further correspondence ensued and Mr. Turcotte made another presentation to the board on May 20, 2008. Eleven owners advised the board they were opposed to the Third Proposal and the board so informed Stone Creek and Mr. Turcotte on June 21, 2008.

[16] The resort club, as presently conceived, does not include a swimming pool or fitness facilities. Maid and concierge services are still contemplated, though the latter would be provided from an off-site location. An online reservation system would allow members to pay annual dues, purchase membership days, check unit availability, reserve units for the desired days and confirm reservations using a credit card. Keys to the reserved unit would be picked up at the Silvertip golf course clubhouse.

II. Issues

[17] The parties are agreed that there are two issues before me. However, they have defined them somewhat differently. I think the issues are accurately described as follows:

(a) Does the usage of Stone Creek's units in the resort club proposed by Stone Creek violate the Town of Canmore's Land Use Bylaw?

(b) Does the usage of Stone Creek's units in the resort club proposed by Stone Creek violate the Corporation's bylaws?

III. Analysis

[18] There was considerable discussion both in the written submissions and during oral argument of the interactions among the Applicants, the Corporation's board and Stone Creek. It appears that these interactions were somewhat fractious and that there are hard feelings between various parties. In my view, however, that has little bearing on this application. Fundamentally, what is before me is the technical issue of whether the proposed resort club runs afoul of either or both of the Town's Land Use Bylaw and the Corporation's bylaws.

A. The Town's Land Use Bylaw

[19] Part K of the Town's Land Use Bylaw sets out several definitions that are relevant to this application:

> accommodation unit means a room or suite of rooms operated as a temporary place to stay, with or without compensation, and does not include a Residence. It usually contains sleeping and sanitary facilities, may contain cooking and eating facilities, and may or may not be a Dwelling Unit. Visitor Accommodation Units shall be deemed to be accommodation units.
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> Guest means an individual who occupies a Dwelling Unit other than as their Residence.
>
> residence means a Dwelling Unit in which a person or persons may reside as their home, with the intent to remain for an undetermined period and with the intent to return to the dwelling unit but not necessarily with the desire to stay permanently.
>
> visitor accommodation means a building or group of buildings not intended for residential use where sleeping facilities are provided for persons for periods of up to 30 days and which may also contain recreational facilities, commercial uses and additional facilities including but not limited to eating establishments, drinking establishments, room service, meeting rooms, public convention rooms, and laundry service. Where the majority of visitor accommodation units within the visitor accommodation contain suites of more than 1 room, two or more of the following services shall be provided: eating establishment, drinking

establishment, room service, public convention room, or laundry service. This definition does not include lodges.

[20] Part C of the Town's Land Use Bylaw provides, in part, as follows:

> 29. TOURIST HOMES
>
> 1. A Tourist Home means a Dwelling Unit operated as an Accommodation Unit, occupied by a Guest or Guests for a period of less than 28 days.
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> What distinguishes a Dwelling Unit used as a Residence from a Dwelling Unit operated as a Tourist Home is the institutionalized commercial nature of a Tourist Home. For example, a Dwelling Unit that is managed and advertised as a vacation property using a system which may include reservations, deposits, confirmations, or credit cares would be considered a Tourist Home. This does not represent an exhaustive list of operating practices that constitute a Tourist Home.
>
> In practice, whether a Dwelling Unit has become a Tourist Home is a question of fact based on the circumstance of each case.

[21] The Applicants assert that the resort club concept falls squarely within the definition of a Tourist Home. They argue that although members of the resort club would have the right to occupy Phase II units for up to 30, 45 or 60 days in a given year, the arrangement would allow this allotment to be broken up such that the actual occupation of the units could be for periods of less than 28 consecutive days.

[22] Further, the Applicants say that the reservation service contemplated as part of the resort club is exactly of the kind referred to under the above reference to Tourist Homes in the Land Use Bylaw.

[23] In support of their position, the Applicants cite *Town of Canmore v. Fossheim*, 2000 ABCA 71, 250 A.R. 333. In that case, the Court of Appeal held at para. 12 that the terms "dwelling unit" and "accommodation unit" as used in the Town's Land Use Bylaw are mutually exclusive:

> The major distinction between the two terms is that a dwelling unit is used or intended to be used as a domicile, whereas an accommodation unit is operated as

> a temporary domicile. The terms are mutually exclusive; an accommodation unit cannot also be a dwelling unit.

[24] The Court of Appeal went on at paras. 16-18 to discuss both the temporary nature of an accommodation unit and the relevance of a reservation system:

> "Temporary" therefore denotes rental on a short-tem basis, perhaps for periods of up to 30 days, with no right of renewal. Property that is offered for rent on a daily or weekly basis would qualify as a temporary domicile, even though an occasional occupant might choose to lease the premises for a month or longer. Property that is offered for rent on a longer-term or seasonal basis most likely would not be captured by the term. The Fossheims' property is available for rent on a nightly, weekly or monthly basis, which meets the definition of temporary domicile.
>
> The length of the rental terms does not end the inquiry. Homeowners may occasionally rent out or permit guests to use their property for short periods of time without turning a house into an accommodation unit. The Bylaw requires that an accommodation unit actually be "operated as a temporary domicile", which is a question of fact based on the circumstances of each case.
>
> What distinguishes the Fossheims' arrangement is its institutionalized commercial nature. The property is managed, advertised and leased by a professional property manager, who uses a system of reservations, deposits and confirmations, collects G.S.T. and accepts credit cards. This is a far cry from the type of casual arrangement a typical homeowner might occasionally make. The Fossheims' property is clearly operated as a temporary domicile and is therefore an accommodation unit.

[25] The Applicants say that this case is on all fours with *Fossheim*.

[26] The Applicants also cite *Canmore Property Management Inc. v. Canmore (Town of)*, 2000 ABQB 645, 273 A.R. 63, in which Nation J. of this Court considered a similar issue. Justice Nation's comments at paras. 26 and 38 are directly relevant to this case:

> The Town in making a classification of Tourist Home is trying to regulate the location in the Town where individuals can own dwellings, and rent them out through agencies such as the Applicant for daily, weekly or short term stays. It is clear from the affidavits, and undertakings, that the Town is concerned about short term rental which it sees as commercial use of property more akin to an accommodation unit, a use it views as different than single family dwelling.
>
> ...

> The argument of the Applicants that a dwelling house used by visitors staying for a few days means the same use as the long term use of the building or land (in terms of eating, showering, sleeping) is intellectually attractive. However, after reviewing the overall legislative scheme and purpose of the scheme, the use of dwelling houses for groups of people who stay a short term as visitors is a different use than longer term family use. This is so from the point of view of community facilities, amenities used, and the commercial nature of the use of the property. Although no money changes hands at the home, and there is no "business" actually setting up shop in the dwelling, the short term rental by days, or weeks creates a use that is akin to a commercial visitor accommodation. When viewed from the perspective of s. 617 of the [Municipal Government Act], the use of land and pattern of human settlement, the physical environment impact, and the overall scheme, it is the use of the building that is at issue, not the users.

[27] For its part, Stone Creek argues that the units in the resort club are not operated as accommodation units, are not occupied by a guest or guests as defined in the Land Use Bylaw and "most decisively" are not occupied for a period of less than 28 days.

[28] With respect to the definition of accommodation unit, Stone Creek asserts that the units in the resort club will not operate as a temporary domicile because they will be leased by the members of the resort club for a three-year term, rather than nightly, weekly or monthly. Stone Creek also refers to *Fossheim*, but points out that the 30, 45 or 60 days of use to which members would be entitled is still not "under 30 days" as contemplated by the Court of Appeal in that case. Stone Creek asserts that the Applicants are attempting to use the decisions in *Fossheim* and in *Canmore Property* to expand the definition of Tourist Home to include the three-year lease.

[29] Stone Creek also argues that the Phase II units used in the resort club would not be accommodation units because they fall within the definition of "residence" in the Land Use Bylaw and are therefore expressly excluded from the definition of accommodation unit. Stone Creek asserts that resort club members may return to the units for the three years of the lease and possibly thereafter, there being at present no restriction on membership renewal. In Stone Creek's submission, therefore, members' use of the units is analogous to that of a person who has leased a unit for three years, rather than to a tourist who rents a unit for a short term. This, they argue, makes the units "residences".

[30] Further, Stone Creek argues that the resort club units would not be occupied by a Guest or Guests as defined in the Land Use Bylaw and therefore do not fall within the definition of a Tourist Home. Stone Creek states that "A person who has paid at least $275,000 as an initial fee and signed a three year lease is not merely a guest." It then argues that if the resort club members do not occupy the units as Guests, the units are not accommodation units and consequently cannot be Tourist Homes.

[31] Stone Creek relies heavily on the fact that the resort club members would sign a lease for three years. The definition of Tourist Home requires that the units be "occupied" for less than 28 days. Stone Creek notes that the Land Use Bylaw does not define "occupied" and cites a dictionary definition of "occupied" that includes "be a tenant of". Since the resort club leases would be for a period of three years, Stone Creek's position is that the members would be tenants of The Pinnacle for three years and could therefore be said to "occupy" the units for that period. In support of this proposition, Stone Creek cites *Toronto Transit Commission v. City of Toronto* [1971] S.C.R. 746, 18 D.L.R. (3d) 68, in which the Supreme Court of Canada held at 74 that:

> I am, in short, of the opinion that the words in para. 9 of s. 4 "but not when occupied by a tenant or lessee" in order to carry out the legislative policy of the *Assessment Act* must be interpreted to result that when a tenant or lessee has a contractual right to occupation whether or not he exercises that right by going on the lands and building or otherwise utilizing them for the development which he intends the exemption is removed and the lands become subject to assessment in the ordinary course.

[32] Interestingly, it would appear that the Town of Canmore does not suggest that the proposed resort club usage violates its bylaw.

[33] Stone Creek distinguishes Nation J.'s decision in *Canmore Property* on the basis that the type of occupancy at issue in that case was nightly, weekly or other short term rental available to the public at large. In contrast, Stone Creek stresses that resort club members will have paid between $275,000 and $425,000 for the use of their units for 30 to 60 days per year over a three-year term. Its position is that this is no way akin to a tourist who pays for one night's accommodation, but is more analogous to the Applicants' use of their units as vacation homes.

[34] Finally, Stone Creek argues that if there is any doubt as to the application of the definition of Tourist Home to the resort club units, that doubt must be resolved in Stone Creek's favour. In support of this proposition, Stone Creek cites the following passage from Ian MacF. Rogers, Q.C., *The Law of Canadian Municipal Corporations*, 2d ed., vol. 1 (Toronto: Thomson Reuters Canada Limited, 2009) at p. 405:

> §64.77 *Statutes Restricting Common Law Rights*
>
> The rule is well established that common law rights are not to be held to have been taken away or affected by a statute or by-law passed under its authority unless it is so expressed in clear language. This is tantamount to a virtual presumption against such a legislative intendment. The burden lies on those seeking to establish that the legislature intended to take away the rights of individuals to show that by express words or necessary implication such an intention appears. So a statute which invests local bodies with authority to restrict or take away the common law right of every subject to employ himself in a lawful

> manner in any lawful trade or calling is to be strictly scrutinized. The same rule applies where the municipality has a right to impose a tax on occupations. Moreover, an enactment which restricts an owner with respect to the lawful user [sic] of his land is to be rigorously interpreted. Legislation imposing new procedural restraints on general rights such as the right to demolish buildings was construed not to affect demolition permits issued before its enactment so as to destroy or impair a prior existing right. [Footnotes omitted.]

B. The Corporation's Bylaws

[35] The Applicants also argue that the resort club as presently conceived would breach the Corporation's bylaws. The relevant portions of those bylaws are these:

> 104. **By-laws.** An Owner shall comply strictly with the Act, the By-laws and the Rules and Regulations and shall ensure compliance by all Occupants present in the Project with his permission.
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> 118. **Monthly Rentals.** No Owner shall rent, lease or grant any license of occupation for his Unit or permit the renting, leasing or granting of any license of occupation for his Unit unless the term of such agreement is at least 28 consecutive days.
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> **PHASED DEVELOPMENT**
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> 131. By-laws 1 to 129 assume that all contemplated development of the Parcel has been completed. Pending completion, those By-laws shall be subject to the terms of the Phased Development Disclosure Statement filed at the Land Titles Office with the Condominium Plan, all of which is incorporated into and forms part of these By-laws. Pending completion of all such development, the figure "10,000" in By-law 71 shall from time to time be replaced by the aggregate of the Unit Factors for the completed Units.
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> Appendix B - Rules and Regulations
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> 1. An Owner shall not use his Unit, nor permit his Unit to be used, in a manner or for a purpose that is unlawful or may cause a nuisance or hazard. Neither shall an Owner use or permit the use of his Unit:
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> > (b) for any purpose which would involve the attendance of the general public on the Unit;
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> 3. An Owner shall not use his Unit or any part thereof or any portion of the Common Property for any commercial, professional or other business purposes

> including auction sales, garage sales and other sales or for any purpose which may be illegal or which is in the opinion of the Board injurious to the reputation of the Corporation or the Project for a purpose involving the attendance of the public at such Unit or the Common Property.
>
> 4. An Owner shall not permit noise in or about any Unit or the Common Property which in the opinion of the Board is a nuisance or unreasonably interferes with the use and enjoyment of any Unit or the Common Property by another Owner or Occupant...
>
> 5. An Owner shall not use or permit the use of his Unit other than as a single family dwelling or for a purpose other than as a residence, except in the case of a Parking Unit in which case the Unit shall be utilized exclusively for parking of automobiles unless otherwise authorized by resolution of the Board.
>
> 10. An Owner shall not do anything or permit anything to be done in his Unit or upon Common Property or the real or personal property of the Corporation or fail to do any act or thing which will or would tend to increase the risk of fire or the rate of fire insurance premiums with respect thereto or which would render invalid any insurance maintained by the Corporation or which would increase the premiums therefor.

[36] The Applicants stress that strict compliance with these bylaws is required and allege several contraventions. First, they assert that the resort club is a commercial venture and is therefore contrary to section 3 of the Rules and Regulations. They point to the changes Stone Creek proposed to the bylaws in the First and Second Proposals as evidence that the resort club is impermissibly commercial. In the Second Proposal, the following was proposed to be added to section 32 of the bylaws:

> Notwithstanding any other provision in these By-laws or the Rules and Regulations, no provision of these By-laws or any provision of the Rules and Regulations shall be valid or have any force or effect which purports to hinder or restrict the use of Units 60 to 124 (inclusive) or the portions of the Common Property shown on sheets 3 to 7 (inclusive) of the Condominium Plan, as a residence club (with all necessary or desirable ancillary uses), provided such uses are permitted from time to time by the Town of Canmore, nor shall such uses be deemed as a nuisance. For clarity, Appendix B (Rules and Regulations) paragraph 1(b), 3, 5 and 10 shall not apply to Units 60 to 124 (inclusive) and the portions of the Common Property shown on sheets 3 to 7 (inclusive) of the Condominium Plan.

[37] The Applicants argue that this proposed change makes it clear that the resort club breaches the bylaws as there would be no need to amend them if it did not.

[38] In oral argument, the Applicants again referred to *Canmore Property* and asserted that the key point with respect to commercial activity is not whether business is being transacted out of a unit, but whether the use of the units as a resort club is, in itself, commercial.

[39] The Applicants also referred to this Court's consideration of time share operations in *Condominium Plan No. 8810455 v. Spectral Capital Corp.* (1990), 112 A.R. 213 (Q.B.). In that case, Moore C.J.Q.B., as he then was, reviewed three types of time sharing packages, including "fractional ownership". Under that arrangement, a purchaser acquired a right of occupation in a unit during a particular week, as well as the right to exchange his time for a similar right at other resorts. Moore C.J.Q.B. was satisfied that this was a commercial use of the unit and held as follows at para. 35:

> In my view, the act of time sharing out one unit in a condominium complex is simply not compatible with the by-laws. Time sharing is as unique a development as a condominium project and therefore requires its own set of rules or by-laws.

[40] Next, the Applicants argue that the resort club arrangement violates the prohibition in the bylaws against leasing or granting a license of occupation for a unit for less than 28 consecutive days. It points out that, while members of the resort club would sign three-year leases, this would be a shared arrangement covering all of the resort club units. Thus, it is conceivable, and even likely, that a member would occupy a given unit for less than 28 days and that a given unit could be occupied by a number of different members over a 28-day period. This, the Applicants say, does not constitute strict compliance with the bylaws.

[41] The Applicants also argue that the resort club would allow units to be occupied by various unrelated persons, in contravention of the requirement in section 5 of the Rules and Regulations requiring the units to be used as single family dwellings. As an example, the Applicants say that a unit could be occupied by a member and several friends or even by friends of a member without the member being present.

[42] Further, the Applicants take the position that since memberships in the resort club are to be marketed to the general public, the concept violates the prohibition against inviting the attendance of the general public at a unit. The Applicants say they fear the loss of a sense of community at The Pinnacle. In the same vein, they argue that the increased number of people staying at The Pinnacle as a result of the resort club would increase traffic, thus creating a nuisance.

[43] Finally, the Applicants point out that the bylaws incorporate the provisions of the Phased Development Disclosure Statement, which they say expressly indicates that the units will be used solely for residential purposes. For example, para. 9 of the Phasing Agreement states:

> There is no restriction or qualification on the type of units and common property included in the Project except: (a) to the extent set out in the first replacement by-laws for the statutory by-laws; (b) as set out in any restrictive covenants as may be registered against title; (c) the Silvertip Multi-Family Design Guidelines prepared by the developer; and (d) as governed by general law, including planning and land use and by-laws. However all units in the Project are anticipated to be used for residential purposes.

[44] The Applicants' position is that the resort club creates a use of the units which is something other than residential, thus breaching the terms of the Phasing Agreement and, in turn, the bylaws.

[45] Stone Creek's response to this latter point is that all of the units in The Pinnacle were anticipated to be used for residential purposes and that the use of the units in the resort club is still residential. It argues that there is no material difference between the way members of the resort club will use units and the way the Applicants use theirs. Stone Creek also points out that it tried for three years to sell the units, but that changing market circumstances have caused it to change course.

[46] With respect to commercial use, Stone Creek asserts that it is the "Owner" of the units it intends to use for the resort club and, as such, has the right under the Corporation's bylaws to lease its units, so long as it does so in accordance with the terms of those bylaws, including making lease agreements of at least 28 consecutive days. It argues that section 3 of the Rules and Regulations prohibits carrying on a commercial venture within a unit or on the common property, but does not prohibit leasing a unit. It states that, while there may be some "commercial essence" in leasing, the units will be used as single family residences rather than commercial premises.

[47] Further, Stone Creek argues that a prohibition or restriction on leasing a unit would be contrary to s. 32(5) of the *Condominium Property Act*, R.S.A. 2000, c. C-22, which provides:

> 32(5) No bylaw operates to prohibit or restrict the devolution of units or any transfer, lease, mortgage or other dealing with them or to destroy or modify any easement implied or created by this Act.

[48] Stone Creek distinguishes *Spectral* on the basis that one of the types of time share that was before Moore C.J.Q.B. was a hotel-type accommodation that was offered to the general public through newspaper advertisements. Stone Creek argues in its brief that "it was the hotel-type time share that was being advertised ... that triggered the commercial purpose finding." It also asserts that it was the hotel-like nature of the time share in *Spectral* that gave rise to the finding of nuisance in that case. Stone Creek says that the resort club concept is nothing like the hotel-type arrangement in *Spectral*. Its members would not be "transient" members of the general public, but would consist of a limited number of individuals who had invested substantial funds and made a three-year commitment. Stone Creek further asserts that the resort club would be

targeted at families and that guests would not be able to stay in a unit without a member present unless special arrangements were made, including the payment of a one-time $15,000 fee. It says that this also answers the Applicants' allegation that the resort club breaches the single family requirement.

[49] Stone Creek says that the minimum term rental provisions of the bylaws are not breached by the resort club because the leases signed by members would be for terms of three years. It argues that the bylaw does not require a tenant to be physically present in a leased unit for 28 consecutive days, only that the term of the lease must be at least that long.

[50] With respect to the general public provisions, Stone Creek's position is that the persons who would be interested in investing in the resort club would be no different from those who would be interested in purchasing a unit at The Pinnacle. Its position is that this provision of the bylaws is intended to prevent hotel-like operations and other business ventures from being operated out of a unit, rather than at preventing persons at large from viewing units that are for sale or rent.

[51] Finally, with respect to the Applicants' nuisance allegations, Stone Creek points out that the resort club would be operated entirely out of Phase II and that the only shared space would be the parking lot. Stone Creek says that this parking lot is chronically underused and that there is no evidence that its use by resort club members would create a nuisance.

IV. Findings and Conclusions

[52] Amongst other relief, the Applicants seek an order of mandamus compelling the Town to enforce the Land Use Bylaw and/or the Corporation to enforce its bylaws. I agree with the submission by counsel for Stone Creek that granting such relief would be premature given that the resort club remains at the proposal stage. If I decide to grant an order in the Applicants' favour, it should be declaratory in nature.

[53] Dealing with the first issue: Does the usage of Stone Creek's units in the resort club proposed by Stone Creek violate the Town of Canmore's Land Use Bylaw? I conclude that it does not.

[54] I am persuaded by the respondent's argument in this regard. Both the *Fossheim* and *Canmore Property* cases are distinguishable on the facts from the situation before me. The units proposed do not fall within the definition of an "accommodation unit" because of the long term nature of the three year lease involved. Nor, in my view, would one who leased one of these units for between $275,000 and $425,000 be considered a "guest" as that term is commonly used. I also conclude that given the nature, cost, use and lease of these units, they are more akin to the definition of "residence" than they are to a short term guest unit in a tourist home. Therefore, these units are more accurately viewed as a vacation home or second residence and as such, are a type of residence and thus excluded from the definition of accommodation unit.

[55] Further, by virtue of signing a lease for three years which gives the member/leasee the right to occupy a unit for terms of 30, 45 or 60 days per year these units fall outside the definition of a "tourist home" since that definition under the by-law contemplates homes being occupied for less than 28 days. While it is true that a member of the resort club might use a unit for less than 28 days (or indeed not at all), the fact remains that he is entitled as of right pursuant to his lease to use the unit for the period of his lease (which in all cases is more than 28 days) and thus can be said to "occupy" the unit for the term of his lease: see *Toronto Transit Commission v. City of Toronto*.

[56] In the result, I conclude that these proposed units do not contravene the Town's land use by-law.

[57] I next turn to the second issue: Does the usage of Stone Creek's units in the resort club proposed by Stone Creek violate the Corporation's bylaws? I conclude that it does. I find at least part of the Applicants' argument convincing on this issue.

[58] I begin by speculating that probably neither the applicants nor the respondent initially contemplated developing a resort club at the Pinnacle when Phase I was marketed. The evidence indicates that the resort club concept came about after Phase II was begun. However, the issue before me is whether or not the resort club usage now contemplated contravenes the Corporation's bylaws.

[59] I have already set out earlier in these reasons, the general concept behind the resort club usage. Greater detail is set out in Mr. Turcott's affidavit.

[60] I am not convinced and do not accept the applicant's arguments that the proposed usage contravenes the general public or the nuisance provisions of the bylaws. In that regard, I prefer and adopt the Respondents' argument set out hereinbefore. Further, I am not satisfied that the proposal breaches the Phased Development Provisions. That contemplated all the units being used for residential purposes. In dealing with the first issue I have concluded that these units may be regarded as a type or form of residential unit. That reasoning applies here.

[61] I also reject the Applicants' argument that the proposed use breaches s.118 of the Bylaws. The Applicants argue that that provision requires the club member to occupy the same unit for 28 consecutive days. Section 118 reads:

> 118. **Monthly Rentals**. No Owner shall rent, lease or grant any license of occupation for his Unit or permit the renting, leasing or granting of any license of occupation for his Unit unless the term of such agreement is at least 28 consecutive days.

[62] Stone Creek is the owner of the units. Under the proposal it will lease its units. The leases are for three years. That is a term of more than 28 consecutive days. Thus s.118 is not breached.

[63] However, where, in my opinion, the proposed use of the resort club offends and breaches the bylaws is in respect of ss.3 and 5 of Appendix B – the Rules and Regulations.

[64] Section 5 provides that an owner will not use or permit the use of his unit other than as a single family dwelling. Interestingly, Mr. Turcott and Stone Creek sought to remove this restriction in their earlier proposals. The respondents argue that such a restriction is absurd as it could be used to prevent an owner and his friends from using his unit. Perhaps that is so but s.104 of the bylaws calls for strict compliance. In any event, there is a distinction in both kind and quality between an owner bring a few friends to his unit for a stay and that of an owner such as the respondents, using the unit as a resort club with a significant number of different "families" using the unit on a rotational type of basis (as appears would be the case from the description of how the club would use these units). I find that the proposed resort club use is in breach of strict compliance of s.5 of the Corporation's Rules and regulations.

[65] Section 3 states:

> 3. An Owner shall not use his Unit or any part thereof or any portion of the Common Property for any commercial, professional or other business purposes including auction sales, garage sales and other sales or for any purpose which may be illegal or which is in the opinion of the Board injurious to the reputation of the Corporation or the Project for a purpose involving the attendance of the public at such Unit or the Common Property.

[66] Both sides refer to the *Spectral Capital* case. The Applicants argue it supports them. The Respondents say it is distinguishable having regard to the nature of ventures being discussed in it.

[67] In *Spectral Capital*, Chief Justice Moore said at para. 35:

> In my view the act of time sharing out one unit in a condominium complex is simply not compatible with the bylaws. Time sharing is as unique a development as a condominium project and therefore requires its own set of rules or by-laws.

And at para. 43:

> In my view, a time sharing operation with fractional interests which are subject to trading around within an international corporation (RCI) cannot exist within a condominium development where the objects contemplate private ownership wherein no commercial operation would exist.

[68] While admittedly, the type of operation in *Spectral Capital* was different than a resort club concept, the principles found in the above quotes I believe to be equally applicable here. A resort club is a unique concept, quite different from a condominium development and it is questionable that it is compatible with a simple condominium development, as Pinnacle started out, with private ownership an no commercial operation.

[69] The activities involved in a resort club as proposed such as ongoing marketing, key pick up, some sort of reservation and accounting system to keep track of time periods and units, trading of units as well as cleaning services for the units, together with possible collection and remittance of GST payments all bring an air of commercialism to the use of these units and, in my opinion, offend section 3 above. The fact that this is a "high end" venture does not change that fact. Further, I note that the leases for the units are for three year terms and thus there will be ongoing renewals either with existing members or new members.

[70] I agree with the applicants that simply removing some of the amenities originally proposed, such as on site concierge services, fitness club and hot tub, does not change the essence of proposal — it remains, in its essence, a commercial venture.

[71] For the reasons set forth above, I find that the proposed resort club breaches the Corporation's bylaws. The applicants are entitled to a declaration to that effect.

[72] If counsel cannot agree on the issue of costs, they may appear before me to settle the issue within 30 days.

Dated at the City of Calgary, Alberta this 31st day of January 2011.

C.S. Brooker
J.C.Q.B.A.

Appearances:

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