

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Smith v. Clearwater Park GP Inc.*,
2025 BCSC 1239

Date: 20250703
Docket: S247957
Registry: Vancouver

Between:

Dennis Smith and Andrea Smith

Petitioner

And:

Clearwater Park GP Inc.

Respondents

-and-

Docket: S248952
Registry: Vancouver

Between:

Clearwater Park GP Inc.

Petitioner

And:

District of Squamish and each of the parties set out in Appendix "A"

Respondents

Before: The Honourable Justice Verhoeven

Reasons for Judgment

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Place and Dates of Hearing:

New Westminster, B.C.
May 7, 8, 2025

Place and Date of Judgment:

Vancouver, B.C.
July 3, 2025

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I. INTRODUCTION

[1] Dennis Smith and Andrea Smith (collectively, the “Smiths”) seek to prohibit the construction of a four-unit townhouse project (the “project”) on the property next door to their residence in Squamish. They say that construction of the project is prohibited by the terms of a common law building scheme (the “building scheme”) registered against the title to the adjacent property, as well as their own property, and many other properties in the area. They say the building scheme prohibits construction of anything other than a single family residence. They seek a permanent injunction prohibiting the owner of the adjacent property, Clearwater Park GP Inc. (“Clearwater”), from constructing anything other than one dwelling for one family on its property.

[2] Clearwater has received a development permit for the project from the District of Squamish (“Squamish” or “the District”), and wishes to proceed with construction. The development permit was issued September 23, 2024, and is valid for two years.

[3] Clearwater's petition seeks an order modifying or cancelling the building scheme to allow its project to proceed. Clearwater’s petition relies on the authority of the court to modify or cancel registered charges against land pursuant to s. 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377 [PLA].

[4] Therefore the central issue in these proceedings is whether the building scheme should be modified or cancelled in order to allow the project to proceed.

[5] As the building scheme is registered on the title to approximately 200 properties in the area, this decision may be expected to set a precedent for other cases. Accordingly, this dispute has garnered considerable interest amongst the property owners and residents in the area.

[6] Clearwater's petition and supporting affidavits were served substitutionally on the owners of the properties in the vicinity of the properties owned by the Smiths and Clearwater. Only one response to Clearwater's petition has been filed by the

property owners other than the Smiths. Clayton Correia and Terra Spitzner support Clearwater's position, but have not sworn an affidavit.

[7] A number of other property owners in the area have sworn affidavits in which they have indicated support for one position or the other.

[8] In its response to the Clearwater petition, Squamish notes that the project complies with the current zoning for the property, which authorizes the erection of multiple dwelling residential units, and that the building scheme restricts a broad range of land uses and activities that are currently permitted under the zoning bylaw and are supported by the policies and objectives of its Official Community Plan ("OCP"). Squamish's response supports and consents to the order sought by Clearwater in its petition. However, at the hearing, counsel for Squamish advised me that it takes no position on the matter.

[9] For the reasons that follow, I conclude that the building scheme should be cancelled on the ground that it is obsolete within the meaning of s. 35(2)(a) of the *PLA*.

[10] These petitions were heard at the same time. It was agreed that the combined evidence would be applicable to both petitions.

[11] I am satisfied that adequate notice has been given to the persons who appear to be entitled to the benefit of the charge or interest to be modified or cancelled, as required by *PLA* s. 35(4). In form these proceedings only directly affect the Clearwater property, Lot 36. The properties more generally affected by the order sought are those adjacent to or at most in the immediate vicinity of Clearwater's property. Clearwater has served all the owners of the 67 properties in the immediate neighbourhood of Lot 36, consisting of the owners of properties in "Block I". An order for alternative service was made by Associate Judge Vos on January 6, 2025, providing that the respondents to Clearwater's petition (who are the owners of the properties in Block I) may be served substitutionally by posting the petition and affidavits on a website, delivering a specified notice to the respondents, mailing the

notice to all of the registered owners of properties in Block I, and publishing the notice in a local Squamish newspaper on two or more occasions. I am satisfied the order has been complied with.

II. BACKGROUND

[12] The building scheme is dated April 16, 1959, and was submitted for registration on April 17, 1959. It was registered under number 402709L. It is described as a “common law” building scheme, as it was created prior to the provisions of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*] permitting creation of statutory building schemes, under s. 220. The building scheme applies to lands described in a plan of subdivision, number 10186, deposited in the Land Registry Office (now, the Land Title Office), at Vancouver, on March 3, 1959.

[13] The building scheme was created by the then owner of the lands to which it related, Garibaldi Park Estates Limited (“GPEL”).

[14] The lands to which the building scheme relates were further subdivided over the ensuing years. The properties subject to the building scheme contain notations on title such as “Land herein within building scheme, see 40279L”. Many of the properties within the building scheme, including Lot 36, also have restrictive covenants registered on title which contain similar restrictions to those set out in the building scheme.

[15] As the Land Title and Survey Authority registry and search system in British Columbia does not have a function allowing for search of properties by legal notation, it is somewhat difficult to confirm the full extent of the lots affected by the building scheme. Individual title searches must be conducted. The restrictive covenants reflecting the applicability of the building scheme to specific land titles do not have consistent numbering. Although it is not easy to ascertain the precise scope or extent of the area affected by the building scheme, it appears the building scheme affects approximately 200 properties in total.

[16] The Smiths own a home located on Lot 35, Block I, located at 40339 Park Crescent. Block I was created by a subsequent subdivision of the lands within the building scheme. Block I consists of 67 properties. The Smiths have owned their property since August 2014.

[17] As noted, the property owned by Clearwater, Lot 36 of Block I, is adjacent to the Smiths' property. The address of Lot 36 is 40343 Park Crescent. Clearwater purchased Lot 36 in September 2024, with the intention of developing it with a multifamily project.

[18] In his affidavit, Dennis Smith refers to the 200-lot subdivision, which encompasses Block I and the other properties within the building scheme, as the "Pat Goode" subdivision. It appears, therefore, that the lands covered by the building scheme generally relate to what is referred to in the evidence as the "Pat Goode subdivision", consisting of approximately 200 properties.

[19] For planning purposes, in its OCP, the District refers to the area in which the Pat Goode subdivision lies as "Garibaldi Estates". The building scheme lands comprise a substantial proportion of the area that Squamish refers to as the Garibaldi Estates neighbourhood in its OCP.

[20] GPEL sold the Clearwater lot, Lot 36, to Imre Sorban and Katalin Sorban (collectively, the "Sorbans") in March 1964. In accordance with the building scheme, the deed of sale to the Sorbans includes a "schedule of restrictions" setting out the restrictions that are found in the building scheme. The schedule of restrictions is attached to these reasons as Schedule "A". The deed refers to the building scheme as a "building estate scheme".

[21] The schedule of restrictions provides for complete and comprehensive control of anything to be built or modified on the building scheme lands by GPEL, or its delegate or delegates, in the absolute and unfettered discretion of GPEL. GPEL's control included designs, siting, colours, and materials to be used.

[22] Clause 1 of the schedule of restrictions states:

1. There shall not be erected, constructed, made or maintained on the said lands any dwelling, building, wall, fence, pole, aerial or other structure or improvement or any addition thereto or alteration thereof until proper plans, elevations and specifications thereof showing the nature, kind, height, materials to be used, location and color scheme of such structure, improvement, addition or alteration have been submitted to and approved in writing by the Grantor herein or by an Approving Officer appointed by the Grantor, and the Grantor and Approving Officer shall have the right and power to approve or reject the same.

[23] However, GPEL reserved to itself complete authority to waive, modify or cancel the building scheme restrictions. Clause 14 of the schedule of restrictions states:

14. PROVIDED ALWAYS and notwithstanding anything herein contained, the Grantee agrees that the Grantor shall have and has the power in its absolute discretion from time to time, by any deed or writing under the seal of the Grantor, to waive, vary, modify, change or release any of the said restrictions, stipulations and conditions in respect of the said lands hereby conveyed or sold or any other lot or lots now or hereafter forming part of the said building estate and whether imposed or entered into before or at the same time as or after the date hereof and to sell or otherwise dispose of or deal with any part of the said building estate which has not been sold prior to the date hereof free from any or all of the said restrictions, stipulations or conditions, and either subject or not to any different restrictions, stipulations or conditions, and either subject or not to any different restrictions, stipulations and conditions, and the right to waive, vary, modify, change or release hereby reserved shall be exercised by the Grantor only and those to whom it is expressly assigned.

[24] Under the building scheme, GPEL could grant or withhold approval itself, or via a delegate, described as an “approving officer appointed by the grantor”. There is no evidence that GPEL ever appointed an approving officer.

[25] GPEL no longer exists. It was dissolved March 28, 1983.

[26] The Smiths rely on the restrictions set out in Clause 3, which reads as follows:

3. Not more than one dwelling for one family or household unit with such further structures as may be necessary for the accommodation of any servants of such one family or household or incidental to the use of such one family or household, shall be erected on any one parcel or lot unless the Grantor or Approving Officer herein shall authorize the construction of

a duplex, semi-detached and/or multiple dwelling pursuant to Clause One (1) hereof.

[Emphasis added.]

[27] Clause 4 of the restrictions is to similar effect:

4. No dwelling, building, parcel or lot or part or parts thereof shall be partitioned, subdivided, or let with the intent or purpose that the same or any part or parts thereof be used or occupied by more than one family or household unit nor shall the said Lands be subdivided into two or more parcels unless or until the plan or plans of the proposed subdivision shall have been submitted to and approved in writing by the Grantor or Approving Officer.

[Emphasis added.]

[28] As is clear from the wording, the prohibition that the Smiths rely on is not absolute, as it was subject to the authority of GPEL.

[29] The title for Lot 36 has a legal notation for the building scheme, as well as registration of a charge, noted as restrictive covenant R128772, which sets out the same restrictions as those set out in the building scheme. The restrictive covenant consists of the deed dated March 23, 1964 between GPEL and the Sorbans.

[30] GPEL released or discharged certain lots from the building scheme. This is evidenced by handwritten notes on the building scheme itself, and is also referenced in the Sorbans' deed, among the recitals to that document.

[31] The building scheme restrictions include other prohibitions, such as Clause 7, which provides that the property owner will not carry on any "trade or business whatsoever", and Clause 10, which provides that no dwelling or other building shall be erected within a distance from roads, lanes or boulevards or lot lines specified by GPEL or its delegate. There is no evidence as to any applicable specifications or permits in this respect.

[32] When the Sorbans bought Lot 36 in 1964, it was within an unincorporated area called "Mamquam". Mamquam became part of the District of Squamish on December 15, 1964.

[33] On June 18, 2024, the District amended the applicable portion of its zoning by-law, replacing the former single-family zoning to “R-1” zoning, which permits up to four residential dwellings on a lot. Single or two unit dwellings remain allowable.

III. EVIDENCE AND POSITIONS OF THE PARTIES

[34] The District’s draft OCP states that the Garibaldi Estates neighbourhood is comprised predominantly of low-density residential land use, with single-unit dwellings occupying over 60% of the land.

[35] The Smiths own and reside in a single-family home on Lot 35. Their property fronts on a cul-de-sac on Park Crescent. There are four other lots on the cul-de-sac, including Lot 36, Clearwater’s property. They say that when they purchased Lot 35 in 2014, they “understood the Pat Goode subdivision to be a low density residential neighbourhood”. Prior to their purchase of their home, they had rented the property for several years. They say that in buying their home they were seeking a “suitably private, safe, quiet and tree-lined neighbourhood”. They say that the existence of the building scheme was an attractive feature, which reassured them that the subdivision would retain its low-density character of modest one or two storey homes, and that the trees would be preserved. They say that construction of Clearwater’s fourplex project on Lot 36 will change the character of the neighbourhood, and they will not be able to enjoy their property as much as before. They observe that at its closest point the project will be about 30 feet from their home.

[36] The Smiths raise a host of specific concerns, including reduced privacy, increased vehicle traffic and parked vehicles, reduced safety for pedestrians, reduced walkability due to the increased traffic and parked vehicles, potential flood risk, increased noise, reduced tree canopy and green space, and reduced light due to shading from the project. They argue that they never thought they would be living next door to a four-unit townhouse complex having a combined living area of 8,000 square feet. They fear that the project will set a precedent, and that other multiple-family projects will be built in the area.

[37] In summary, the Smiths like their neighbourhood as it is, and oppose changes in the character of the neighbourhood in general, and specifically, they oppose construction of Clearwater’s project on the lot next to their residence.

[38] Several other residents owning property in the area have sworn affidavits expressing similar concerns as those of the Smiths and supporting their position.

[39] On the other hand, some residents support the project. For example, Clare Robinson, whose property is also subject to the building scheme, deposes that small-scale multi-unit development such as that proposed by Clearwater is the exact type of development needed to address housing availability and affordability issues in the neighbourhood. Lucas Paczek deposes the same thing, and also supports Clearwater’s position. His property is subject to the scheme. When he and his spouse purchased their home in 2017, it contained a secondary suite that was added by the previous owners in the mid-2000’s. He and his spouse plan to build a coach house on their property.

[40] As noted, area residents Clayton Correia and Terra Spitzner support Clearwater’s position, but have not sworn an affidavit.

[41] The District has issued ten building permits for accessory dwellings and secondary suites for properties within the Garibaldi Estates neighbourhood, and apparently subject to the building scheme during the years 2015 to 2024.

IV. ANALYSIS

A. Legal Principles

[42] Section 35 of the *PLA* provides:

35 (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:

...

(d) a statutory building scheme or statutory letting scheme;

(e) a restrictive or other covenant burdening the land or the owner;

...

(2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that

- (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
- (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
- (c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,
- (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
- (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

[43] Section 35 is a comprehensive code permitting modification or cancellation of registered charges. The authority of the court to cancel or modify an easement is constrained by the specific grounds set out in s. 35(2) of the *PLA*. Sections 35(2)(a) to (e) are to be read disjunctively; in exercising its discretion under s. 35(2) the court may make an order to modify or cancel a charge against an interest in land if it is satisfied that the conditions in at least one of subparagraphs (a) to (e) have been met: *Vandenberg v. Olson*, 2010 BCCA 204 at paras. 23–25; *Tri-X Timber Corporation v. Rutherford*, 2012 BCCA 71 at para. 29.

[44] The court must be satisfied that the application to modify or cancel the charge is not premature: s. 35(2).

[45] A party seeking to rely on s. 35(2)(a) must prove that the easement is obsolete: *Vandenberg* at para. 32. The test of whether the easement or restrictive covenant or other charge is obsolete is not a test to be satisfied on the basis of balancing the rights of the parties, but rather by a consideration of the nature of the charge itself in the circumstances of the use of the relevant property, and a determination of whether on those facts the charge or interest is obsolete: *Chivas v. Mysek*, [1986] B.C.J. No. 2547, cited in *Vandenberg* at para. 27.

[46] Regarding the meaning of “obsolete” within the meaning of s. 35(2)(a), in *Vandenberg*, the Court stated:

[28] Obsolescence is to be determined in accordance with its dictionary meaning, as held by Prowse J.A. in *Portrait Homes Ltd. v. Strata Plan LMS 1191*, 2002 BCCA 257, 212 D.L.R. (4th) 295, 167 B.C.A.C. 286 at para. 23:

[23] In determining whether an easement is “obsolete” within the meaning of s. 35(2)(a), this Court has stated that the word “obsolete” should be given its ordinary meaning. For example, in *Collinson v. LaPlante* (1992), 1992 CanLII 685 (BC CA), 73 B.C.L.R. (2d) 257 (C.A.), Madam Justice Southin, speaking for the Court, stated at para. 19:

No technical meaning is to be given to the word “obsolete” in this provision [s. 31(2)(a)]. It is an ordinary English word which is defined in the *Shorter Oxford Dictionary*, 3d ed., thus:

1. That is no longer practised or used; discarded; out of date.
2. Worn out; effaced through wearing down, atrophy, or degeneration.

[47] Consideration of the nature of the charge in the circumstances of the use of the relevant property inevitably involves a consideration of the purpose of the building scheme. Therefore, determining whether the building scheme is obsolete requires the court to consider the purpose or objects of the building scheme at the time of its creation: *Tri-X Timber Corporation v. Rutherford*, 2010 BCSC 1001, aff'd 2012 BCCA 71; *Larocque v. Mackenzie*, 2014 BCSC 2223 at para. 23; *Putt v. Kunetsky*, 2010 BCSC 394 at para. 23.

[48] Where the building scheme provides that something can only be done with the consent of the grantor, but the grantor no longer exists, an owner wishing relief from any of the restrictions contained in the building scheme must either obtain the consent of all of the other owners or apply under s. 35 of the *PLA* for modification or cancellation of the scheme: *Tri-X Timber Corporation v. Rutherford*, 2012 BCCA 71, at para. 17.

B. Discussion

1. Prematurity

[49] Clearwater’s application is not premature, and the Smiths do not argue otherwise. Clearwater has received approval from the District for its proposed project, and is entitled to know whether the scheme and associated restrictive covenant on its title to Lot 36 is a barrier before it invests further time and money on the project: *Mountain Development Corp. v. McCrodan*, 1995 CanLII 780 (BC SC) at para. 20. The Smiths would like to know if the building scheme is enforceable in the manner they suggest. Other neighbourhood property owners and residents as well as the District are also interested in the issue. There are no pending decisions or future circumstances which are likely to be material to the court’s decision.

2. Obsolete

[50] The building scheme does not set out its purpose or objects, other than to establish the restrictions set out in it. The object or objects of the scheme must be inferred from the words in the document, in particular the schedule of restrictions, in the context of the surrounding circumstances.

[51] The Smiths argue that the purpose of the building scheme is to maintain a quiet, natural, low-density residential area. They argue that this is why the building scheme limits construction on a lot to a single-family dwelling. In support of this, in addition to Clauses 3 and 4, they point to Clause 7, which prohibits carrying on of any trade or business.

[52] I accept that while one apparent objective of the scheme was to limit construction to single family residences, there was no real commitment to this by GPEL, as this restriction as well as all the others was entirely within GPEL’s control and discretion.

[53] Contrary to the position of the Smiths, the scheme does not prohibit construction of anything other than single family residences, since Clause 3 specifically allows GPEL to authorize the construction of “duplex, semi-detached

and/or multiple dwelling” units. The scheme contains no limitation on this authority. Similarly, Clause 4 prohibits partitioning, subdividing, or letting properties, or occupation by more than one family or household unit, but again, this is subject to the uncontrolled discretion of GPEL.

[54] Therefore, the prohibition against multi-family housing was very limited. It was a “soft” commitment, only.

[55] On the other hand, a clear, central objective of the scheme was to provide GPEL with complete control over the design of anything to be built on the lands, in its uncontrolled discretion. GPEL’s administration of the scheme is central to it.

[56] As noted, under Clause 1, no construction of any kind, including, even, construction of a fence, is permitted without detailed plans and specifications being provided to GPEL and being approved in writing by it, or its delegate, the “approving officer”. GPEL had the unfettered right to “approve or reject the same”. The scheme does not set out any parameters in this respect. So, for example, there is nothing in the scheme which limits the square footage or overall size of structures. Under Clause 10, setbacks from roads, lanes, other lots, etc., were within the discretion of GPEL, without any guidelines or standards being stipulated. Even a change of colour required GPEL approval.

[57] Clause 11 provided GPEL with the right to withhold approval or reject any submission or request for approval or consent.

[58] Under Clause 14, GPEL reserved the power in its “absolute discretion” to waive, vary, modify or change any of the restrictions, stipulations and conditions set out in the building scheme, and to sell properties free of the restrictions, without recourse to any owner. Under Clause 15, GPEL reserved the right to subdivide any of its own lands.

[59] The building scheme never provided any owner with an assurance that neighbouring properties would never have multifamily residences constructed on them, because, as written, GPEL could allow such construction without recourse to

the other property owners. Clause 3, relied upon by the Smiths, is subject to GPEL's general authority and control as set out in Clause 1. However, the Smiths seek a permanent injunction, forever prohibiting the construction of anything other than a single-family structure on Lot 36. This goes well beyond the terms of the building scheme.

[60] Compliance with the building scheme became impossible once GPEL ceased to exist in 1983. Since that time, at least, anything built or any modifications to any structures within the area covered by the building scheme have not complied with the scheme. Clause 1 prohibited any substantial renovations, additions, additional structures, or creation of secondary suites without GPEL's approval.

[61] Given that the scheme applies to about 200 properties, most of which can be expected to have multiple owners, obtaining any consent or approval of all other owners of properties subject to the building scheme is impossible, as a practical matter.

[62] Although the Smiths maintain that Clearwater may build a single-family residence on the property, pursuant to the building scheme, it cannot do so, without being in breach of Clause 1, which requires the approval of GPEL. Similarly, the set-back requirements of Clause 10 cannot be enforced.

[63] The portions of the building scheme restricting construction to single-family residences, etc., were, from the outset, secondary and subordinate to the primary object of the building scheme providing for control of the development as a whole by GPEL. Without GPEL's involvement, or someone on its behalf, administration of the scheme is impossible. It would be inappropriate for the court to enforce the part of the scheme limiting construction to single family residences, while ignoring the remainder of the scheme. In effect, this would require the court to re-write the scheme in a manner inconsistent with it.

[64] Since administration of the building scheme and compliance with it are now impossible, it is obsolete, within the meaning of the statute.

[65] The building scheme contains no sunset provisions, nor any provisions addressing what is to happen when GPEL has no further interest in the development, or when GPEL ceases to exist. There is no time limitation on the restrictions. In the circumstances, given the central role of GPEL under the scheme, I infer that it was not intended to remain in effect in perpetuity.

[66] A reasonable interpretation of the scheme is that it was intended to allow GPEL to control the initial character and design of all development on the lands, for some unstated period of time, but not longer than GPEL's interest in some of the lands, or at the outside, its willingness and ability to administer the building scheme in accordance with its terms. That clearly ended with the end of GPEL's existence as a corporation. On this basis, as well, the scheme is now obsolete and should be cancelled.

[67] These two factors fall within the meaning of the very broad phrase "other circumstances the court considers material" under s. 35(2)(a) of the *PLA*.

[68] Clearwater's position is that if the building scheme is to remain in force, then in the absence of GPEL or its designate, the court should modify the building scheme (as to the restrictive covenant on Clearwater's property, that is) by stipulating that the District of Squamish is the "approving officer" under the building scheme. Given my conclusion that the building scheme (and hence, the restrictive covenant on Lot 36) is obsolete, there is no need for any such order.

[69] I observe, however, that there is no room for doubt as to what decisions Squamish would make in such circumstances. Its senior planner has stated that the restrictive covenant on Clearwater's title is inconsistent with Squamish's planning priorities, in general, and specifically, its OCP policy for the Garibaldi Estates neighbourhood. Squamish's OCP policy 9.4 identifies Garibaldi Estates as an important location for increased housing diversity and density. The senior planner states that the building scheme has not been applied for many years, and staff have no intention of enforcing its terms.

[70] In fact, of necessity, the building scheme has been widely ignored for many years. While some of the details of this are contested, on the evidence overall, it is clear that many residences have been substantially renovated, secondary suites have been added, and storage or utility sheds have been added, without, of course, obtaining approval of GPEL. These circumstances further support my finding that the building scheme is obsolete.

[71] Some of the concerns expressed by the Smiths and other residents in the area about the negative effects of further density appear to me to be overblown. Circumstances have changed since the building scheme was created in 1959, or when Lot 36 was first sold in 1964. Today, the properties in the area are subject to modern and comprehensive zoning, planning, and development rules and regulations. I expect that the District's planning and development rules and policies will address and attempt to ameliorate, at least in part, several of the concerns the Smiths express, including flooding, tree canopy, traffic and pedestrian safety, and other concerns. I note that Clearwater's plans for its project include a stormwater management plan.

[72] In view of my conclusion that the building scheme is obsolete as a result of "other circumstances the court considers material", there is no need for me to consider Clearwater's further and alternative contentions that changes in the character of the neighbourhood render the building scheme obsolete, and its other arguments based on ss. 35(2) (b), (c), and (d).

3. The Court's Discretion to Refuse Relief

[73] The Smiths argue that orders under s. 35(2) are discretionary, and that cancellation of the building scheme would be unjust or inequitable, and so should be refused, in the exercise of the court's discretion, even if the grounds for the order have been made out.

[74] In *Burmout Holdings Ltd. v. Chilliwack (District)*, 1994 CanLII 3326 (BC SC), Justice Cohen held that the court has discretion to refuse cancellation if doing so

would be inequitable. See also *Watermark Developments Ltd. v Kelowna (City)*, 2024 BCSC 2188 at para. 111.

[75] As noted, the Smiths argue that Clearwater's development, and others like it that can be expected to follow, will change the character of the neighbourhood, decrease privacy of the residents, and generally decrease their enjoyment of their properties and their quality of life. They argue that they bought their home with the expectation that the neighbourhood characteristics they value would be preserved. They argue that Clearwater bought the property with full knowledge of the terms of the restrictive covenant on the title, and simply wants to make a profit. They argue that cancellation of the scheme would be inequitable.

[76] Clearwater's representative, Mike Van Capelle, acknowledges that he caused Clearwater to buy Lot 36 in September 2024, hoping that the building scheme would not prevent development of the property. Among other things, he relied on the fact that the property had been re-zoned by Squamish to allow for multi-unit structures, and assurances from the District that it would issue a development permit notwithstanding the terms of the building scheme, for a development that complied with zoning and other relevant by-laws. I see nothing to criticize in this course of conduct.

[77] I am not persuaded that cancellation of the building scheme would be unjust or inequitable. Anyone actually reading the building scheme with care would have had some doubts about its continued applicability. GPEL's overriding and untrammelled discretion to allow the restrictions to be ignored is apparent on the face of the scheme. Anyone who investigated would have learned that GPEL had been dissolved long ago. They would have understood that this meant that, for a very long time, the building scheme could not have been enforced in accordance with its terms. Unsurprisingly, neither the Smiths nor any other witnesses have stated that they received professional assurances regarding the enforceability of the restrictions in the building scheme. I place little weight, then, on statements that buyers of properties in the area relied on the building scheme.

[78] I am not without sympathy for the desire of the Smiths and other property owners and residents of the area to preserve their neighbourhood as it is, including in particular its single family, low-density nature. However, in relation to the exercise of the court's residual discretion, the need of the community for additional housing is also relevant. Squamish's 2021 population was 23,819. Its population grew by 22.2% from 2016 to 2021. It is one of Canada's 10 fastest-growing communities. It forecasts that its population will exceed 40,000 by 2040. Consideration of the public interest does not favour the position of the Smiths that the court should refuse to cancel the building scheme.

V. CONCLUSION

[79] The orders sought by the Smiths in their petition are dismissed.

[80] The notation on Clearwater's title to Lot 36 relating to the building scheme and the associated restrictive covenant (registered under R128772) are cancelled. Pursuant to *PLA* s. 35(6), the registrar of land titles will amend the title accordingly.

[81] The parties have liberty to speak to costs. Any application in respect of costs must be filed within 30 days of the date of these reasons. As Clearwater has been successful, in the absence of any further order, Clearwater is entitled to costs of both proceedings, payable by the Smiths. There is no order for costs for or against Squamish.

"Verhoeven J."

SCHEDULE “A” – SCHEDULE OF RESTRICTIONS

1. There shall not be erected, constructed, made or maintained on the said lands any dwelling, building, wall, fence, pole, aerial or other structure or improvement or any addition thereto or alteration thereof until proper plans, elevations and specifications thereof showing the nature, kind, height, materials to be used, location and color scheme of such structure, improvement, addition or alteration have been submitted to and approved in writing by the Grantor herein or by an Approving Officer appointed by the Grantor, and the Grantor and Approving Officer shall have the right and power to approve or reject the same.
2. The exterior of any dwelling or building erected on the said lands after compliance with the provisions of Clause One (1) hereof shall be fully completed within a period of twelve (12) months from the date of commencement of construction of the said dwelling or building which shall not be occupied by the Grantee or permitted by the Grantee to be occupied until such exterior has been fully completed.
3. Not more than one dwelling for one family or household unit with such further structures as may be necessary for the accommodation of any servants of such one family or household or incidental to the use of such one family or household, shall be erected on any one parcel or lot unless the Grantor or Approving Officer herein shall authorize the construction of a duplex, semi-detached and/or multiple dwelling pursuant to Clause One (1) hereof.
4. No dwelling, building, parcel or lot or part or parts thereof shall be partitioned, subdivided or let with the intent or purpose that the same or any part or parts thereof be used or occupied by more than one family or household unit nor shall the said lands be subdivided into two or more parcels unless and until the plan or plans of the proposed subdivision shall have been submitted to and approved in writing by the Grantor or Approving Officer.

5. No poultry, swine, sheep, cows, cattle or other livestock shall be kept in, on or upon the said lands and premises.
6. No water from any stream, culvert, ditch, pond or collection of water shall be diverted, dammed, or drained, nor shall any culvert, ditch, stream or water-flow be altered or interfered with without the consent in writing of the Grantor or Approving Officer herein.
7. The Grantee will not carry on or permit to be carried on upon the premises or the said lands or in any dwelling or building thereon any trade or business whatsoever.
8. No bill-boards, placards, advertising or signs of any kind whatsoever shall be erected, exposed, maintained or displayed on the premises or the said lands or any part thereof, or on any residence, building or structure thereon or in any window or on any door of any residence or building on the said lands.
9. No trees, shrubs, or other growth shall be allowed to grow, be or remain on any part of the said lands in any manner that shall or may interfere with any poles or wires erected for the conveyance of electrical energy or the carrying of telephone wires or that may in any way interfere with any guy wires necessary to support any such poles or that may in any way interfere with the facilities or any public utility furnishing services to the said subdivision.
10. No dwelling or other building shall be erected on the said lands within a distance from any road, lane, boulevard or lot line less than that which is specified, permitted or allowed by the Grantor or Approving Officer herein.
11. Wherever and whenever the approval or consent of the Grantor is required to be obtained such approval or consent may be given by such officer, agent, committee, person or persons or Approving Officer as may from time to time be nominated or appointed in writing by the Grantor for such purpose and such power of appointment or right or nomination may be delegated by the Grantor and such appointees or nominees shall have the right to withhold

- approval of or their consent to and may reject any matter or thing submitted to them for approval or consent.
12. The Grantee undertakes to participate in and consent to the establishment of an Improvement District under the provisions of the *Water Act*, R.S.B.C. 1948 as amended or any similar body authorized or established under that Act or any amendment or substitution thereof for the purpose of taking over from the Grantor and operating the water supply system to be constructed by the Grantor to the said lands the costs of which construction is part of the consideration for the sale of the said lands to the Grantee, as soon as there are sufficient water users in the community to justify an application for the establishment of such an Improvement District or other similar body to the Water Rights Branch of the Province of British Columbia.
13. The restrictions, stipulations and conditions herein contained shall not be deemed to be exclusive either of any obligations or liabilities or requirements imposed by statute or law or equity on the owners or occupiers of land, all of which shall by duly observed and complied with.
14. **PROVIDED ALWAYS** and notwithstanding anything herein contained, the Grantee agrees that the Grantor shall have and has the power in its absolute discretion from time to time, by any deed or writing under the seal of the Grantor, to waive, vary, modify, change or release any of the said restrictions, stipulations and conditions in respect of the said lands hereby conveyed or sold or any other lot or lots now or hereafter forming part of the said building estate and whether imposed or entered into before or at the same time as or after the date hereof and to sell or otherwise dispose of or deal with any part of the said building estate which has not been sold prior to the date hereof free from any or all of the said restrictions, stipulations or conditions, and either subject or not to any different restrictions, stipulations or conditions, and either subject or not to any different restrictions, stipulations and conditions, and the right to waive, vary, modify, change or release hereby

reserved shall be exercised by the Grantor only and those to whom it is expressly assigned.

15. **PROVIDED FURTHER** and it is hereby expressly agreed by and between the parties hereto that notwithstanding anything herein contained whether expressly or by implication, the Grantor shall have the right and power to subdivide further all or any lot or lots in the subdivided lands above described or all or any lot or lots which may hereafter be created by deposit of subdivision plan or plans from or out of the unsubdivided lands above described and to sell or otherwise dispose of or deal with any such further subdivision or subdivisions in the same manner in all respects as if each such subdivision were one of the original lots.