

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***North Pender Island Local Trust  
Committee v. Conconi,***  
2009 BCSC 328

Date: 20090311  
Docket: L031980  
Registry: Vancouver

Between:

**North Pender Island Local Trust Committee**

Plaintiff

And

**Robert Leslie Conconi**

Defendant

Before: The Honourable Madam Justice B.J. Brown

## **Reasons for Judgment**

Counsel for the Plaintiff:

F. Marzari  
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Counsel for the Defendant:

P.D. MacDonald  
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Date and Place of Hearing:

Vancouver, B.C.

[1] The plaintiff North Pender Island Local Trust Committee applies, pursuant to Rule 18A of the **Rules of Court**, for a declaration that Mr. Conconi is using or allowing the use of the property located at 6901 Shark Place, North Pender Island as a commercial resort with five dwellings, meeting and wedding facilities, recreation facilities and a dock, contrary to North Pender Island Local Trust Area, Bylaw No. 103, 1996, A *Bylaw to Establish Land Use Regulations* (23 September 1999) [**Land Use Bylaw**]; or in the alternative, a declaration that Mr. Conconi is using the property, including a farm building on the property known as the “Drying Shed”, for commercial assembly purposes, contrary to the **Land Use Bylaw**. The plaintiff also seeks an order that Mr. Conconi cease the use of the property as a commercial resort. The facts are not in dispute and no one argues that this matter should not be decided pursuant to Rule 18A.

[2] The background facts are quite straightforward.

[3] In 1994 Mr. Conconi bought 34 acres of property on North Pender Island. At the time, it was zoned “Rural 1 Zone”. When he bought it, it was forested and did not have any buildings. Over the next several years, Mr. Conconi built various buildings on the property: a residence, referred to as “the Conconi residence”, in 1995; a guest cabin in 1996; two additional dwellings in 1996 and 1997; and two more guest cabins in 1998 and 2000. In 1999 he built a building referred to as the “Drying Shed”. In this judgment, I refer to the two dwellings built in 1996 and 1997 as the “larger units”, the guest cabins built in 1996, 1998 and 2000 as the “smaller units”, and the five collectively as the “units”.

[4] Since 1997, Mr. Conconi has made the units available for rental by the public, except the Conconi residence.

[5] The issue in this action is whether this development complies with the zoning bylaws.

### **THE POSITIONS OF THE PARTIES**

[6] The North Pender Island Local Trust Committee argues that Mr. Conconi is using his property as a resort, called “The Timbers”. The Trust Committee says that this is a resort or lodge and therefore a commercial use of the property, and that such a use is not permitted.

[7] In support of its contention that Mr. Conconi operates The Timbers as a resort, the Trust Committee points out that it is generally booked solidly, on a weekly basis, throughout the summer and every weekend from May to June and through September. Bookings continue through the fall and winter. Mr. Conconi uses a professional booking agency for all of his bookings and reservation inquiries. Any member of the public can book one of the units, or a wedding or conference at The Timbers. The Timbers advertises on the internet and on the radio. Until this litigation was commenced, The Timbers was advertised on its website as “The Timbers Resort”.

[8] The defendant is a registered operator of a lodging accommodation under the **Hotel Room Tax Act**, R.S.B.C. 1996, c. 207, and collects hotel room tax as well as GST from paying guests at The Timbers. The Timbers generates over \$150,000 in income from guest bookings each year. It pays wages and commissions in excess of

\$60,000 per year. Mr. Conconi declares the income from The Timbers as business income, not as income from residential rental of the property.

[9] The Timbers has a full-time caretaker, who lives on site and who assists with check-in and check-out of guests. He receives an annual salary of \$40,000 and pays no rent to live on the property.

[10] The five units operated by The Timbers as guest accommodations range in size from 700 to 1,500 square feet and accommodate 4-6 people each, with a maximum capacity of 26 overnight guests. The rates for these units range from \$2,900 per week in the high season to \$256.67 per night in the low season. They are available nightly from September to June and weekly from July to August. The units are fully furnished with clean linens, dishes and personal hot tubs. They are rented pursuant to a rental agreement that specifically excludes the application of the **Residential Tenancy Act**, S.B.C. 2002, c. 78. They are cleaned and linens changed by cleaning staff between guests. Friends and family of the defendant generally stay in the Conconi residence, not the five guest units.

[11] The Timbers provides recreation facilities to its guests, including a swimming pool, playground, trampoline, and Frisbee golf course. The swimming pool and each of the units are connected by a phone system.

[12] The Timbers provides a meeting and banquet facility to its guests, the Drying Shed. The only use of the Drying Shed is as a wedding and meeting hall. It is equipped with sufficient tables, chairs, glasses, cutlery, etc. to host a party of up to 100 people. The Timbers has booked over one dozen weddings and corporate events in

2008 that have or will use the Drying Shed. Wedding packages that use the banquet hall are billed at a premium, over the cost of the five guest units alone.

[13] The Timbers has a dock where guests may moor their boats. In 2007 eight reservations were made to accommodate boats at the dock as part of The Timbers' operations. A boat is available for guest use at the dock; it is not clear whether there is a \$50 fee for using this boat, or whether guests must simply cover the costs of the gasoline they use.

[14] The Trust Committee argues that this evidence establishes that The Timbers is operating as a commercial resort or lodge, in breach of the bylaws.

[15] There are two bylaws in issue: North Pender Island, By-law No. 5, *Zoning By-law, North Pender Island, 1978* (20 December 1978), as amended [***Zoning Bylaw***], and the ***Land Use Bylaw***, which repealed and replaced the ***Zoning Bylaw***.

[16] The ***Zoning Bylaw*** permitted the Conconi residence and the two larger units as "one family dwellings"; the three smaller units were also permissible as one "guest cabin" could be built for each one-family dwelling. A "one family dwelling" was defined in the bylaw as "any building consisting of one self-contained dwelling unit." A "dwelling unit" was defined as "any room or suite or rooms used or intended to be used as a place of habitation by one or more persons." "Guest cabin" was defined as "a separate residential building...for the purpose of accommodating guests in conjunction with a one family dwelling."

[17] The units are also permissible under the **Land Use Bylaw**, which permits a “dwelling” plus “one cottage” per dwelling. “Dwelling” is defined as “a residence for a single household...”. “Cottage” is defined as “a dwelling with a floor area of 56m<sup>2</sup> or less.”

[18] The parties agree that the size of the defendant’s property permits three “dwellings” and three “cottages”. The dispute is over their use. The Trust Committee argues that a commercial resort like the Timbers was permitted by the **Zoning Bylaw**, and later by the **Land Use Bylaw**, only in the commercial zones on North Pender Island, and not in the rural zones. The plaintiff says that the units are not “dwellings” as that term is defined in the bylaws, that “dwellings” are residential accommodation, not commercial accommodation, and that “dwellings” does not include recreation facilities or a banquet and meeting hall.

[19] The plaintiff argues that a “dwelling” permits occupation by people who ordinarily reside there, not accommodation for paying vacationers. Similarly, a “habitation” is a place of abode, a residence, not temporary accommodation for paying guests. The Trust Committee says that when the bylaws are read as a whole, the meaning is clear: dwellings which allow for residential uses are distinct from commercial units which permit temporary accommodation. The plaintiff says that in any event, the Drying Shed is used as a banquet hall, not as an agricultural building, and the dock is used to provide access to the commercial lodge and for boat rental, neither of which are permitted.

[20] The plaintiff says that it is entitled to an injunction pursuant to s. 274 of the **Community Charter**, S.B.C. 2003, c. 26.

[21] Mr. Conconi, for his part, argues that the permitted use of units includes rental to guests, that his use of the units is permitted under both the **Zoning Bylaw** and the **Land Use Bylaw**. The defendant says that he used or intended to use the units for rental to guests before September 23, 1999, has used them as such since they were constructed, and that such use is therefore permissible as a “non-conforming use” under s. 911 of the **Local Government Act**, R.S.B.C. 1996, c. 323. The defendant says, alternatively, that the zoning regulations are ambiguous, and the court can look at how the **Zoning Bylaw** was administered as a guide to its interpretation.

[22] The defendant says, with respect to the Drying Shed, that the term “commercial assembly purposes” in the declaration sought by the plaintiff is vague, uncertain and not used in either of the bylaws, and the relief sought should be refused.

[23] The defendant argues that the rental of dwellings and guest cabins was a permitted use under the **Zoning Bylaw** which was in force when construction was started for all of the six structures.

[24] The defendant says that the term “habitation” used in the definition of the term “dwelling unit” in the **Zoning Bylaw** means a place people occupy, and refers to the fitness of a building for occupation by one or more persons. This does not imply a length or duration of the occupation. The defendant argues that where the bylaws intend to limit the length of stay, they do so expressly. The words “domicile” or

“residence” are used in the bylaws when the intent is to capture the fact of residing, a sense of permanence.

[25] The defendant says that the definition of “guest cabin” is to similar effect in that the word “building” in that definition means a “structure...used for...habitation, accommodation...of persons...”. This too, says Mr. Conconi, describes the structure, one fit for human occupation. The purpose of Mr. Conconi’s guest cabins is to accommodate guests. He says that there is nothing in the definition of “guest cabin” to distinguish paying from non-paying guests, nor is there a minimum period of stay.

[26] The defendant says that his interpretations of “dwelling unit“ and “guest cabin” are consistent with the scheme of the **Zoning Bylaw**. The defendant argues that other zones provide for commercial guest accommodation, which is temporary or transient public lodging. “Public” means “accessible to any person” and “specifically excludes private or restricted access or use”. The defendant says that his property is not available to the public because the units have private, restricted access. He says that the units are not commercial guest accommodation because he does not offer food services. The defendant says that his use of the units is not covered by any other zone, that the phrase “used or intended to be used for habitation” includes the use of units for rental to guests on property zoned Rural 1 that has restricted access and where food services are not offered.

[27] The defendant says that the Rural 1 zone permits several commercial activities, such as golf courses and equestrian facilities which demonstrates that there was no

legislative intent to restrict uses to non-commercial uses. He also says that his use is in keeping with these others.

[28] The defendant says that he lawfully used the property under the **Zoning Bylaw**, he has continued the same use throughout, and the use is protected as a non-conforming use by s. 911(1) of the **Local Government Act**. The defendant says, alternatively, that his use is lawful under the **Land Use Bylaw**.

## **DISCUSSION**

[29] The approach to statutory interpretation in this country has long been that enunciated by Elmer Driedger in *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67:

... the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

A term in a statute will be considered ambiguous if, using Driedger's approach to interpretation, it is reasonably capable of more than one meaning: **Bell ExpressVu Limited Partnership v. Rex**, 2002 SCC 42, [2002] 2 S.C.R. 559 at paras. 29-30.

Where there is ambiguity, the court may consider the interpretation used by the body administering the bylaw: **Nowegijick v. The Queen**, [1983] 1 S.C.R. 29 at 37.

[30] The **Zoning Bylaw** was in effect from 1978 until September 1999. It is, as it is sub-titled, "a bylaw to divide North Pender Island into zones and regulate the use of land, including the surface of water and the location, size and use of buildings."

[31] No building may be used or constructed, or land occupied or used, except in conformity with the bylaw: **Zoning Bylaw** s. 3.2. The bylaw creates 18 zones, which included Rural Residential 1 and 2, Rural 1 and 2, and Commercial 1, 2, 2A and 2B. Rural Residential zones 1 and 2 and Rural zone 1 permit one-family dwellings and a guest cabin; Rural zone 2 permits one-family dwellings. Commercial 1 zone permits retail stores and shops, professional offices, restaurants, service stations, etc., with one self-contained dwelling unit in the same building. Commercial 2 zone permits “hotel, motel, cottages or lodge, providing for four or more commercial guest accommodation units on the parcel; campground; marina”, and one self-contained dwelling unit.

[32] “Commercial Guest Accommodation Unit” is defined as “the area allocated to a registered guest for temporary public lodging...”. “Public” means “providing for or accessible to any person, whether or not an admission fee or charge is required to be paid to obtain access or use and specifically excludes private or restricted access or use.”

[33] Reading the **Zoning Bylaw** as a whole, it is clear that accommodation of temporary public guests is expressly permitted in the C2 zone, and not in the R1 zone. The bylaw clearly distinguishes between temporary accommodation of the public and other accommodation.

[34] The bylaw permits the following uses and no others in the R1 zone: one-family dwelling, guest cabin, and other permitted uses which are not relevant. A one-family dwelling is one self-contained dwelling unit. A “dwelling unit” is “used or intended to be used as a place of habitation...”. A “guest cabin” is a “separate residential building... for

the purpose of accommodating guests in conjunction with a one family dwelling.”

Habitation is not defined. “Residential use” means a “use providing for the accommodation and home life of a person or persons.” “Habitation” is not defined in the **Zoning Bylaw**. In *The Concise Oxford English Dictionary*, 10th ed., it is defined as “the state or process of inhabiting”. “Inhabit” means “live in or occupy”.

[35] The defendant submits that “habitation” in the context of this bylaw is meant to refer to the fitness of a building for human occupation and says nothing about the duration of the occupation and that where time limits are intended, express language is used, such as the use of the word “residence” in the definition of “dwelling” in the **Land Use Bylaw**. In an earlier action related to this case, **North Pender Island Local Trust Committee v. Conconi**, 2007 BCSC 1436, Mr. Justice Hinkson concluded at para. 104 that this definition of the term “habitation” was an arguable one. I agree with my brother Justice Hinkson that Mr. Conconi presents a plausible definition of the term. Indeed, based on the dictionary definition the term may or may not imply something about the duration of occupation.

[36] However, the interpretation urged by the defendant cannot be accepted because it is not harmonious with the scheme of the bylaw, and this for two reasons. First, it would not distinguish a “dwelling” from a hotel, motel or other form of temporary public accommodation: all are fit for human habitation. The definition of dwelling would be meaningless in the context of the bylaw. Second, the defendant’s interpretation of habitation would lead to an absurd result, because the guest cabin, which is to be used in conjunction with a one-family dwelling, is a residential building, with residential use defined as “providing for the accommodation and home life of a person or persons”.

Arguably, the cabins could only be used as residences, a more narrow use than the dwellings, which need only be fit for human habitation, and can be used as temporary lodging.

[37] The defendant is not assisted by **0757107 BC Ltd. v. Town of Lake Cowichan**, 2008 BCSC 961. In that case, a “dwelling” was defined as “a self contained set of habitable rooms in a principal building...”. As Justice Wilson stated at para. 29, the focus of the definition of “dwelling” in the bylaw at issue was on the physical structure and not on the use of the building; given the definition there was no ambiguity in the interpretation of the term. That distinguishes the use of the term in that case from its use in the **Zoning Bylaw**, where the term could be interpreted in different ways, and the interpretation which focuses only on the physical structure does not make sense in the context of the bylaw.

[38] Nor do I accept the defendant’s submission that The Timbers is not available to the public. Any member of the public may book a unit at The Timbers through the booking agency. That individual is then given access to the property. I see no difference in principle between booking online, or by telephone, and receiving an access code to the gate of the property and obtaining a key to your unit on arrival; and checking in at a desk and receiving a key to the front door of the hotel as well as a key to your suite. Each method is “accessible to any person”. The Timbers is not private or restricted simply because there is a gate at the driveway which requires an access code.

[39] Turning now to the smaller units, the defendant argues that each is permissible as a “guest cabin”, which is defined as “a separate residential building ... for the purpose of accommodating guests in conjunction with a one family dwelling.” The defendant says that the smaller units are permissible because they are “buildings” which have always been used to “accommodate guests”, and that the phrase “in conjunction with” simply means that a guest cabin is only permissible in zones which allow one family dwellings.

[40] I disagree. The words “in conjunction with” would be superfluous on the defendant's interpretation. The phrase “in conjunction with” in the definition requires that there be some connection between the use of the building claimed to be a guest cabin and a permissible one-family dwelling. There is no such connection between the smaller units and the larger units at issue here. The smaller units are used in exactly the same way as the larger units, as part of a commercial resort, and their use on any given day is completely independent of the use of the larger units. Even if there were some kind of relationship between the uses of these buildings, the larger units are not used as “one family dwellings”, and so cannot be used to justify the use of the smaller units. For these reasons, the defendant's use of the smaller units is not a permissible one under the **Zoning Bylaw**.

[41] Regarding the Drying Shed, although the website states that it is frequently used to process the farm's produce, hang bulbs, and preserve fruits and vegetables, the defendant is not aware of this ever happening. Rather, as the website states elsewhere, it is a “beautiful venue” for a reception, with ample room to seat 100, a band and a DJ, and a spacious, fully equipped kitchen. Links are provided to catering and

other services available on Pender Island. The Drying Shed is booked for weddings and corporate events. Wedding packages are available, which include a premium for use of the Drying Shed.

[42] The Drying Shed as it is used does not come within the R1 zone.

[43] The dock at The Timbers is used as the launch point for the defendant's boat, which is made available to paying guests; it is not clear, on the evidence, whether guests are charged any additional fee for its use. It is also used by guests to moor their own boats. Again, whether they are charged a fee over and above what they might pay to stay at The Timbers is not clear.

[44] I am not aware of, and the defendant has not brought to my attention, any provision of the **Zoning Bylaw** which would permit him to use the dock for these purposes. Several of the zones defined in the **Zoning Bylaw** permit the use of a marina. The term is defined in the bylaw as "public moorage and launching facilities available for a fee and includes the rental of boats...." As was the case in **Islands Trust v. Pinchin Holdings Ltd.** (1981), 130 D.L.R. (3d) 69, 32 B.C.L.R. 209 (C.A.), the dock at the Timbers cannot be considered a private dock; rather, its use by paying guests of The Timbers makes it a public moorage available for a fee, i.e., a "marina". The Rural 1 and the Water A zone do not list a marina as a permissible use, and expressly prohibit any uses which are not listed. It follows that this use of the dock is not a permissible use of the property.

[45] In my view, the bylaw is not ambiguous on any of these points, and therefore I do not need to consider the affidavits from former trustees. Further, I am not satisfied that

they would be evidence of administrative practice, policy or interpretation. They are, at best, evidence of subjective interpretation by the trustees, and in any event, are contradictory and not helpful.

[46] Because the use is not a permitted use under the **Zoning Bylaw**, it is not a lawful non-conforming use under the **Land Use Bylaw** by operation of s. 911 of the **Local Government Act**. I turn now to consider whether the use of the property complies with the **Land Use Bylaw**.

[47] The **Land Use Bylaw** came into effect on September 23, 1999. Section 2.2.1 of the **Land Use Bylaw** is similar to s. 3.2 of the **Zoning Bylaw**, it provides that:

Land or the surface of water ... shall not be used, ... buildings and structures on land or on the surface of water shall not be constructed ... or used ... except as specifically permitted by this Bylaw.

[48] The new bylaw creates 23 zones. Mr. Conconi's property is in the Rural zone, which permits the following uses and no others: a dwelling, a cottage, and several specific uses not relevant to these proceedings. There are also a number of Commercial zones. The Commercial 2 and 3 zones each permit the following uses and no others: hotel, motel, lodge, campground, marina, boat launching ramps, and several specific uses not relevant to these proceedings.

[49] The following definitions found in s. 1.1 of the bylaw are relevant here:

"cottage" means a dwelling with a floor area of 56 m<sup>2</sup> or less.

"commercial guest accommodation unit" means a room or suite of rooms in a ... lodge ... containing not more than two bedrooms, used for the temporary accommodation of travellers.

“dwelling” means a building used as a residence for a single household and containing a single set of facilities for food preparation and eating, sleeping and living areas.

“lodge” means commercial guest accommodation units and facilities in detached buildings.

From the use of these terms in defining the permissible uses of land and water in the various zones established by the **Land Use Bylaw**, it is clear that the new bylaw, like the **Zoning Bylaw**, creates a set of zones allowing for temporary commercial accommodation which are distinct from those zones allowing for more permanent accommodation.

[50] The term “residence” is not defined in the bylaw. I am satisfied that the ordinary meaning of the term is that set out in *The Concise Oxford English Dictionary*: “a person’s home.” This meaning accords with the scheme of the **Land Use Bylaw**. With the use of the term “residence”, the defendant concedes that the new bylaw imposes ‘a sense of permanency in the occupancy of “dwellings” not found in the **Zoning Bylaw**.’

[51] As the defendant submits that the units on his property are either dwellings or cottages under the **Land Use Bylaw**, and none of the five disputed units operated by The Timbers are used as residences, they run afoul of the bylaw and are not permissible. Nor is there anything in the new bylaw which would cause me to alter my conclusions with regards to the Drying Shed and the dock.

[52] In the defendant’s argument that his use is a permissible one under the **Land Use Bylaw**, he relies heavily on the fact that s. 1.3 of the bylaw was repealed in April 2000, evidencing an intention on the part of the trustees to allow rentals of any duration in any zone. Section 1.3, entitled “Residential Uses”, read:

Where this Bylaw permits the use of land for dwellings and cottages, the permitted use is, in the case of dwellings, the use of the dwelling as a permanent or seasonal residence and, in the case of cottages, the use of the cottage as a permanent residence or as an accessory building for the accommodation of non-paying guests of persons resident in the principal dwelling on the same lot. Accordingly, no such dwelling or cottage may be occupied by any person under a tenancy or similar agreement for less than a 30 day period or otherwise used as a commercial guest accommodation unit. The intent of this provision is to ensure that commercial guest accommodation uses occur exclusively at locations zoned for that purpose.

[53] This submission finds some support in the decision of Mr. Justice Hinkson, referred to above, where he states at para. 113 that the repeal of s. 1.3 may well have been intended to permit short term rentals in all zones. However, Hinkson J. expressly refused to resolve the issue of whether the repeal had that effect, concluding that the argument advanced was enough to demonstrate that Mr. Conconi had an arguable case, which disposed of the issue before him.

[54] I do not disagree that the issue is an arguable one, with the repeal of s. 1.3 giving some support to the defendant's argument. However, in my view, if the intention of the trustees in repealing s. 1.3 was that urged by the defendant, they did not go far enough. As stated above, the word "residence", employed in a legislative scheme which clearly distinguishes between commercial and residential uses of property, is unambiguous. To hold otherwise would vitiate the basic scheme of the bylaw.

[55] Turning now to the specific relief sought by the plaintiff, the plaintiff seeks

(1) a declaration that the defendant is using the property as a commercial resort, including the use of five dwellings, meeting and wedding facilities, recreation facilities and a dock, contrary to the ***Land Use Bylaw***;

(2) an injunction prohibiting use of the property as a commercial resort and wedding facility, and in particular enjoining providing the dwellings, wedding, meeting and recreational facilities to paying guests, using the dock for commercial purposes and marketing the property for these purposes.

[56] The injunction sought is a statutory injunction pursuant to s. 274 of the **Community Charter**. It is a purely statutory remedy, not based in equity. It is no objection to the granting of the injunction that there has been a failure to enforce the bylaw for many years or that officials have permitted or approved of the breach. The court's role is to determine whether there has been a breach: **Langley (Township) v. Wood**, 1999 BCCA 260, 173 D.L.R. (4th) 695. Although the court has a very narrow jurisdiction to refuse an injunction where the injunction does not remedy the mischief of the bylaw (**Burnaby (City) v. Pocrnic**, 1999 BCCA 652, 71 B.C.L.R. (3d) 211; **Coquitlam (City) v. Aweryn**, 2001 BCCA 373, 156 B.C.A.C. 218), that does not apply in this case, where an injunction would remedy the mischief.

[57] I have found that the various uses of the property are not permitted by the bylaws. The defendant does not take exception to the particular wording for the injunction, which, although it is not expressed in the words of the bylaw, does effectively express the uses enjoined. I am concerned that the words "to paying guests" may be over-broad, in that it may be read to prohibit long-term tenancies of the units, which may be a permitted use. If necessary, the parties may make further submissions on this issue.

[58] I will grant the relief sought at paras. 1 and 3 of the motion. If the parties are not able to agree on costs, they may schedule submissions before me.

“B.J. Brown J.”

The Honourable Madam Justice B.J. Brown