

Statutory Rights of Way: Best Practices

The B.C. Supreme Court's recent decision in *Skene v. Ucluelet (District)*, 2019 BCSC 2051 is a helpful reminder on what factors the courts will take into consideration when determining the validity of a statutory right of way.

Background

Brent and Laurie Skene (the "Petitioners") were the registered owners of a parcel of land in the Reef Point development area of Ucluelet, B.C. (the "Property"). The Property was one of several lots that were once the subject of a proposed resort development by the developer, Seabridge Construction Limited ("Seabridge").

Prior to the land being subdivided to create the 24 lots, Seabridge, in fulfillment of its development permit, granted the District of Ucluelet (the "District") a statutory right of way ("SROW") against the undivided parcel of land for the purposes of constructing a public boardwalk over the subject lands. In 1998, the District's Council passed a resolution authorizing the issuance of a development permit (the "Permit") conditional on the following requirements:

- The cycle path and boardwalk path plan be completed;
- The SROW be registered on the land for the proposed boardwalk ensuring the unrestricted use of the entire boardwalk for public use and absolving the district from maintenance costs and upkeep; and
- A cycle path be constructed.

Seabridge submitted an application to register the SROW and the same was registered on title to the now subdivided lands. While the SROW was registered against title, no plan for the SROW was included in the filing. The Land Title Office subsequently issued a Notice Declining to Register, which indicated that the SROW was "returned" on the basis that a statutory right of way plan was required. This

plan was never submitted. Further, the District's copy of the Development Permit did not include a development plan showing the boundaries of the proposed boardwalk and there was no evidence to suggest that a formal boardwalk plan had ever been prepared by Seabridge and provided to the District. The District's copy of the Development Permit remained unsigned.

Seabridge eventually ran into financial difficulties and abandoned its plans to develop the resort. As a result, the lands were subdivided and sold off to multiple purchasers and each lot was individually developed in a "patchwork fashion", such that they were in no way "collectively integrated in ownership, management, or use". The Petitioners are successors in title to one of the parcels, namely the Property.

In 2018, the District informed the Petitioners that it planned to move forward with plans to construct the boardwalk in reliance on the SROW. The Petitioners brought an application to the Supreme Court under section 35 of the Property Law Act for an order cancelling the SROW registered against the Property. The Court found that the SROW was invalid and unenforceable due to uncertainty.

Decision

Strict Construction Rule

This case relied on the strict construction rule, which states that where an agreement is ambiguous, the restrictions contained therein are to be strictly interpreted in favour of the free utilization of land and against those persons seeking to enforce the restriction. The requirement for precise language in agreements creates certainty and informs present and future owners of the specific restrictions and obligations imposed upon them.

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Lack of Certainty

The Land Title Act requires that a statutory right of way plan be deposited when an application to register a statutory right of way as to a specified area is submitted. In the case at hand, no plan relating to the boardwalk or boundaries of the SROW was ever deposited. The court emphasized that the benefit of a statutory right of way plan is that it “provides certainty and transparency where the use of land is restricted.”

The District argued that a successor in title would know from the agreement that there were restrictions on the Property and could look elsewhere to find them. However, the court determined that there was no certainty about where a successor in title could search to find that information”. Because there is no information on title, the present property owner or the successor in title would have to look outside of the agreement to determine all of the terms related to the restriction. While the Development Permit prescribed the “general location of the boardwalk”, the actual area over which the District claimed to assert its rights was not defined with any certainty. The Court maintained that vague and general terms in an agreement will not provide a sufficient level of certainty for a present or future owner to know the specifics of the restrictions.

The SROW agreement between the District and Seabridge was predicated, in part, on the consensus that Seabridge would provide the District with certain rights over part of the Property once Seabridge had determined the boundaries. Since Seabridge never defined the boundaries of that interest, the Court ruled that “there was no crystallization of any interest in land the SROW could have conveyed to the District”.

Takeaways

Local governments will typically acquire statutory rights of way at the time of subdivision or as a condition of a rezoning or the issuance of a land use permit. This case confirms that the court will not give legal effect to a statutory right of way where it lacks certainty, even in unique cases where it has already been registered by the Land Title Office on title to the land.

The Court noted the District’s role in being at least partially responsible for its own misfortune. The District did not

properly record the SROW on which it claimed to rely when moving forward with its plans for the construction of the boardwalk. As such, the District permitted the uncertainty and its own inaction resulted in the loss of the rights that would have been attached to an otherwise properly executed statutory right of way.

Hence, where a statutory right of way is registered, applicants should ensure that it is drafted so that the terms clearly and explicitly define the boundaries of the interest such that present and future owners would not need to look outside of the agreement to ascertain the restrictions imposed upon the use of the land. This case is also a good reminder that statutory rights of way that seek to impose positive obligations on property owners will not run with the land to bind successors in title. Further, the court will not sever positive obligations that go to the heart of the contract.

January, 2020

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