BYLAW ENFORCEMENT WITHOUT INVOLVING THE COURT

LEGISLATIVE AND JUDICIAL TRENDS

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I. INTRODUCTION

A local government bylaw is effectively enforced if a person is compelled to cease a contravention or is discouraged from engaging in such prohibited conduct in the first place. When a court becomes involved in an enforcement proceeding the presiding judge will be called upon to consider: (1) what alleged conduct has, in fact, occurred; (2) whether that conduct is, at law, a contravention of a bylaw; and (3) what available and appropriate sanction the judge should impose for the contravention.

In many cases, however, a bylaw can be effectively enforced without a court proceeding. This paper discusses recent legislative and judicial trends that have expanded or enhanced the non-court methods by which a local government may effectively enforce its bylaws. These methods engage the same three considerations: (1) what is occurring; (2) what is the law; and (3) what sanction or consequence can be imposed. The non-court processes discussed in this paper can address these considerations using quite different, and often simpler or easier to control, methods of enforcement, when appropriately applied.

[1] The author thanks Aidan Andrews for his assistance with preparing this paper.

II. THE STARTING POINT: COURT-ORDERED ENFORCEMENT THROUGH FINES AND INJUNCTIONS

In British Columbia, taking an alleged bylaw contravener "to court" means commencing either a prosecution in the Provincial Court (long form or municipal ticket information) or injunctive proceedings in the Supreme Court. Bylaw enforcement officers will be aware of the significant differences between the two forums. In the Provincial Court, the local government prosecutor must prove beyond a reasonable doubt that an offence was committed. Evidence is given by witness testimony, and the defendant is not obliged to give any evidence at or before trial. If the defendant is found guilty of an offence on a particular date, the court's primary remedy is to impose a fine. These fines can be as high as $50,000 per offence in a long form prosecution, if such amount is authorized by bylaw.

In a Supreme Court injunction proceeding, the local government must prove its claim on the balance of probabilities (or a different standard, if seeking a pre-trial injunction). Evidence may be tendered by witness testimony or affidavit, and evidence may be compelled from the defendant under certain procedures. If the court finds that the defendant has committed or is continuing to commit a contravention, then the court's primary remedy is to issue an injunction, a court order compelling the defendant to cease the contravention or remedy the consequences of the contravention.

The significant differences between Provincial Court and Supreme Court proceedings can result in quite different outcomes and consequences for the same alleged contravention. Despite these differences in process and remedies, the judges of the Provincial Court and Supreme Court both determine what facts have been proven under their respective evidentiary procedures. The judges then rely on precedent decisions, particularly those of appellate courts, to guide their application of the law, including bylaws, to such facts. If a contravention is proven, the judges can impose a sanction within their jurisdiction.

A Hypothetical Example

Consider a single-family dwelling that has been the subject of complaints from neighbours because it is occupied by short-term visitors who noisily celebrate during a weekend getaway. The municipality might respond by commencing a prosecution or an injunctive proceeding against the owner of the property.

The extent to which evidence of the property being advertised on Airbnb is sufficient evidence of the actual use on a particular date may be treated differently based on which court proceeding the municipality pursues. The choice of proceeding should not, at least in theory, result in different interpretation of purely legal questions. Suppose the house is subject to a land use bylaw that simply provides: "The only permitted use is a single-family residence and uses accessory to that

principal use." The municipality may take the position that this provision does not allow the house to ever be used as a short-term vacation rental ("STVR"). The owner may respond by saying that renting the house out to tourists for a week or two in a year is a permitted accessory use. Regardless of whether the dispute results in a prosecution in the Provincial Court or an injunctive proceeding in the Supreme Court, the court should consider the same interpretive principles and legal precedents to determine whether an STVR use can ever be part of a principal residential use under the land use bylaw at issue. The court's answer to this question will determine whether a contravention can be proven by the showing that the STVR use happened at least once, or whether the STVR use must have occurred more frequently to be something not merely "accessory" to the principal residential use.

A successful prosecution in this hypothetical case should result in a fine, and a successful injunctive proceeding should result in an order requiring the use be stopped. The amount of time, work and expense required to obtain such sanction, and whether such sanction results in the immediate cessation of the STVR use, may encourage a non-court approach to dealing with this and other types of alleged bylaw contravention. Readers should keep in mind that, while these enforcement methods can be pursued and completed without involvement of the courts, it remains open to a contravener to apply to the Supreme Court for judicial review of enforcement-related decisions.

III. VOLUNTARY COMPLIANCE

Seeking voluntary compliance is not a new trend but is a preferred way to achieve effective enforcement. The BC Ombudsperson has also endorsed voluntary compliance initiatives in its report called "Bylaw Enforcement: Best Practices Guide for Local Governments" (March 2016). What is (relatively) new is the use of social media to help educate the public about bylaw prohibitions and requirements. In the case of this paper's hypothetical example, if an owner knows through social media that the municipality prohibits a particular STVR use, that owner may be more willing to stop that use than if the owner had a prior belief that such use was permitted.

IV. BYLAW NOTICES

Most bylaw enforcement officials will be familiar with bylaw notices issued under the *Local Government Bylaw Notice Enforcement Act*, SBC 2003, c 60. It is nevertheless a relatively new method of bylaw enforcement. The *Act* is just over twenty years old, and local governments have only been gradually added to the list of communities to which the *Act* applies in that time.

For the purposes of this paper, what is most notable about bylaw notices is that, subject to earlier resolution of a disputed bylaw notice (i.e., a compliance agreement or cancellation by screening officer), whether the alleged contravention has occurred is determined by someone who is not a judge using procedures that are less onerous than ones required by the court. Even if that

adjudicator's decision is judicially reviewed, a court will not interfere with an adjudicator's incorrect interpretation of the law as it applies to facts, so long as the decision is reasonable.[2] An adjudicator's decision is subject, on judicial review, to the reasonableness standard of review under *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*").[3] This means that the court gives the adjudicator more deference on judicial review than they would on a true appeal of a lower tribunal's decision. Bylaw notices may therefore be infrequently challenged in court, because adjudicators' decisions are effectively harder to overturn.

Finally, if the adjudicator finds that a contravention did occur, the prescribed (civil) penalty must be imposed.[4] Section 3 of the *Local Government Bylaw Notice Enforcement Act* currently limits the maximum penalty amount to $500.

In the case of the hypothetical STVR use, the local government may find that it is able to achieve effective enforcement if the adjudicator concludes that a contravention occurred. Not only will the owner of the house need to pay a fine, but the owner will also have had their defences rejected by an independent arbiter.

There is at least one reported case in which the constitutionality of the *Local Government Bylaw Notice Enforcement Act* was challenged on the basis that *Charter* defences made in response to a bylaw notice needed to be heard by a "court with jurisdiction", but that allegation was not considered, because the court dismissed the bylaw notices for other reasons.[5] Bylaw notices remain a frequently used and effective means of non-court bylaw enforcement.

V. REMEDIAL ACTION REQUIREMENTS

Sections 72 to 80 of the *Community Charter* provide municipal councils with the specific power to make orders compelling an owner or occupier of land to remediate a nuisance or hazardous building, structure, tree, drainage or another feature. Regional District boards have a similar, but more limited, power (see the *Local Government Act*, ss. 305 and 309). Often, but not always, the targeted nuisance or hazard also contravenes a bylaw. When this occurs, a municipal council may be in a position to choose either to authorize court proceedings to obtain an injunction to enforce the bylaw or consider making a remedial action order directly against the owner or occupier.

Some councils may consider it preferable to task the municipality's lawyers with getting an injunction enforcing a bylaw, because that means the problem is dealt with by another body. However, an increasing number of councils recognize that ss. 72 to 80 of the *Community Charter* can provide a likely quicker path to an order and one in which the council determines, acting

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[2] *Yard Investment Inc. v. Langley*, 2018 BCSC 1658.
[3] *Hildebrand v. Penticton (City)*, 2020 BCSC 353.
[4] *Pringle v. Peace River (Regional District)*, 2024 BCCA 322.
[5] *Regehr v. North Vancouver (City)*, 2014 BCSC 51.

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reasonably, both what the nuisance or hazard is and what should be done about it. A council may further enforce their order by authorizing the municipality to perform the required action at the owner or occupier's expense (and recover the costs through property taxes, if necessary), if the person does not perform the remedial action requirement in the time required.

Remedial action requirements may be judicially reviewed, but instances in which a court sets aside an order are rare.[6] Council resolutions imposing a remedial action requirement are also subject to the reasonableness standard of review under *Vavilov*, which is more deferential than the correctness standard the court itself uses when deciding whether proven conduct amounts to a contravention of a bylaw.

Remedial action requirements are not a panacea, and they are not suitable for dealing with nuisances or hazards that are created by badly-behaved individuals or a bothersome use. The hypothetical example of the STVR use may not be something that Council can target through a remedial action requirement, if the house is a perfectly safe structure. The problem of the bothersome noise is a result of STVR guests' propensity to make more noise than the average resident.

VI. "SELF-HELP" INCLUDING NUISANCE ABATEMENT

Municipal councils should all be aware that their statutory power to require a person to do something includes a power under the *Community Charter,* s. 17 to authorize the local government do that thing at the person's cost, if the person fails to do that thing. This power, combined with other statutory authorities to regulate and inspect, effectively enables a municipal council to adopt a bylaw providing for remedial orders[7] that are either simpler, or have a different focus, than remedial action requirements. One example of a bylaw that contains a "self-help" provision is an unsightly premises bylaw that: (1) prohibits lawn with weeds and overgrown grass; (2) allows a bylaw enforcement officer to issue an order to the occupant requiring the lawn be mowed within a specified time; and (3) authorizes the municipality to mow the lawn, charge a fee, and add it to taxes following non-compliance with the order.

Self-help is also a prominent feature in "nuisance abatement" bylaws that impose charges for abating nuisances on private property and generally involve criteria for determining when the municipality is entitled to abate a nuisance at the owner's cost. These bylaws raise complex considerations, including what actions qualify as a cost-recoverable service to land, that are beyond the scope of this paper. However, when effectively applied, municipalities often see that owners are more attentive to preventing further prohibited nuisances from occurring, because

[6] See e.g., *North Vancouver (District) v. Wilson*, 2022 BCSC 2014.
[7] *Chase Discount Auto Sales Ltd. v. Waugh*, 2019 BCCA 271.

they want to avoid bylaw-authorized costs from being added to their taxes without going so far as to judicially review costs they consider unreasonably imposed.

Municipal councils should also not forget their "self-help" authority to "authorize the seizure of things unlawfully occupying a portion of a highway or public place" (*Community Charter*, s. 46(2)(a)). Simply removing an advertising sign that has been placed on a sidewalk, contrary to a bylaw, is much quicker enforcement than attempting to issue a municipal ticket information to the person a bylaw enforcement officer thinks placed the sign.

Similarly, a municipality that provides a service can suspend or disconnect that service in response to non-compliance with a bylaw regulating the use of that service. This "self-help" remedy must be exercised in accordance with section 18 of the *Community Charter*, a provision that requires users to receive reasonable notice of disconnection and an opportunity to seek reconsideration in most cases.

VII. SECTION 57 NOTICES

Section 57 of the *Community Charter* provides a procedure for placing a notice on title to a property containing certain building regulation contraventions. Municipalities have had the power to register such notices for over thirty years, and its principal function is to warn prospective purchasers who might buy a property before the contravention is addressed.

Although the notice does not compel the owner to do anything directly, simply flagging a contravention in this way is often seen as a method of bylaw enforcement. Such a notice may make it more difficult for the owner to sell or mortgage the property, using the owner's desire to have "clear title" to compel the owner to remedy the contravention.

VIII. INDIRECT REGULATION, INCLUDING LICENSING CONDITIONS

The emphasis on deference to (reasonable) decisions made by local governments in *Vavilov* and earlier Supreme Court of Canada decisions regarding judicial review has enhanced a local government's ability to make its own determination of whether one of its bylaws is being contravened for the purpose of applying requirements in another bylaw. This practice typically arises with permit requirements. For example, a change in use of a building may require a building permit if it results in a change in the "occupancy". If a person changes their use of a building to something that the municipality says contravenes the applicable land use bylaw, the municipality can take the position that a building permit is required, has not been obtained, and will not be issued, so long as the use is prohibited (as determined by the local government) by the applicable land use bylaw.

Even if the person who is refused a permit seeks judicial review, the court's involvement will be less than if they were considering an enforcement proceeding. For example, a court may find that a refusal based on a particular factor was unreasonable but still decline to order the permit be issued. Instead, the court would direct the permit official to reconsider the application in case there are other factors that might warrant refusal.[8] Sometimes the court orders that the permit be issued.[9]

Expanding on the hypothetical STVR scenario, a municipality could require all persons operating commercial accommodation uses to have a business licence. That municipality could then refuse to give an owner who operates an STVR in their single-family dwelling such a business licence. Further, the municipality could issue bylaw notices for "no business licence", leaving the owner with no clear basis for disputing the notice, given that the operator does not have a business licence, even if they think their commercial use is compliant with zoning.

Very similar circumstances arose in the case of *Mailloux v. Tofino (District)*, 2018 BCSC 2298. In that case, operators of STVRs complained about a municipality not issuing them business licences and subsequently issuing bylaw notices for their operating without a not having business licences. The operators believed that their STVR use was not a zoning bylaw contravention. Because the municipality was enforcing a business licence requirement and was not seeking to enforce specific zoning restrictions directly in a court proceeding, the operators were not able to rely on their alleged compliance with the zoning bylaw as a defence.

The owners sought judicial review of the municipal council's refusal to issue business licences when reconsidering the licensing official's decision. Seeking judicial review meant that the court was considering a different type of claim and applying a different standard of review than if the municipality was seeking an injunction enforcing the zoning bylaw and the operators were alleging compliance as a defence. In the case of a judicial review of a business licence refusal:

> Here, the petitioners brought their proceedings under the [*Judicial Review Procedure Act*]. They do not seek damages. Rather, they claim that District Council wrongly interpreted the 1997 Zoning Bylaw. While they seek an order that the District may not rely on its legal conclusion, they are in effect seeking an order setting aside the decision. As stated in *TeleZone* at para. 26, the focus of judicial review is to quash invalid government decisions.
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> Where an administrative body has expressly denied an application, the Court cannot simply declare the orders away. The only jurisdiction of the Supreme Court to deal with orders or decisions made by an administrative body is through the Court's supervisory jurisdiction on judicial review: *Lockyer-Kash v. British Columbia*

[8] *Turner v. Langley*, 2016 BCSC 1099; *English v. Richmond (City)*, 2021 BCCA 442.
[9] *McKeown v. Port Moody (City)*, 2000 BCSC 73.

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> *(Workers' Compensation Board)*, 2013 BCCA 459 (B.C. C.A.), at paras. 22-23, 25-27; *Shuswap Lake Utilities Ltd. v. British Columbia (Comptroller of Water Rights)*, 2008 BCCA 176 (B.C. C.A.) at paras. 49-53.
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> Whether the petitioners seek declaratory relief or judicial review of District Council's reconsideration decision, the primary issue is the same: whether the 1997 Zoning Bylaw permitted the use of a townhouse dwelling in the RM2 zone as a short-term rental.
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> On an application for judicial review, the record that should be before the Court is the record that was before the decision maker, in this case, District Council, and the record should not be supplemented by the petitioners. Therefore, I will deal with the hearing of this petition as an application for judicial review. In doing so, I will rely on the record that was before District Council, which is contained in the extensive affidavit of Elyse Goatcher-Bergman, Manager of Corporate Services for the respondent District. I will then consider the other relief and orders sought.[10]

Because this was a judicial review procedure, the court considered whether the municipal council's conclusion regarding a zoning contravention was unreasonable:

> The petitioners contend that their short-term rentals are not a business. Rather, it is the property management companies that are operating a business, and all each of the petitioners do is "rent short-term". However, the petitioners pay a fee to a property management company to advertise their units for short-term rentals, take reservations and payment, provide check-in and check-out services, and provide amenities including bathroom amenities. Those who pay "the rent", also pay a hotel tax. The short-term rentals generate rental income. In my view, it was not unreasonable for the District Council to find on reconsideration that each of the petitioners is operating a tourist, traveller, or transient accommodation business on RM2 zoned lands that are not zoned for that purpose.[11]

A later passage of the decision in the *Mailloux* cases suggests that the court considered the municipal council to be correct in its interpretation of the applicable zoning bylaw. It is possible for a court to find a council's decision regarding how its own zoning bylaw applies to a situation for business licensing purposes reasonable and not to be interfered with, even though the court might impose a different "correct" interpretation when considering a claim seeking to obtain an injunction to enforce the zoning bylaw.

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[10] *Mailloux v. Tofino (District)*, 2018 BCSC 2298 at paras. 10-13.

[11] *Mailloux v. Tofino (District)* at para. 130.

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IX. INTERMEDIARY REGULATION

Another trend, reflected in the *Short-Term Rental Accommodations Act*, SBC 2023, c. 32, is to regulate one class of businesses in a manner that encourages that class of business to not assist another prohibited class of business. The *Short-Term Rental Accommodations Act* imposes a (Provincial) requirement on "platform service providers" (Airbnb, VRBO, etc.) to not advertise STVRs that a local government has identified as contravening that local government's business licensing requirements. That means that a local government may be able to effectively enforce its bylaws by causing a property to be pulled from the most popular websites. That de-listed property may cease to attract enough customers to make the prohibited use worthwhile.

The *Short-Term Rental Accommodations Act* relies on unique Provincial legislation, but there is some scope for similar municipal regulation. For example, the City of Vancouver requires a business licence for both the business of "cycle courier services" and individual "cycle couriers". By requiring licensed cycle courier services only employ licensed cycle couriers, the City may be able to ensure that individual couriers are diligent about obtaining and maintaining their licenses because they expect that no employer will jeopardize its own licence by hiring them as unlicensed couriers.[12]

X. CONCLUSION

Bylaw enforcement can be pursued via many paths. While going to court might offer the prospect of big fines or powerful injunctions, those sanctions are typically only necessary or appropriate for the worst or most defiant contraveners. More often "non-court" enforcement tools are sufficient to deal with the contravention, and local government councils or boards and their delegates increasingly prefer to make the key decisions themselves. The courts effectively support this local government-centric approach by being deferential when such local government decisions are judicially reviewed. Consistent with this trend, the Legislature has also increased the number of available non-court enforcement tools over the past few decades.

[12] City of Vancouver, Licence By-Law No. 4450.

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