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12-13-2018

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Citation Details
Douglas C Harris, "Regulating Short-Term Accommodation within Condominium", Case Comment on Semmler v The Owners, Strata Plan NES3039, (13 December 2018) CanLII Connects.

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Regulating Short-Term Accommodation within Condominium

Semmler v The Owners, Strata Plan NES3039, 2018 BCSC 2064

Douglas C Harris*

Owning land within condominium, or strata property as it is known in British Columbia, includes holding an individual strata lot, a share of the common property, and the right to participate in governing the uses of the private and common property. Owners participate in governing through membership and voting rights in a strata corporation which has the responsibility to maintain the common property and the authority to establish bylaws that restrict the use of the common and private property. The corollary of membership and a voice in the affairs of the strata corporation is a duty to accept its governing authority.

Airbnb, Expedia, and other digital platforms that facilitate short-term accommodation have caused governments at many levels, including provinces, regional districts, municipalities, and strata corporations, to consider restricting this use of residential property. In this comment, I review the decision of the British Columbia Supreme Court (BCSC) in *Semmler v The Owners, Strata Plan NES3039*, a case involving a dispute between an owner and strata corporation over short-term accommodation.[1]

Justice Baker's decision in favour of the owner turns on a characterization of short-term accommodation agreements as licences, not leases, and also on a ruling that the fines against the owner were significantly unfair. I set out the reasons for decision in greater detail below, and then suggest that they are not convincing. In particular, although the case turns on a finding that short-term accommodation occur under licences, at certain important points Justice Baker reverts to characterizing short-term accommodation as rentals. In addition, she is too quick to rule that the actions of the strata corporation were significantly unfair.

The decision has shortcomings, but it does provide a useful example of the challenge that collective government within condominium poses to deeply rooted understandings of land ownership within the common law. And at a practical level, strata corporations in BC that wish to restrict short-term accommodation should not ignore the ruling that rental restriction bylaws miss the mark.

The Valley's Edge Resort in Edgewater, BC, is a 201-lot bare land strata property subdivision that combines "cottage" lots and recreational vehicle (RV) lots. Promotional material describes it as "a 4-seasons private resort" that includes a clubhouse, swimming pool, tennis court, and other recreational amenities for the owners and their guests.[2]

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[1] *Semmler v The Owners, Strata Plan NES3039*, 2018 BCSC 2064 [*Semmler*].

[2] Valley's Edge Resort, "About Valley's Edge Resort," online: <https://www.valleysedgeresort.ca/a-about-us/> [accessed: 6 December 2018].

In 2009, in what appears to be an attempt to preserve the recreational orientation of the development, the Valley's Edge strata corporation introduced a Residency Bylaw to ensure that owners used their strata lots as secondary dwellings and not as principal residences or for business purposes:

> 4(11) **The strata lot shall not be used as a principal place of residence**, save and except for bona fide retirees and persons employed by the strata in the management, security, repair or maintenance of the common property of the Strata. Such persons must have the prior written approval of the council. **No strata lot shall be used for any business purpose whatsoever** without prior approval by the council. No inventory for the purpose of a business shall be visibly stored upon any strata lot.[3]

Then in 2015, in an attempt to stop owners from using their strata lots to provide short-term accommodation, the strata corporation passed the following Rental Restriction Bylaw Amendment:

> 4(47) No Strata Lot may be rented for a term of less than thirty (30) consecutive days.[4]

At the municipal level, the Regional District of the East Kootenay (RDEK) does not appear to have turned its attention directly to short term accommodation. However, it has zoned according to land use, and the zoning map for Edgewater shows the cottage lots within Valley's Edge as R-1(B) Single Family Residential and the RV lots as RES-1 Recreation Accommodation.[5]

Kristen Semmler purchased a cottage strata lot in Valley's Edge in 2008. Since 2010, she has advertised it for short-term accommodation through her property management company.

Sometime after passing the Rental Restriction Bylaw, Valley's Edge began to fine Semmler for bylaw infractions. In response, Semmler petitioned the BCSC to quash the fines and to order that the bylaw did not apply to short-term accommodation. In turn, the strata corporation sought an order to enforce compliance with the Rental Restriction Bylaw and the prohibition on business use in the Residency Bylaws. The strata corporation also argued that short-term accommodation violated the RDEK's residential zoning.

Justice Baker held in favour of Semmler. In doing so, she ruled that neither the RDEK's single-family residential zoning nor the strata corporation's prohibitions

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[3] Valley's Edge Resort, "Disclosure and Governance," online: <https://www.valleysedgeresort.ca/a-disclosure-and-governance/> [accessed 12 December 2018], "Residency Bylaw Amendment," 1 April 2009 [emphasis added].

[4] *Ibid* "Rental Restriction Bylaw Amendment," 10 March 2015.

[5] RDEK, Columbia Valley Zoning Consolidation, Bylaw No. 900, 1992, Edgewater Zoning Map, online: <ftp://ftp.rdek.bc.ca/planningbylaws/bl900_ucv_zoning_consalidated/bl900_ucv_zoning_edgewater_a10_jun18.pdf> [accessed: 12 December 2018].

on business use and short-term rentals applied to Semmler's use of her strata lot. Justice Baker also ruled that it would be significantly unfair to enforce the fines against Semmler because she had purchased the strata lot with a reasonable expectation that she could use it for short-term accommodation to paying customers.

Dealing first with the Residency Bylaw, Justice Baker held that the prohibition on "any business purpose whatsoever" banned the locating or running of a business from a strata lot, but not the selling of short-term accommodation.[6] This ruling seems consistent with what appears to be the bylaw's intent, which is to maintain the "resort" or recreational environment of Valley's Edge by prohibiting the use of strata lots as principal residences or as locations from which to operate a business. Short-term accommodation would not diminish this recreation orientation and so does not appear to contravene the purpose behind the bylaw.

What then about the RDEK's residential zoning? Having concluded that selling short-term accommodation was not a business purpose, Justice Baker ruled: "Nothing in zoning bylaw R-1(B) prohibits the rental of a dwelling house."[7] In short, the residential zoning did not preclude rentals, including short-term accommodation rentals.

There are two difficulties with this characterization of short-term accommodation as a rental and thus falling within residential zoning. First, although Justice Baker ruled that selling short-term accommodation was not captured by the prohibition on business purposes in the Residency Bylaw, it clearly is a business or commercial purpose and thus difficult to fit within residential zoning. In *Nanaimo (Regional District) v Saccomani*, the BCSC grappled directly with the question of whether short-term accommodation was a permitted use within residential zoning and concluded that it was not: "Short-term accommodation and residential accommodation are two completely different uses of land."[8] This decision required Justice Baker's attention.

The other difficulty with Justice Baker's characterization of short-term accommodation as "the rental of a dwelling house" is that it is inconsistent with her next finding that Semmler was not renting her strata lot but licensing it.[9] The characterization of short-term accommodation agreements as licences follows *HighStreet Accommodations Ltd. v The Owners, Strata Plan BCS2478* in which a hospitality management company that rented a strata lot to sell short-term accommodation attempted to use the protections in the *Strata Property Act* for existing tenants to avoid a new bylaw prohibiting short-term accommodation.[10] The BCSC ruled that the occupants used the strata lot under licences, not leases, and therefore that the company could not rely on the protections for existing tenants.

[6] *Semmler*, *supra* note 1, at para 23.
[7] *Ibid* at para 25.
[8] *Nanaimo (Regional District) v Saccomani*, 2018 BCSC 752 at para 54.
[9] *Semmler*, *supra* note 1 at para 46.
[10] *HighStreet Accommodations Ltd. v The Owners, Strata Plan BCS2478*, 2017 BCSC 1039.

Following *Highstreet*, Justice Baker ruled that Semmler granted licences for her strata lot, not leases, and therefore the Rental Restriction Bylaw did not apply. This strict reading of "rented" seems at odds with the intent of the bylaw and it discounts the widespread use of "rental" when describing short-term accommodation. Moreover, the ruling that short-term accommodation occurs under a licence is not consistent with her preceding determination that, for the purposes of the RDEK's residential zoning designation, Semmler was renting her strata lot.

In the final part of the judgment, Justice Baker turned to the two-part test set out in *Dollan v The Owners, Strata Plan BCS 1589* for determining when the actions of a strata corporation are "significantly unfair."[11] In applying this test, Justice Baker ruled, first, that when Semmler purchased the strata lot in Valley's Edge she had a reasonable expectation "that she would be permitted to generate income through the rental of her strata lot"[12] and, second, that the Rental Restriction Bylaw violated this reasonable expectation and, thus, was significantly unfair.[13]

The first ruling misconstrues what it is reasonable for owners to expect within strata property. Semmler may well have expected to earn income from selling short-term accommodation when she purchased her strata lot, but she had no reasonable expectation that the permitted uses of strata lots would remain unchanged. The collective power of owners, through a strata corporation, to govern the uses of private lots is one of the principal features of strata property ownership, and strata corporations have the capacity under the *Strata Property Act* to amend their bylaws and thus to change permitted uses. As a result, there is no reasonable expectation that the permitted uses at the time of purchase will remain permitted uses if the owners, through a bylaw amendment, decide otherwise.

Justice Baker was also too quick to find that the strata corporation's actions were significantly unfair. This finding seems animated by the fact that the resort's developer owned and rented the RV lots. As an owner of strata lots, the developer had voted in favour of the Rental Restriction Bylaw, but as owner-developer was not subject to the bylaw under a provision exempting developers and original purchasers in the *Strata Property Act*.[14] However, Justice Baker found nothing improper in the owner-developer's exercise of its voting rights.[15] Moreover, there was no indication that it was using the RV lots for short-term accommodation in a manner that contravened the Rental Restriction Bylaw. The lots are currently advertised for 2-month minimum terms.[16] Indeed, given the absence of procedural impropriety and of any suggestion that the owner-developer was using its voting power in the strata corporation to target particular owners with oppressive bylaws,

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[11] *Dollan v The Owners, Strata Plan BCS 1589*, 2012 BCCA 44.
[12] *Semmler*, *supra* note 1 at para 63.
[13] *Ibid* at para 83.
[14] *Ibid* at para 75.
[15] *Ibid* at para at 78.
[16] Valley's Edge Resort, "Seasonal Rentals at Valley's Edge Resort," online: <https://www.valleysedgeresort.ca/a-seasonal-rentals/> [accessed: 12 December 2018].

it is hard to find a basis for concluding that the actions of the strata corporation were "significantly unfair".

The reasons for decisions are not convincing, but they help to reveal the challenge that condominium government presents to deeply rooted understandings within the common law about what it means to be an owner of land. Whether short-term accommodation is labeled licensing or renting, the power of an owner to make time-limited grants of possession is a well-established incidence of ownership. In some jurisdictions, courts have knocked back the attempts of condominium corporations to restrict rentals on the basis that the statutory authority for condominium corporations is insufficiently clear for them to take away such an important incidence of ownership.[17] The reflex of common law courts is to preserve the incidents of land ownership, and thus to be suspicious of collective power to curtail them.

Similarly, there is a wariness within common law doctrine, particularly that dealing with positive and restrictive covenants, of private rule-making and rule-enforcing authority over the uses of land.[18] Condominium constructs exactly such a private governing regime. Indeed, a structure of private government with authority to restrict the uses of land and assess fees is one of the principal features of condominium. Given the caution within common law doctrine about private attempts to burden land with restrictions and owners with responsibilities, it should not be surprising that the courts find ways to curtail and restrain the governing authority of condominium government.

Whether correctly decided or not, and whatever the underlying influences, from a practical standpoint, strata corporations in BC that wish to restrict short-term accommodation should take into account the finding in *Semmler* that short-term accommodation occurs under a licence, not a lease, and therefore that the language of renting or leasing in a bylaw may not capture it. This much is clear. It is also clear that the struggle to find an appropriate balance between the individual interests of owners and the collective government of owners will be an enduring feature of ownership embedded within condominium.

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[17] See *Owners Corporation PS 501391P v Balcombe*, [2016] VSC 384 at para 124, in which the Victoria Supreme Court in Australia concluded that the state's condominium legislation did not give owners corporations the authority to prohibit short-term letting:

> In summary, I do not consider that the Parliament conferred powers on bodies corporate for the Statutory Purpose of substantially interfering with rights and privileges usually attendant upon freehold owners.

[18] For a discussion of covenants in the context of condominium, see Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (London: Routledge, 2017), 12-14, 60-61.