

**BULL, HOUSSER & TUPPER****BARRISTERS & SOLICITORS**  
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Our File No.: 99-3867  
Date: May 4, 1999Resort Municipality of Whistler  
4381 Blackcomb Way  
Whistler, BC  
V0N 1B4Alan Gelfand and Lenore Gelfand  
6240 Ash Street  
Vancouver, BC  
V5Z 3G9

Dear Sirs/Mesdames:

**Re: Strata Lot 5, District Lots 3903 and 4214  
Strata Plan VR 2482 (the "Property")**

We have been asked to provide our opinion with respect to a matter in dispute between the Resort Municipality of Whistler ("Whistler") and Alan Gelfand and Lenore Gelfand ("Gelfands") the owners of the Property. At the outset, it should be noted that the following opinion is not intended by the parties to be binding on either of them. A final, conclusive and binding determination of the dispute between the parties could only be determined by a court of competent jurisdiction.

We have reviewed the Original LUC, Amended LUC, Covenant and Kent Memo (as those documents are hereinafter defined) as well as correspondence between the solicitors for Whistler and the Gelfands and submissions made directly to us by the Gelfands and their solicitor (copies enclosed). The delivery of this opinion was somewhat delayed by our request that Whistler search its records to determine whether it had copies of a Technical Concept Plan and Development Approval application in respect of Area L. We were advised by Mike Purcell that Whistler could not find such documents and so we have proceeded to finalize our opinion on the basis of the information available to us.

*A Member of***MCMILLAN BULL CASGRAIN**

VANCOUVER

SURREY

TORONTO

MONTREAL

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**I. SUMMARY OF OPINION**

While both Whistler's position and the Gelfands' position have merit, it is our view, based on the facts and circumstances as we understand them and our review of the documents provided to us that it is unlikely that Whistler would be successful in a court application for injunctive relief, based on the Amended LUC and/or the Covenant to prevent the Gelfands from using the Property in its current manner, as set out in Section 10 of the Facts discussed below.

We do not render any opinion regarding the likelihood of success of Action No. 982451 commenced against the Gelfands by some of their neighbours.

**II. FACTS**

1. The Property is situated at 4930 Horstman Lane in Whistler. The Property is a subdivided portion of the Lands which are subject to the Original LUC and Amended LUC.
2. Registered against title to the Property is Land Use Contract G2520 ("Original LUC") as modified by Land Use Contract GB77455 ("Amended LUC").
3. The Original LUC was registered against title to the Lands on January 11, 1979.
4. Sections 3, 4 and 5 of the Original LUC are as set out below.

**3. PERMITTED USES OF THE LANDS:**

The Lands and the various portions thereof shall be used for the uses and purposes specified in Schedule "C" hereto and for no other uses or purposes.

**4. AREA DENSITY PLAN FOR THE LANDS:**

The Developers acknowledge and agree that without restricting in any way the effect and restriction of the other restrictions contained in this Land Use Contract, no portion of the Lands shall be used and no development or subdivision plan shall be approved nor building permit issued which has the effect of creating or allowing the density for that development or subdivision in excess of the maximum number of BU's per Zone as permitted by Schedule "C".

**5. DEVELOPMENT ZONES:**

The Developers agree that the use and development of the Lands is further restricted by the requirements as set out in Schedules "C" and "D" hereto and that only certain types of development may be constructed in certain of the

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Zones as shown on Schedule "D" hereto. Accordingly the Developers are and shall be limited to the permitted uses and purposes in Schedule "C" as they relate to the Zones in Schedule "D". These restrictions shall be in addition to all other restrictions herein contained. No building, structure or improvement shall be constructed, developed or used upon the Lands except in compliance with Schedule "C" and "D" hereto."

5. Section 1 of the Original LUC contains the following definitions:

"Lodge" shall mean a building intended for transient occupancy which contains sleeping units and may contain restaurant and bar facilities primarily used by the occupants.

"Single Residential Dwelling" shall mean a building consisting of one Dwelling Unit (other than a mobile home) which is occupied or intended to be occupied seasonally or permanently by one family or six or fewer unrelated persons.

"Zones" or "Zones" shall mean one or more of "Zone 1", "Zone 2" or "Zone 3" as shown on Schedule "D" hereto, the permitted uses and restrictions for each of which are described in Schedule "C" hereto.

Schedule "D" (a copy of which is attached hereto) divided the Lands affected by the Original LUC into 3 Zones. Schedule "C" to the Original LUC prescribed the permitted uses for each of Zone 1, Zone 2 and Zone 3. For the purposes of this opinion, the following permitted uses under the Original LUC are pertinent:

**Zone 1** - lodges, hotels, hostels and multiple residential dwellings were permitted while single residential dwellings were not.

**Zone 2** - multiple residential dwellings, duplex residential dwellings, single residential dwellings and lodges were permitted.

**Zone 3** - multiple residential dwellings, duplex residential dwellings, single residential dwellings were permitted but lodges were not.

6. The Property was situated in Zone 3 under the Original LUC.
7. On July 13, 1992 the Amended LUC was registered against the Lands replacing the Original LUC. The Amended LUC is different from the Original LUC in many respects.

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Sections 3, 4 and 5 of the Amended LUC are set out below:

“3. PERMITTED USES OF THE LANDS

The Lands and the various portions thereof and all buildings, structures and improvements thereon may be used for the uses and purposes permitted in Schedule “C” hereto and for no other uses or purposes and shall be used only in accordance with the regulations, restrictions and provisions contained in this Land Use Contract.

4. AREA DENSITY PLAN FOR THE LANDS

The Developers acknowledge and agree that without limiting in any way the force and effect of other provisions and restrictions contained in this Land Use Contract, no portion of the Lands shall be used and no development or subdivision plan shall be approved nor building permit issued which has the result of authorizing or allowing a greater intensity of development than the maximum number of BU’s on the Lands that is provided for in clause 16 of this Land Use Contract, or greater than the maximum number of BU’s permitted in each Zone as provided for in Schedule “C” to this Land Use Contract.

5. DEVELOPMENT ZONES

The Developers agree that the use and development of the Lands is further limited and restricted by the limitations and requirements set out in Schedule “C” hereto with the effect that only certain types of development may be constructed in certain of the Zones as shown on the plan attached as Schedule “B” hereto. Accordingly the Developers are and shall be limited to the permitted uses of land, buildings and structures prescribed in Schedule “C” as they relate to the Zones shown in Schedule “B”. These restrictions shall be in addition to all other restrictions herein contained. No part of the Lands shall be used and no building, structure or improvement on the Lands shall be placed, constructed, reconstructed, altered, added to, developed or occupied except in compliance with Schedules “C” and “B” hereto.”

8. Section 1 of the Amended LUC contains the following definitions:

“Lodge” means a building comprising forty (40) Sleeping Units or less for the Temporary Use and occupation by tourists or transients and which may where provided for in the Zone contain commercial uses pursuant to Schedule C and which commercial uses are wholly contained within the Lodge.

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**"Single Residential Building"** shall mean a building consisting of one Dwelling Unit (other than a mobile home) which is occupied or intended to be occupied seasonally or permanently by one family or six or fewer unrelated persons living together as a single domestic unit provided that where permitted in the Zone a Single Residential Building may contain an Auxiliary Dwelling Unit having a floor area not exceeding the lesser of one-third of the aggregate floor area of the building or 80 sq. metres.

**"Temporary Use"** means the use and occupation of a Sleeping Unit, Dwelling Unit or a bed or Sleeping Unit in a Hostel for not more than four consecutive weeks and not more than a total of eight weeks in a calendar year by the same person or persons.

**"Zone"** or **"Zones"** shall mean either or both of "Zone 1" and "Zone 2" as shown on Schedule "B" hereto, the permitted uses of land and restrictions pertaining thereto are described in Schedule "C" hereto.

9. Schedule "B" to the Amended LUC (a copy of which is attached hereto) divided the Lands into two zones; Zone 1 and Zone 2. Zone 1 and Zone 2 are further divided into 16 areas, A to P. The Property is situated in Zone 2 Area L on Schedule "B" to the Amended LUC. Attached as a legend to Schedule "B" is a chart entitled "Build-Out Summary Amended Land Use Contract Design Workshop Inc. March 1988". That chart lists the uses in Area L as multi-residential, duplex and single. Lodge is not mentioned as a use in Area L although it is mentioned in other areas. The following note is also listed on Schedule "B":

"Note: This plan forms part of the Blackcomb Land Use Contract and is provided for reference purposes. In the event of any variations or inconsistencies between this Plan and the Land Use Contract, the provisions of the Land Use Contract shall govern."

10. Constructed on the Property is a building similar in design and construction to the other buildings in the neighbourhood surrounding it. The issue of contention between the Gelfands and Whistler is the use of that building. It is acknowledged by the parties that the building on the Property is used at times as a Lodge for the short-term accommodation of tourists and others on a for-profit basis.
11. Five of the Gelfands' neighbours living on Horstman Lane have commenced an action in the Supreme Court of British Columbia under action no. A982451 seeking a permanent injunction restraining the Gelfands from operating a commercial tourist accommodation on the Property.
12. Registered against the Property on September 29, 1989 under no. GC125596 is a covenant under Section 215 (now 219) of the *Land Title Act* (the "Covenant").

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Section 1 of the Covenant states:

"No buildings or structures (other than ski lifts or other lifts) may be constructed on the Lands other than in accordance with each of:

- a. The design guidelines attached hereto as Schedule "A"; and
- b. The terms and conditions of this Covenant."

Section 2 of the Covenant states:

"Without in any way limiting, or deviating from, the provisions of Section 1 hereof, the Lands may not be used other than for ski lifts and other lifts and for the purpose of constructing a single family bare land strata lot project containing not more than 33 bare land strata lots substantially as shown on the Plan attached hereto as Schedule 'B' (each of which is called "Strata Lot") and utilizing not more than 198BU-s bed units (as defined in the Land Use Contract) and shall be subject to the following restrictions:

- a. no buildings or structures (other than ski lifts or other lifts) may be constructed on the Lands other than within the footprint envelopes identified in the plan attached hereto as Schedule B (the "footprint envelopes") unless otherwise permitted by the Coordinating Architect (as defined in Schedule A) and the Municipality;
- b. the density of buildings or structures constructed within the footprint envelopes shall not exceed the maximum density for each strata lot set out in Schedule C;
- c. the provision for parking made with respect to each strata lot to be created within the lands shall be in compliance with the Land Use Contract, except as otherwise permitted by the Municipality; and
- d. the height of buildings or structures constructed within the footprint envelopes shall not exceed the maximum height for each strata lot set out in Schedule C."

Schedule "A" to the Covenant sets out design guidelines for buildings being constructed in Horstman Estates which includes the Property.

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Part I of Schedule "A" entitled "Introduction" includes the following:

"The Phase 3 Development Plan for the resort on Blackcomb Mountain identified Parcel 32 as a single family bare land strata subdivision to be called Horstman Estates. A total of 33 strata lots ranging in size from 8,000 to 45,000 sq. ft. will be situated on 14 acres of land along the lower reaches of Blackcomb Mountain."

Part II of Schedule "A" entitled "Objectives" contains the following:

"Horstman Estates will, in every way, be among the finest single family communities to be developed at Whistler."

Part IV of Schedule "A" entitled "Zoning Regulations" contains the following:

"The following zoning regulations are part of the development approval specific to Parcel 32 (Horstman Estates)...:

- A. Permitted Use - Permitted Use on each strata lot is restricted to single family dwellings only. No accessory buildings will be permitted. A single self-contained suite may be allowed within a dwelling provided that the additional parking stalls required conform to the requirements set out in the zoning regulations and, in the opinion of the coordinating architect, do not compromise integrity of the site plan and the character of the subdivision."

Attached as Appendix C to Schedule "A" of the Covenant is the "Design Guidelines Conformance Checklist" ("Checklist"). In the case of the house constructed on the Property the Gelfands completed and submitted to Whistler a Checklist. Under the heading "Use" the applicant submitted "single family with suite".

13. In a memo to Council dated March 18, 1998 Peter Kent, the former administrator of Whistler summarized the major elements of the Amended LUC ("Kent Memo"). Section 18 of the Kent Memo states as follows:

"The present Contract divides the Contract lands into three zones based on the original concept plan for development of the lands. Specific uses and regulations governing the development of the lands are specified for each zone. However, changing marking conditions, a revised ski lift and base facilities plan, the proposed CP golf course, a portion of which is located on the Contract Lands, have necessitated changes in the boundaries of these zones. In addition, the former Zone 2 and Zone 3 have been consolidated into a single Zone 2 as the only significant difference between these zones was a small difference in height restrictions for multiple residential dwellings and the exclusion of lodges from Zone 3. As well, the five acre parcel which is

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designated as the site for school education facilities, fine arts facilities or other uses permitted by the Municipality has been transferred from Zone 2 to Zone 1.

### III. WHISTLER'S POSITION

Whistler's position can be summarized as follows:

1. The regulation governing land use on the Lands and the Property is the Amended LUC.
2. Section 3 of the Amended LUC provides in part:

"Lands...and all buildings... may be used for the uses and purposes permitted in Schedule "C" hereto and for no other uses and purposes..."
3. Pursuant to Schedule "C", the Property is situated in Zone 2 and Zone 2 permits generally among other uses, both single residential buildings and lodges.
4. Section 5 of the Amended LUC provides:

"The Developers agree that the use and development of the Lands is further limited and restricted by the limitations and requirements set out in Schedule "C" hereto with the effect that only certain types of development may be constructed in certain of the Zones as shown on the Plan attached as Schedule "B" hereto. Accordingly, the Developers are and shall be limited to the permitted uses of land, buildings and structures described in Schedule "C" as they relate to the Zones shown on Schedule "B". These restrictions shall be in addition to all other restrictions herein contained. No part of the Lands shall be used and no building, structure or improvement on the Lands shall be placed, constructed, reconstructed, altered, added to, developed or occupied except in compliance with Schedules "C" and "B" hereto."
5. Section 29 of the Amended LUC provides that Schedule B forms part of the Amended LUC.
6. The wide range of uses permitted by Schedule "C" are circumscribed and further restricted by Schedule "B" and both schedules operate together and are intended to be read together to determine the permitted uses of the Property.
7. Schedule "B" indicates that the Property is situated in Area L. In Area L the only permitted use of land, buildings or structures is multi-residential, duplex and single and not lodge.

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**IV. GELFANDS' POSITION**

The Gelfands' position can be summarized as follows:

1. Section 3 of the Amended LUC provides that the Lands and the Property may be used for the uses and purposes permitted in Schedule "C".
2. Section 5 of the Amended LUC provides that the use and development of the Lands and the Property is further limited and restricted by the limitations and requirements set out in Schedule "C" with the effect that only certain types of development may be constructed in certain of Zones as shown on the Plan attached as Schedule "B".
3. Zones are defined in the Amended LUC as meaning either or both of Zone 1 and Zone 2.
4. The Property is situated in Zone 2.
5. Schedule "C" provides that in Zone 2 the use of land, buildings and structures is restricted to a number of uses including single residential buildings and lodges.
6. The legend in Schedule "B" does not further limit the permitted uses of the Property in the manner contended by Whistler for the following reasons:
  - a. Such interpretation is inconsistent with the wording of Sections 3, 5 and 28 of the Amended LUC.
  - b. Schedule "B" includes a specific disclaimer which provides that the plan is provided for reference purposes and in the event of any variations or inconsistencies between the plan and the Amended LUC the provisions of the Amended LUC shall govern.
  - c. The legend does not contain all of the uses permitted in Schedule "C". The legend does not refer to skiing facilities or golf courses even though those are uses permitted in Schedule "C" and uses existing and permitted on portions of the Lands.
  - d. If the parties intended to further restrict the uses of the Lands beyond that set out in Schedule "C" they could have done that easily by providing specific language in the Amended LUC particularly in Section 5 and 28. Due to the type, size and legibility of Schedule "B", it is difficult to imagine that the parties intended to fundamentally restrict the right of property owners in such an obtuse manner when they had the opportunity to do so in a clear and ambiguous manner.

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- e. The Covenant deals with the exterior design of buildings in Horstman Estates and not to their use. The building was constructed with the approval of Whistler and in accordance with the provisions of the Covenant.

V. ANALYSIS1. Amended LUC

Simply put, the principal issue between the parties is the effect of Schedule "B" of the Amended LUC.

In order for Whistler's position to prevail one must conclude that the limitations set out in Schedule "C" to the Amended LUC are further refined by the legend in Schedule "B" with the result that there are slightly different land use regulations for each of the sixteen different areas of Zone 1 and Zone 2 which are described in Schedule "B" to the Amended LUC.

Section 5 is the principal section of the Amended LUC which regulates land use. As evidenced by the contrasting positions of Whistler and the Gelfands, Section 5 is capable of more than one interpretation.

In attempting to reconcile the conflicting interpretations of Section 5 in particular and the Amended LUC in general, assistance can be gained by considering other documents including the Original LUC and the Kent Memo.

In support of the Gelfands' position the first two sentences of Section 5 of the Amended LUC limit the permitted uses in the Zones to those uses set out in Schedule "C". The reference to Schedule "B" in the second sentence is used merely to describe the location of the Zones. This is consistent with the Original LUC which used Schedule "D" (replaced by Schedule "B" in the Amended LUC) for the sole purpose of geographically defining the boundaries of the Zones. (In the Original LUC there were three and not two Zones.) Schedule "D" in the Original LUC did not further divide the Zones into areas and made no reference to any restrictions on use. Further, the reference to Schedule "B" in the first sentence of Section 5 has been removed suggesting that Schedule "B" was not intended to be related to the issue of land use. Also, the definition of Zone provides that the permitted uses of land in each of the Zones are described in Schedule "C" and not Schedule "C" and "B". In addition, Section 28 of the Amended LUC provides that the Amended LUC may be amended by resolution of Whistler Council except where the amendments alter the uses permitted in Schedule "C" in which case the amendment must be authorized by bylaw. The Gelfands submit that if Schedule "B" was intended to regulate land use an amendment to Schedule "B" would also be required to be authorized by bylaw.

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In support of Whistler's position the third sentence of Section 5 provides that the restrictions contained in the first two sentences shall be "in addition to all of the restrictions herein contained". Section 29 of the Amended LUC provides that all schedules, including Schedule "B", are incorporated and made part of the Amended LUC. Accordingly, it can be argued that the restrictions in Section 5 are not limited solely to the restrictions set out in Schedule "C" but include restrictions found elsewhere in the Amended LUC including Schedule "B" and the legend contained therein. Also the last sentence of Section 5 of the Amended LUC states in part that "no part of the land shall be used and no building shall be occupied except in compliance with Schedule "B" and "C". An argument can be made that that sentence also should be construed more broadly than the rest of Section 5 so as to incorporate all of Schedule "B", including the legend, as regulating land use.

In our view, Schedule "D" in the Original LUC was used merely to describe the location of the Zones. Schedule "B" replaced Schedule "D" in the Amended LUC. If the parties intended that Schedule "B" in the Amended LUC was to be regarded in such a significantly different manner from Schedule "D" in the Original LUC (i.e., so as to regulate land use rather than merely defining the boundaries of the Zones) one would expect to see a significant change in the language of Section 5 or elsewhere in the Amended LUC.

Further, we are not inclined to the broader interpretation that could be drawn from the wording of the last two sentences of Section 5. Firstly, the existence of the disclaimer in Schedule "B" tends to diminish the notion that it was intended to regulate land use. The note attached indicates that Schedule "B" is provided for reference purposes which suggests that it is intended to be supportive rather than determinative. Secondly, the last sentence in Section 5 of the Amended LUC is identical to the last sentence in Section 5 of the Original LUC. As there is no reference in Schedule "D" in the Original LUC to any regulation of land use it is difficult to assume that the same language in the Amended LUC was intended to have a totally different meaning.

Further, the definition of Zone in the Amended LUC limits the land use within those Zones to the permitted uses set out in Schedule "C". There is no reference to Schedule "B" which one would expect if the parties intended that land use was to be regulated by Schedule "B".

Finally, Section 18 of the Kent Memo explaining the changes from the Original LUC to the Amended LUC makes no reference to land use being different in different parts of Zone 1 and Zone 2. It makes no reference to the division of Zone 1 and Zone 2 into sixteen separate areas or to the fact that those sixteen separate areas should have different land uses. In fact, Section 18 of the Kent Memo seems to imply the opposite. It states that the former Zone 2 and Zone 3 in the Original LUC were to be consolidated into a single Zone 2 "as the only significant difference between these Zones was a small difference in height restrictions for multiple residential dwelling units and the exclusion of lodges from Zone 3" (emphasis added). Under the Original LUC the Property was situated in Zone 3 which did not permit lodges. The inference in Section 18 of the Kent Memo suggests that Zone 3 was to be eliminated and those properties in Zone 3 were to be included in Zone 2 which specifically permitted lodges.

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In light of the foregoing, it is our view that, on the basis of the facts as we understand them, it is unlikely that Whistler would be successful in obtaining injunctive relief against the Gelfands concerning their use of the Property as described in Section 10 of the Facts based upon the provisions of the Amended LUC.

2. Covenant

Section 219 of the *Land Title Act* provides, inter alia, that a covenant of a negative or positive nature may be registered against land and may contain provisions in respect of the use of land, the use of buildings erected on the land and that land is not to be built on except in accordance with the terms of the Covenant. The regulatory aspect of the Covenant is found in Sections 1 and 2 of the Covenant.

Section 1 of the Covenant deals with construction on the Property. Section 2 of the Covenant refers to the use of the Property but provides that the Property may not be used other than for "the purpose of constructing a single family bare land strata lot project containing not more than 33 bare land strata lots". The restrictions set out in Section 2 concerning the use of the Property for construction of the single family bare land strata lot project all refer to the initial construction of buildings in that project. There is no reference in the body of the Covenant to regulating the use of the Property or the use of buildings on the Property once those buildings have been constructed.

While there are references in the Design Guidelines attached as Schedule "A" to the Covenant to the fact that the "Permitted Use on each strata lot is restricted to single family dwellings only" the only reference to those Design Guidelines in the body of the Covenant is found in Section 1 which deals solely with the construction and not use of the buildings. As a general rule, any ambiguity in a restrictive covenant is usually resolved in favour of the free use of the property. (*Gubbels v. Anderson* (1994) 91 B.C.L.R. (2d) 379).

In light of the foregoing it is our view that, on the basis of the facts as we understand them, it is unlikely that Whistler would be successful in obtaining injunctive relief against the Gelfands concerning their use of the Property as described in Section 10 of the Facts based upon the provisions of the Covenant.

Yours truly,

BULL, HOUSSER & TUPPER



BRIAN E. TAYLOR

BET/jn/716325  
Encs.