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Our File No.: 99-3867  
Date: September 27, 1999

## BY FAX AND MAIL

Resort Municipality of Whistler  
4381 Blackcomb Way  
Whistler, BC  
V0N 1B4  
Attention: Mike Kirkegaard

Alan Gelfand and Lenore Gelfand  
6240 Ash Street  
Vancouver, BC  
V5Z 3G9

Dear Sirs/Mesdames:

**Re: Strata Lot 5, District Lots 3903 and 4212  
Strata Plan VR 2482 (the "Property")**

On May 4, 1999, we provided you with the following 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.”

The above opinion was provided in the absence of any information concerning the Development Approval Process concerning the Lands. As noted in our letter, we had requested such information but had been advised by Whistler that the information was not available. As such, we provided you with our prior opinion in the absence of that information.

*A Member of*  
MCMILLAN BULL CASGRAIN

Whistler has since been able to locate and provide us with further documentation concerning the Development Approval process and has asked us to reconsider our opinion in light of this further information. This opinion should be read in conjunction with our earlier opinion.

## **FACTS**

The further documents referred to above were provided to us in a letter of July 28, 1999 from Mike Kirkegaard, Senior Planner at Whistler, enclosing the following documents:

1. Full size copy of Schedule "B";
2. Minutes from Whistler Council regular meeting of August 14, 1989, describing Council Resolution approving BPA-27 (Building Permit Application No. 27) subject to specified conditions;
3. Approved drawings for BPA-27;
4. August 8, 1989 Staff Report presenting staff's review of BPA-27 for August 14, 1989 Council Meeting;
5. August 3, 1989 letter from Intrawest Properties Ltd. (applicant) to Whistler regarding Development Approval requested for Hortsman Estates including both lands within the Amended LUC area (BPA-27) and outside the Amended LUC area (Zoning Amendment Bylaw No. 742);
6. Minutes from Whistler Council Meeting of August 14, 1989 describing Council Resolution adopting Zoning Amendment Bylaw No. 742;
7. April 5, 1989 Staff Report presenting staff's review of Rezoning Application 111 (Bylaw No. 742);
8. January 26, 1989 letter from Intrawest to Whistler regarding Rezoning Application 111; and
9. Design Guidelines Conformance Checklist.

Mr. Kirkegaard, in his letter of July 28, 1999, raised a number of arguments as to how he felt the further documents might effect our opinion of May 4, 1999. By letters of August 9, 24 and 25, 1999, Mr. Gelfand responded to Mr. Kirkegaard's arguments. While we are grateful to both Mr. Kirkegaard and Mr. Gelfand for their input, we don't intend to recreate their arguments in this letter.

The further documents generally relate to the Development Approval process set out in Section 7 of the Amended LUC. Following is a brief synopsis of some of the pertinent subsections of Section 7:

Section 7(a)

- Provides that Schedule "B" constitutes the Development Concept Proposal for the Lands.

Section 7(d)

- Provides that no portion of the Lands shall be built upon, improved or developed in any way until Development Approval has been obtained from the Municipality.

Section 7(f)

- Provides that an application for Development Approval shall include writing and plans containing information including a Development Programme which shall include:
  - gross floor area of all buildings
  - floor space ratio
  - site coverage
  - total number of Dwelling Units and Sleeping Units and in the case of Hostels, beds
  - breakdown by area of Dwelling Units and Sleeping Units and in the case of Hostels, beds, by area

Section 7(g)

- Provides that the Municipality will approve an application for Development Approval provided that the application for Development Approval is substantially in conformance with, among other things, the Approved Development Concept Plan and the Amended Land Use Contract.

Section 7(h)

- Provides that no Building Permit will be issued except in accordance with and upon Development Approval.

Section 7(l)

- Provides that the Municipality's obligation to give Development Approval shall be exercised by resolution of Council.

Also of some significance are the provisions of Section 9 of the Amended LUC dealing with parking. Section 9 provides that all off-street parking and loading spaces shall be provided, located and constructed in accordance with the requirements set out in Schedule "K". Following are some of the salient features of Schedule "K":

Section 2.1

- Parking and loading spaces shall be provided and continuously maintained in accordance with Schedule “K-1”.

Sections 3.1 and 3.2

- Parking spaces for disabled persons shall be provided at one space per forty Sleeping Units and shall be located adjacent to a main entrance of a building for which the parking is required and marked with a sign identifying each space reserved for such parking.

Section 5.4.1

- The maximum gradient of a driveway shall not exceed 6% within a distance of 3 metres from the edge of pavement of a municipal or private roadway.

Section 5.4.2

- The maximum permitted gradient for driveways which access off-street parking for all commercial, lodge, hotel, hostel and indoor recreation uses is 6%.

Section 5.4.3

- For driveways that slope downwards from a road for all single, duplex and multiple residential units the maximum average gradient shall not exceed 10% or 15% over one portion of a driveway not exceeding 3 metres in length.

Section 5.4.4

- Provides that for driveways that slope upwards from a road for all single, duplex and multiple residential uses the maximum gradient shall not exceed an amount based upon the formulae set out in that section.

Schedule K-1

- For a hotel, lodge and hostel with 0-100 Sleeping Units, the required parking spaces are 0.176 spaces per 10 square metres of residential floor area or 0.75 spaces per Sleeping Unit, whichever is greater, and the required loading spaces are one space for each tourist accommodation building.

- For residential buildings containing 2 or less Dwelling Units, the required parking is 2 spaces per Dwelling Unit with a gross floor area of 235 square metres or less and 3 spaces per Dwelling Unit with a gross floor area in excess of 235 square metres. There are no loading spaces required for residential buildings containing 2 or less Dwelling Units.

A review of the further information reveals:

- A. On August 14, 1989 Whistler Council approved BPA-27 as represented by drawings by Tom Barratt, Landscape Architect, L-1 through L-3 dated April 6, 1989. This approval was subject to a number of conditions, one being the registration of a Section 215 (now 219) Covenant to limit the number of Bed Units on the Lands to 198.

The Staff Memo recommending the approval of BPA-27 indicates that the understanding of Staff was that the development of Hortsman Estates was to be single residential buildings with a Bed Unit count of 198 (a calculation of the Bed Unit totals in the Staff Memo is consistent with a single residential use and not a lodge use).

- B. Concurrent with the approval of BPA-27, Council, on August 14, 1989, approved the adoption of Zoning Amendment Bylaw No. 742 which rezoned that portion of Hortsman Estates that was outside the LUC area (the "Zoned Area") to RS3. The permitted uses in the RS3 zone were:

- (1) detached single family residential buildings;
- (2) auxiliary residential Dwelling Units; and
- (3) park.

Parking in the Zoned Area was to be provided pursuant to the requirements of Schedule "K" of the Amended LUC.

The Staff Memo that accompanied Zoning Bylaw No. 742 refers to the Zoned Lands as being a continuation of the Blackcomb Phase 3 Subdivision.

- C. BPA-27 sets out the information which was submitted to Whistler in support of the application for Development Approval. Section 3 of BPA-27 refers to the Development Programme described in Section 7(f) of the Amended LUC. BPA-27 indicates that a Development Programme summarizing gross floor area, floor space ratio, site coverage, number of Dwelling Units and guestrooms, breakdown of units by area and parking required and provided was submitted to Whistler.

In response to our request that Whistler provide us with the Development Programme in support of BPA-27, we were provided with the following:

- Hortsman Estate Zoning Regulations and Design Guidelines
- Site Plan showing the footprint envelopes for each lot
- Allowable Gross Floor Area and Height for each lot
- Sample lot landscaping plan for 6 metre buffer strip along Hortsman Lane and Hortsman Place
- Common Area Revegetation and Landscape Plan

The material provided in respect to the Development Programme did not indicate the number of Dwelling Units or Sleeping Units or breakdown of units by area.

- D. We have been advised by Whistler that the Property has four parking spaces, no loading spaces and no disabled parking spaces. Mr. Gelfand has indicated that the Property has eight parking spaces.

## ANALYSIS

In our view, the further information provided indicates that Whistler considered and approved a development, including the Property, that would contain single residential buildings and not lodges. In support of that view is the following:

- (a) staff calculation of bed units is consistent with single residential buildings;
- (b) adoption of Zoning Bylaw No. 742;
- (c) the provision of parking spaces (including the Property) was based on single residential buildings and not lodges;
- (d) parking and driveway requirements which comprise Part IV of the Design Guidelines which were submitted as part of the Development Programme are based on single residential buildings and not lodges (for example, the number of parking spaces described in Part IV(E) of the Design Guidelines is two for each site providing the floor areas are less than 2,500 square feet otherwise three). That is consistent with single residential buildings. Additionally, the driveway criteria contained in the Design Guidelines are a recitation of Sections 5.4.1, 5.4.3, 5.4.4, 5.6.5 and 5.6.6 of Schedule "K" to the Amended LUC. The driveway provisions with respect to lodges are contained in Section 5.4.2 of Schedule "K" and were not included in the Development Programme; and
- (e) Development Cost Charges (DCC's) were based on single residential buildings.

We are satisfied, upon review of the further documentation, that Whistler and the developer were of the view that the Development Approval with respect to the Lands, including the Property, was for single residential buildings and not lodges. It can even be argued that the Gelfands were of the same view when they applied for a building permit as their Design Guidelines Conformance Checklist listed "Single Family with Suite" as the use and they paid DCC's calculated on the basis of a single family dwelling, as opposed to a lodge.

However, the intention of the parties must be contrasted with the actual wording of the Amended LUC and the Covenant.

Section 7 of the Amended LUC deals with Development Approval. It does not deal with ongoing use, contrary to what the parties might possibly have believed. For example, paragraphs B and C of the Covenant provide:

"That the Developer will grant to the Municipality a covenant restricting the use and development of the Lands to the use and development as set out in any Development Application issued by the Municipality." and

"The Developer has pursuant to the Land Use Contract, submitted to the Municipality an application for an approval of the proposed use and development of the Lands."

Contrast that to Section 7(h) of the Amended LUC which states:

"No building permit authorizing or permitting the excavation, placing, construction, reconstruction, alteration, repair or addition, of any building or structure on the Lands shall be issued except in accordance with and after Development Approval and upon Development Approval, no buildings, structures or improvements of whatsoever nature may be placed, erected, constructed or otherwise made on or to the land subject of the Development Approval except as provided therein, and the Developers shall grant to the Municipality a restrictive covenant in registrable form (the "Covenant") to that effect, which Covenant shall charge such portion of the Lands."

Section 7(h) of the Amended LUC makes no specific mention of use notwithstanding the reference to that fact in paragraphs B and C of the Covenant.

A further example of the inconsistency between intention and documentation can be found in the reference to 198 BU's. It is clear from the further documentation that it was the intention of the parties to limit the density of development on the Lands to 198 BU's and to place a Section 215 (now Section 219) Covenant against the Lands to reflect that restriction. In fact, Section 2 of the Covenant provides that the Lands 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 and utilizing not more than 198 BU's, subject to a number of restrictions, including:

“The density of buildings or structures constructed within the footprint envelope shall not exceed the maximum density for each strata lot set out in Schedule “C”.”

However, notwithstanding the wording in Section 2, Schedule “C” makes no reference to the maximum density for each strata lot in terms of BU’s even though the definition of BU in the Amended LUC provides that BU’s are used as a method of determining and computing the intensity of development on the Lands.

Assuming for the moment that the Gelfands’ use of the Property generates more than 6 BU’s we can find no express provision in the Covenant restricting the density of the Property to 6 BU’s. An argument can be made by Whistler that the only logical interpretation of the Covenant is that each strata lot is restricted to 6 BU’s (198 BU’s/33 strata lots). To interpret Section 2 otherwise would be to hold all of the strata lots within the Lands responsible for a contravention by a single strata lot owner which pushed the bed units for the Lands over 198. However, the counter-argument to that position rests within the wording of the document and the fact that if the drafters of the document wished to limit each strata lot to 6 BU’s only, that language would have been simple to include, particularly in Schedule “C”.

Although the further information provides evidence of the intention of the parties, the actual wording of the Amended LUC and Covenant are such that, we believe on balance, Whistler would not be successful in obtaining injunctive relief against the Gelfands on those grounds.

The parking requirements set out in Schedule “K” do, however, have an ongoing application. Section 2.1 and 2.4 of Schedule “K” state:

“2.1 Parking and loading spaces shall be provided and **continuously maintained** in accordance with Schedule K-1”(emphasis added)

“2.4 If a building or structure contains more than one use or provides collective parking for more than one class of building or use, the total number of spaces required shall be the sum of the various classes of uses calculated separately, and except as permitted in this section, a space required for one use shall not be included in the requirement for any other use.”

Section 3 of the Amended LUC states:

“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.”

On the basis of Mr. Gelfand's assertion that the gross floor area of the Property is 340 square meters, Schedule K-1 would require 4 parking spaces for a single residential building use (3 for the dwelling unit and 1 for the auxiliary dwelling unit). Schedule K-1 would require 6 parking spaces (1 of which must be a disabled parking space) for a lodge use ( $.176 \times 34 = 6$ ). It is arguable that a lodge use would also require a loading space pursuant to Schedule "K-1" which requires 1 loading space for each "Tourist Accommodation Building". Not surprisingly, Tourist Accommodation Building is not defined in Schedule "K-1" or in the Amended LUC. While that creates an argument that no loading spaces are required on the Lands, we are inclined to the view that a court would construe the term "Tourist Accommodation Building" as referring to the hotel, lodge or hostel at issue. Accordingly, the lodge use would require 6 parking spaces plus 1 loading space.

The question that next arises is whether the provisions of Section 2.4 of Schedule "K" require the provision and maintenance of 4 parking spaces for a single residential use and an additional 6 parking spaces, plus 1 loading space, for a lodge. Although there are arguments in favour of that interpretation, it is our view that Section 2.4 applies to situations where different uses co-exist in the same building at the same time (i.e., 1st floor commercial, 2nd floor residential).

Accordingly, it is our view that to sustain a lodge use as well as a single residential building use on the Property, the Gelfands will require 6 parking spaces (1 of which must be a disabled parking space) and 1 loading space, constructed and maintained in accordance with Schedule "K".

Mr. Gelfand has suggested that the parking spaces can exist anywhere on the Lands. We disagree. In our view, those spaces would have to be constructed and maintained in accordance with Schedule "K" on the Property (although Schedule "K" refers to parcel, the word "parcel" is defined in both the *Municipal Act* and the *Land Title Act* as meaning "any lot, block or other area in which land is held").

If the Gelfands are not providing and maintaining the correct amount of parking spaces for a lodge use, it is our view that Whistler would be successful in obtaining injunctive relief preventing the continuation of the lodge use.

## SUMMARY

The further documentation submitted has provided a context which was not evident at the time we rendered our initial opinion in May 4, 1999.

This documentation makes it clear that, at the time the application for Development Approval was made, considered and approved, both Whistler and the developer contemplated that Hortsman Estates was to contain single residential buildings as defined in the Amended LUC. While the argument set out in our letter of May 4, 1999 concerning the interpretation of various provisions of the Amended LUC still exists, it is our view that the facts surrounding the creation of Hortsman Estates and the original intention of the parties would have an impact on any application for injunctive relief commenced by Whistler.

While the further documentation evidences the intention of the parties and thus enhances Whistler's chances of success, it remains our view that, subject of course to the facts surrounding the issue of parking, Whistler would, on balance, still not be successful in obtaining injunctive relief against the Gelfands.

We acknowledge that the parties may not consider our opinion to be determinative of this issue. A final and binding resolution of this matter can only be achieved through the courts.

Yours truly,

BULL, HOUSSE & TUPPER



BRIAN E. TAYLOR

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