COX TAYLOR
BARRISTERS | SOLICITORS | NOTARIES

Reply: **Lindsay R. LeBlanc***
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File: C-1769-1

November 6, 2020

City of Victoria
1 Centennial Square
Victoria, BC V8W 1P6

Attention: Mayor and Council

Dear Sir/Madam:

Re: Business Licence Appeal for 42 Moss Street

We act for Birute Curran, also known as Birute Foster (the "Appellant"). We have received the Licence Inspector's letter dated June 18, 2020 (the "June 18 Letter") along with the Submissions of the Licence Inspector dated October 29, 2020 (the "Submissions").

The Submissions raise, for the first time, additional grounds for denying a business licence to the Appellant. As such, we are instructed to submit the following reply submissions on behalf of the Appellant:

FACTS:

1. In 2020, the Appellant applied for a business licence for a short-term rental at the Property, as had been granted in the past by the City. The application was rejected on the grounds that the use is not permitted pursuant to Schedule D of the Zoning Regulation Bylaw. The Appellant appealed the decision on the grounds that the use is legal and permitted.

2. The Appellant, with her partner, reside at the Property as her principle residence. This is not in dispute.

3. The Appellant has rented out 2 bedrooms of the Property since at least August 2012 for short-term rental. This is not in dispute.

4. The house located on the Property was constructed in 1954. The only modification that has been undertaken to the house since construction is a renovation to the kitchen (electrical permit obtained) and some minor upgrading over the years, such as replacement of windows. There has been no conversion of the Property to a duplex, as suggested by the Licence Inspector at paragraph 8 of the Submissions. There are no outstanding permits or occupancy permits required for the Property, as paragraph 8 of the Submissions suggest. The Appellant has not applied to convert the Property to a duplex and any notation contained in the Prospero database relates to the City's own initiative to convert the description of the Property, which the Appellant refused.

5. The Property remains as it was constructed in 1954 as an approved "building".

6. In reply to paragraph 9 of the Submissions, the two bedrooms are accessed through the house as the photographs attached to the Submissions and the original building permits confirm. The Licence Inspector, at paragraph 13 of the Submissions, submits that the 2 bedrooms are not part of the Appellant's principle residence – this is incorrect. A review of the original building permit plans clearly demonstrates that the two bedrooms are part of the in-law suite attached to and forming part of the Appellant's principle residence, as approved in 1954.

7. In reply to paragraph 12 of the Submissions, the Appellant received a business licence in 2019; however, denies making the representation attributed to her and says that the licence application speaks for itself. In any event, the short-term rental is within the in-law suite that was part of the originally constructed single-family house.

8. The Licence Inspector originally refused the business licence relying on Schedule D of Bylaw No. 18-035 (copy attached) that restrict rental of the entire self-contained dwelling unit (except occasionally while the operator is away). Schedule D of Bylaw No. 18-035 was passed by Resolution of Council on March 8, 2018 after the Appellant commenced the use of the Property as a short-term rental.

9. The use of the Property, as a short-term rental, also pre-dates the September 21, 2017 bylaw amendment that added a definition of "short-term rental".

LAW:

10. The Appellant relies on s. 528 of the *Local Government Act,* [RSBC 2015] CHAPTER 1, and the decision of the Supreme Court of British Columbia decision, *Newton v. The Corporation of the City of Victoria,* 2018 BCSC 728 (attached).

11. Section 528 of the *Local Government Act* provides as follows*:*

> Non-conforming uses: authority to continue use
> 528 (1) Subject to this section, if, at the time a land use regulation bylaw is adopted,
>
> (a) land, or a building or other structure, to which that bylaw applies is lawfully used, and
> (b) the use does not conform to the bylaw,
>
> the use may be continued as a non-conforming use.
>
> (2) If a non-conforming use authorized under subsection (1) is discontinued for a continuous period of 6 months, any subsequent use of the land, building or other structure becomes subject to the land use regulation bylaw.
>
> (3) The use of land, a building or other structure, for seasonal uses or for agricultural purposes, is not discontinued as a result of normal seasonal or agricultural practices, including
>
> (a) seasonal, market or production cycles,
> (b) the control of disease or pests, or
> (c) the repair, replacement or installation of equipment to meet standards for the health or safety of people or animals.
>
> (4) A building or other structure that is lawfully under construction at the time of the adoption of a land use regulation bylaw is deemed, for the purpose of this section,

> (a) to be a building or other structure existing at that time, and
> (b) to be then in use for its intended purpose as determined from the building permit authorizing its construction.
>
> (5) If subsection (1) authorizes a non-conforming use of part of a building or other structure to continue, the whole of that building or other structure may be used for that non-conforming use.

12. In 2012, when the Appellant commenced renting out 2 bedrooms, on a short-term basis, short-term rental was lawfully permitted.

13. The relevant provisions of the pre-2017 amendments are contained within paragraph 17 of the Submissions and read as follows:

> "Subject to the following requirements, where any building is used as a single-family dwelling, up to two bedrooms may be used for transient accommodation as a home occupation."

14. The relevant language is "building".

15. The present zoning bylaw defines "building" as "anything constructed or placed on a lot used or intended for supporting or sheltering any use, excluding landscaping, docks, wharfs and piers". The definition appears to be consistently applied during the relevant periods.

16. The house, as constructed in 1954, is a "building" and the Appellant has for all revenant periods of time used the building as a single-family dwelling. Accordingly, on a proper reading of the applicable bylaw, the Appellant is permitted to rent up to two bedrooms for transient accommodation provided the two bedrooms are located <u>in the "building"</u> and the "building" is used as a "single family dwelling" which is not disputed by the Licence Inspector. The applicable zoning of the property is "single-family dwelling" – R1B which is also not disputed.

17. In a May 30, 2016 Report to the Committee of the Whole prepared by Jocelyn Jenkins, Deputy City Manager, the Appellant's use of the property was confirmed as permitted:

> "In Zones where Home Occupation Use is permitted a licence may be obtained to rent up to two bedrooms for transient accommodation with limited regulations in Schedule "D" of the zoning bylaw. Home Occupation uses can occur in most single-family areas. This allows for the rental of rooms and shared accommodation as long as the homeowner is living in the establishment. See Appendix C for a map of all parcels where transient accommodation is permitted including single-family dwellings and strata condominium parcels."

18. At paragraph 15 of the Submissions, the Licence Inspector relies on subparagraph 17(4) of the Zoning Regulation Bylaw. The Licence Inspector does not; however, identify that the subparagraph 17(4) of the Zoning Regulation Bylaw was part of the September 21, 2017 amendments approved by Council. The Appellants use pre-dates Bylaw No. 17-084 and such reliance by the Licence Inspector is inconsistent with s. 528 of the *Local Government Act*. Attached is a copy of Bylaw No. 17-084 (as attached to the Victoria City Council meeting September 21, 2017 meeting agenda).

19. The Licence Inspector seeks to apply a restriction regarding "self-contained dwelling units" that did not exist in 2012.

20. The Applicant has a legal non-conforming authority to continue to rent out up to two bedrooms in the Property as per the pre-September, 2017 bylaws.

21. In response to paragraphs 26 and 27 of the Submissions, it is respectfully submitted that such current objectives of the City cannot be the basis for denying a legally protected right to use the Property.

22. In conclusion, the Appellant has demonstrated a clear permitted use of the Property pursuant to s. 528 of the *Local Government Act*. The Licence Inspector relies incorrectly on the current *Zoning Regulation Bylaw* to restrict a permitted use. The Appellant requests issuance of its 2020 business licence and a finding that it has a lawful non-conforming status to continue to rent up to two bedrooms in the building as per the pre-September, 2017 bylaws.

23. The Appellant seeks prompt written reasons of the decision of Council and the record of the decision should Council uphold the decision of the Licence Inspector.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Yours very truly,

COX TAYLOR

Per:

Lindsay R. LeBlanc*
*Law Corporation

LRL/jt
Encl.
cc: client

NO. 17-084

A BYLAW OF THE CITY OF VICTORIA

The purpose of this Bylaw is to amend the Zoning Regulation Bylaw by amending the definition of Transient Accommodation, adding a definition for Short-Term Rental and prohibiting Short-Term Rentals in the entire City unless where expressly allowed.

The Council of The Corporation of the City of Victoria enacts the following provisions:

1 This Bylaw may be cited as the "ZONING REGULATION BYLAW, AMENDMENT BYLAW (NO. 1112)".

2 Bylaw No. 80-159, the Zoning Regulation Bylaw, is amended:

(a) in section 17, by adding a new subsection (4) as follows:

"(4) Without limiting the generality of subsection (1), short-term rentals, whether as a principal or accessory use, are prohibited in all zones except

(a) where they are expressly permitted subject to regulations applicable in those zones;

(b) rental of no more than two bedrooms in a self-contained dwelling unit, as home occupation, provided that:

(i) the self-contained dwelling unit is occupied by the operator of the short-term rental; and

(ii) short-term rental complies with all regulations in Schedule D as if it were transient accommodation."

(b) in Schedule A – Definitions by:

(i) deleting the words "vacation rentals" in the "Transient Accommodation" definition; and

(ii) adding a definition of "Short-Term Rental" immediately after the definition for "Setback" as follows:

""Short-Term Rental" means the renting of a dwelling, or any portion of it, for a period of less than 30 days and includes vacation rentals."

3 This bylaw comes into force on adoption.

READ A FIRST TIME the	**7th**	day of	**September**	2017
READ A SECOND TIME the	**7th**	day of	**September**	2017
Public hearing held on the		day of		2017
READ A THIRD TIME the		day of		2017
ADOPTED on the		day of		2017

CITY CLERK MAYOR

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Newton v. The Corporation of the City of Victoria,* 2018 BCSC 728

Date: 20180213
Docket: S174644
Registry: Victoria

Between:

John Newton, Steven Nguyen, Jacqueline King, Lea Cathcart, Jocelyn Cathcart and 613 Herald Street Ltd.

Petitioners

And

The Corporation of the City of Victoria

Respondent

Before: The Honourable Madam Justice Winteringham
(appearing by teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:	A. Faulkner-Killam
Counsel for the Respondent:	T. Zworski
Place and Date of Trial/Hearing:	Victoria, B.C. January 15 and 16, 2018
Place and Date of Judgment:	Victoria, B.C. February 13, 2018

[1] **THE COURT:** Counsel indicated at the outset of this hearing that there was some urgency in determining the issue raised in the petition. I am thus delivering these reasons orally.

Introduction

[2] The petitioner seeks various declarations with respect to a building under construction at 613 Herald Street in the City of Victoria (the "Building"). The central issue raised in the petition and request for declaratory relief arises out of an amendment to the City of Victoria's zoning regulation bylaw that restricts the usage of individual units for vacation rentals. The petitioners contend the units in the Building were purchased and sold on the basis that the Building was located within a zoning district that permitted short-term rentals.

[3] The petitioners seek declaratory relief that:

1) the Building was lawfully under construction at the time of the adoption of the bylaw;

2) the residential units are deemed to be in use for their intended purpose in accordance with s. 528 of the *Local Government Act*, RSBC 2015, c. 1; and

3) the intended purpose of the residential units includes vacation rentals and may be lawfully used as vacation rentals pursuant to s. 528 of the *Local Government Act*.

[4] The respondent says the Building does not qualify for lawful non-conforming status under s. 528(4)(b) of the *Local Government Act*, such that it can be used for short-term rentals.

[5] The petitioners made preliminary submissions regarding the jurisdiction of the court to deal with the issues raised and submitted that it did, either pursuant to the *Judicial Review Procedure Act*, RSBC 1996, c. 241, or the inherent jurisdiction of the court. With respect to the latter, the petitioners submit that the declaratory relief

sought in this case is sustainable, even without reliance on the *Judicial Review Procedure Act*, citing *Whitechapel Estates v. Canada (Ministry of Transportation and Highways)*, 57 BLLR (3d) 130 (C.A.), where Justice Prowse addressed the nature of the declaratory relief and stated:

> [44] The nature of declaratory relief was also discussed in an earlier decision of the Supreme Court of Canada, in a different context, in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745. There, a penitentiary inmate sought a declaration that mail to and from his solicitor was privileged and must be delivered unopened. His action was dismissed at trial and the dismissal was upheld in the Federal Court of Appeal. The Supreme Court of Canada allowed the appeal. Dickson J., speaking for the majority (Estey J. concurring in separate reasons), stated at p. 753:
>
> > Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.
> >
> > The principles which guide the Court in exercising jurisdiction to grant declarations have been stated time and again. In the early case of *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438, in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 448):
> >
> > > The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradicter, that is to say, some one presently existing who has a true interest to oppose the declaration sought.
> >
> > In *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government*, [1958] 1 Q.B. 554 (reversed [1960] A.C. 260, on other grounds), Lord Denning described the declaration in these general terms (p. 571):
> >
> > > . . . if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is a good reason for so doing.
>
> [45] These are but two of countless decisions which illustrate the broad nature of declaratory relief and the varied circumstances in which a court may exercise its discretion to grant, or refuse, such relief.

[6] The respondent agrees that there is a real issue between the parties and that the court has jurisdiction to resolve the issues raised in the petition. Based on the position of the parties and the authorities cited above, I am satisfied that this court

has jurisdiction to grant the declaratory relief sought. In the words of Justice Prowse, whether the court exercises its jurisdiction to grant the declaration sought is another matter and it is to that issue that I turn now.

The Background to the Dispute

[7] The petitioner, 613 Herald Street Ltd., is the registered owner of the Building. The petitioner John Newton is an officer and director of 613 Herald Street Ltd., and one of the owners of a unit in the Building. The other named petitioners are owners of units in the Building.

[8] The respondent, the Corporation of the City of Victoria, is a local government with jurisdiction over zoning and land use in Victoria. The parties do not disagree about the circumstances giving rise to the dispute, and I summarize those briefly here.

[9] The City adopted the zoning regulation bylaw for the purpose of dividing the city into zones and regulating land uses in each zone. The Building is within the CA-3 zone.

[10] The uses permitted under this zone include residences, as well as transient accommodation. Transient accommodation use includes a wide range of uses for temporary accommodation of visitors, and includes hotels, motels, and bed and breakfast accommodation. Before September 21, 2017, transient accommodation expressly included vacation rentals. "Vacation rentals" is not a defined term in the zoning regulation bylaw.

[11] Before September 21, 2017, short-term rentals or vacation rentals were permitted in all zones where transient accommodation was a permitted use. The city undertook a review and examination of the impact of short-term rentals on its housing supply. On September 21, 2017, the city amended the zoning regulation bylaw. The amendment defined short-term rentals as a distinct use under the bylaw and the amendment prohibited it in most circumstances in most zones. The

definition of "transient accommodation" was amended to delete "vacation rentals" and a new separate definition of "short-term rental" was added to the bylaw:

> Short-term rental means the renting of a dwelling or any portion of it for a period of less than 30 days and includes vacation rentals.

[12] The parties agree that, for the purpose of the petition, "transient accommodation", "vacation rental", and "short-term rental" have been used somewhat interchangeably. For consistency, I will try to use the term "short-term rental" as it applies here.

[13] Because of the September 21, 2017, amendment, short-term rentals of less than 30 days became unlawful and was no longer a permitted use. For those buildings where the use was in place on September 21, the city granted a designation of lawful non-conforming use within the CA-3 zone. In other words, and as stated by the city, although transient accommodation continues to be a permitted use within the CA-3 zone, as a result of the September 21, 2017, amendment, short-term rental is no longer a permitted use of the Building under the bylaw unless it is a lawful non-conforming use.

[14] At the time of the amendment, the Building was lawfully under construction. The construction of the Building was authorized by the city through a building permit issued on November 28, 2016. Approved by council of the city on February 11, 2016, development on the property was authorized by a development permit. The building and development permit authorized construction of a new, six-storey, multiple-dwelling building with 32 units and two commercial units on the ground floor. The city does not dispute that the Building was lawfully under construction on September 21, 2017, when the bylaw was amended to prohibit short-term rentals. In addition, the city does not dispute that before the bylaw was amended, short-term rentals would have been a permitted use of the units in the Building.

[15] By correspondence dated November 30 and December 4, 2017, the city informed the petitioners that the Building would not be permitted to be used for

vacation rental or short-term rental of less than 30 days. Put another way, the city did not grant lawful non-conforming use status for the Building.

Bylaw and Amendments

[16] Here I set out the statutory framework which governs the resolution of this dispute. Section 528 states:

> Non-conforming uses: authority to continue use
>
> 528 (1) Subject to this section, if, at the time a land use regulation bylaw is adopted,
>
> (a) land, or a building or other structure, to which that bylaw applies is lawfully used, and
>
> (b) the use does not conform to the bylaw,
>
> the use may be continued as a non-conforming use.
>
> (2) If a non-conforming use authorized under subsection (1) is discontinued for a continuous period of 6 months, any subsequent use of the land, building or other structure becomes subject to the land use regulation bylaw.
>
> (3) The use of land, a building or other structure, for seasonal uses or for agricultural purposes, is not discontinued as a result of normal seasonal or agricultural practices, including
>
> (a) seasonal, market or production cycles,
>
> (b) the control of disease or pests, or
>
> (c) the repair, replacement or installation of equipment to meet standards for the health or safety of people or animals.
>
> (4) A building or other structure that is lawfully under construction at the time of the adoption of a land use regulation bylaw is deemed, for the purpose of this section,
>
> (a) to be a building or other structure existing at that time, and
>
> (b) to be then in use for its intended purpose as determined from the building permit authorizing its construction.
>
> (5) If subsection (1) authorizes a non-conforming use of part of a building or other structure to continue, the whole of that building or other structure may be used for that non-conforming use.

[17] The Building exists in Zone CA-3, referred to as "Central Area General Commercial District". The petitioners and the respondent refer to the following extract from the Victoria Zoning Bylaw showing permitted uses:

> All uses permitted in the CA-4 Zone . . . are permitted in this Zone, subject to the regulations applicable in that Zone, provided that notwithstanding

> anything contained in Part 6.8 no building shall be constructed, extended, altered or maintained so that any point on the exterior of any integral part thereof is at a greater elevation above the grade of the building than 15m.

[18] Relevant to the petition, CA-4 zoning bylaw includes these permitted uses:

> (f) transient accommodation and transient accommodation accessory uses;

[19] The stated purpose of the Zoning Regulation Bylaw is to "define the zones into which the City of Victoria is divided and to regulate and control the uses of land and buildings therein". On September 21, 2017, the city passed a bylaw which express purpose was to amend the definition of transient accommodation:

> The purpose of this [Bylaw amendment] is to amend the [Bylaw] by amending the definition of transient accommodation, adding a definition for short-term rental and prohibiting short-term rentals in the entire city unless where expressly allowed.

The Positions of the Petitioners and the Respondent

[20] The petitioners and the respondent disagree about whether the Building, as a building under construction, qualifies for non-conforming use status. The petitioners frame the issue this way:

> The narrow point in dispute in this proceeding is whether the use of residential units for vacation rental is within an intended purpose as determined from the building permit.

[21] The respondent frames the issue to be:

> . . . whether or not short-term rental is the intended purpose of the Building as determined from the building permit.

[22] The petitioners contend that the use or purpose intended, as determined from the Building Permit properly interpreted "intends" all of the available lawful uses that would be permissible and possible in a given unit whose construction is authorized by the Permit.

[23] Presented as an alternative, the petitioners rely on the doctrine of commitment to use.

[24] The respondent takes the position that the Building under construction does not qualify for lawful non-conforming status under s. 528(4)(b) of the *Local Government Act*, such that it can be used for short-term rentals. The respondent says the determination of this issue is driven by the building permit and whether short-term rentals is the Building's intended purpose as determined from the building permit. The city says it is not.

[25] With respect to the petitioners' reliance on the doctrine of commitment to use, the respondent submits that s. 528(4) was intended by the legislature to govern the resolution of disputes such as these. As such, the respondents say the doctrine of commitment to use does not apply to buildings under construction and hence the court cannot rely on the doctrine here.

[26] Clearly the Building permit and the interpretation of it is central to the determination of this dispute. I reproduce those portions of the building permit referenced by the parties. Attached as Exhibit E to the John Newton affidavit provides:

> Permit Type: BP-RES-MULTI - MF NEW STR
>
> Permit Scope: CONSTRUCT RESIDENTIAL COMPLEX (STRATA) - The Residences
> PART 3 BLDG GROUP C/F3 3.2.2.50./80 6 STOREY 533.0 SQ M COMBUSTIBLE / NONCOMBUSTIBLE (BASEMENT) SPRINKLER / FIRE ALARM / STANDPIPE
>
Address:	613 HERALD ST	Zone: CA-3
Legal:	LOT 617, VICTORIA	P.I.D. 009-375-5686
Owner:	613 HERALD STREET LTD	Phone: 250-475-1130
Address:	160-4396 WEST SAANICH RD VICTORIA B.C. V8Z 3E9	
Applicant:	613 HERALD STREET LTD	Phone: 250-475-1130
Address:	160 4396 WEST SAANICH RD VICTORIA B.C. V8Z 3E9	

Description	Quantity	Amount	Description	Quantity	Amount
Bp App Fee	3,684,000.00	11,520.00	Bp Fee	3,684,000.00	34,560.00
Bp Fee Reduce	3,684,000.00	-500.00	En Art Fee Sssd	1.00	1,230.00

En Art Fee Ww	1.00	1,230.00	En Ww Cutcap 25	1.00	1,000.00
En City Works	1.00	2,500.00	En New Works	1.00	23,500.00
En Ss/sd 2-150	1.00	19,500.00	En Ww 50mm	1.00	17,500.00
En Ww Fire 150	1.00	14,000.00	Pl Ldscp Dep	1.00	18,190.62
Bp Multiple	1.00	70,806.06			
			Total		$215,036.68

[27] The respondents state that short-term rental was a permitted use at the time the development permit and building permit were issued. However, the respondent states the documents submitted as part of the application for the development permit and the building permit made no reference to vacation rentals or transient accommodation. The respondent says that the building permit is clear that it authorizes construction of a residential complex with two retail spaces on the ground floor. The building permit makes no reference to transient accommodation, vacation rental, or short-term rentals.

[28] In support of its interpretation, the respondent refers to material relating to a parking variance sought by the petitioners. The respondent states that the development permit allows for variances from the bylaw, including a reduction in the mandated minimum number of parking spaces for the Building. As part of the application for the development permit and parking variance, the petitioner 613 Herald Street Ltd. submitted to the city a parking study and access review. Included in this review, the respondent highlights the following excerpt that was used by 613 Herald Street Ltd. to justify the parking variance:

> . . . It should be noted developments with reduced parking supply result in residents "self selecting". That is, the future residents of the subject development are less likely to purchase (or rent) a unit if parking was desired but not available to them. Marketing of the units will be directed towards first time buyers and residents working and living within the Downtown core.

[29] The respondent says the documents submitted in support of the development and building permits made no reference to vacation rentals or transient accommodation.

Analysis

General Legal Framework

[30] Counsel did not refer to any authorities addressing the interpretation of s. 528(4) in the context where, as here, a bylaw is amended such that it impacts the future use of a building under construction. However, the existing case law does assist with the interpretation of s. 528 in the context presented here. As a starting point, it is useful to refer to a number of basic legal principles applicable to the construction of municipal legislation. In so doing, I have considered Chief Justice Bauman's review of those principles in *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014 BCCA 271 at paragraphs 11-18 where he states:

> [11] Second, it is always salutary to remind oneself of the basic principles of statutory interpretation applicable in construing this species of delegated legislative authority.
>
> [12] Counsel, of course, cited the Supreme Court of Canada's decision in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, and then noted Tysoe J.A.'s reformulation of the direction in the context of a municipal law case in *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494 at para. 13:
>
> > . . . the words of an [enactment] are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the [enactment], the object of the [enactment], and the intention of [the legislative body that passed the enactment].
>
> [13] Again, in the context of municipal empowering legislation and bylaws enacted pursuant thereto, this Court said in *Neilson v. Langley (Township)* (1982), 134 D.L.R. (3d) 550 (at 554 per Hinkson J.A.):
>
> > In the present case, in my opinion, it is necessary to interpret the provisions of the zoning by-law not on a restrictive nor on a liberal approach but rather with a view to giving effect to the intention of the Municipal Council as expressed in the by-law upon a reasonable basis that will accomplish that purpose.
>
> [14] In *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, Mr. Justice Bastarache stated for the Court (at paras. 6 and 8):
>
> > 6 The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. . . . The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced . . .

> . . .
>
> 8 A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. . . .
>
> [15] These common law rules must be married with the expressions of intent by the Legislative Assembly.
>
> [16] Generally, in s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 we are told that:
>
> > 8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
>
> [17] Specifically, under s. 4(1) of the *Community Charter*, S.B.C. 2003, c. 26, we are directed so:
>
> > 4(1) The powers conferred on municipalities and their councils under this Act or the Local Government Act must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.
>
> [18] Frankly, the Court can take the hint – municipal legislation should be approached in the spirit of searching for the purpose broadly targeted by the enabling legislation and the elected council, and in the words of the Court in Neilson, "with a view to giving effect to the intention of the Municipal Council as expressed in the bylaw upon a reasonable basis that will accomplish that purpose".

[31] I am also reminded that the burden of proving entitlement to a lawful non-conforming use rests on the petitioners: see *Sanders v. Langley (Township)*, 2010 BCSC 1543 where Justice Wedge stated:

> [33] One significant difference between the two provisions is that "use" is not a defined term under the *Local Government Act*. The judicial interpretation of "use" under that enactment is as follows: where a property owner can demonstrate that at the time of a new zoning bylaw his or her property was actually used in a manner that was a lawfully permitted use but for the new bylaw, the property owner is entitled to continue that formerly lawful, but now non-conforming use. The property owner must establish the actual use of the property on the exact date of the adoption of the new bylaw (*City of North Vancouver v. Vanneck* (1997), 39 M.P.L.R. (2d) 249 (B.C.S.C.) and cases cited therein).

[32] In support of the city's position that use is to be interpreted in accordance with the building permit, the city refers to authorities which are said to support the proposition that transient accommodation, including short-term rentals, is not a residential use but a commercial one and is more akin to a motel or hotel than to a

residence: see *Kamloops (City) v. Northland Properties Ltd.*, 2000 BCCA 344, *Whistler v. Miller*, 2009 BCSC 419, and *Winchester Resorts Inc. v. Strata Plan KAS2188*, 2002 BCSC 1165.

[33] The petitioners submit that I must adopt a purposive approach to the interpretation of s. 528(4) and not the narrow interpretation advanced by the respondent. To that end, the petitioners assert the building permit provides for much more than the interpretation proffered by the city. That is because, the petitioners submit, Zone CA-3 is expressly included on the building permit.

[34] The B.C. Court of Appeal considered the objective of s. 528(4), then s. 970(3), of the *Municipal Act*, RSBC, c. 290 in *Whistler (Resort Municipality) v. Whistler Service Park Ltd.* (1990), 71 D.L.R. (4th) 168. Here, Whistler Service Park obtained a building permit to construct a building for the public storage and work it was obligated to perform pursuant to its contract with Whistler Municipality. The building permit indicated that the use was industrial, even though industrial and commercial use of the land in question had been prohibited since 1976. After the building permit was issued, Whistler passed a bylaw which made that use a lawful non-conforming use. Once the building was complete, Whistler Service Park sought to extend the use by renting out parts of the building for other industrial purposes. Whistler Service Park argued the purpose of s. 528(3) is to allow a building under construction to be used as stated in the building permit.

[35] The B.C. Court of Appeal disagreed. Justice Macdonald stated (at page 175) that subsection (1) and (3) must be read together:

> The legislative objective is apparent. Subsection (3) deals with the situation of a building in the course of construction when the by-law is adopted. Its purpose, for the sake of fairness, is to place that building under construction in a situation similar to the one enjoyed, under s-s. (1), by buildings completed before adoption of the by-law. That purpose appears from use of the words: "shall, for the purpose of this section...".
>
> The subsection is predicated upon the building permit having been issued for a purpose which was lawful just before adoption of the by-law. It does not make an unlawful use lawful. It permits a non-conforming use. Therefore, "industrial use" is not permitted under s. 970 if it was not permitted before the new by-law.

[36] In *Nanaimo (Regional District of) v. Salapura* (1994), 94 B.C.L.R. (2d) 213, Justice Owen-Flood also considered the purpose of s. 528, then s. 970, of the *Municipal Act* and stated at page 28:

> The purpose of s. 970 of the *Municipal Act* is to allow lawfully established uses to continue when zoning amendments are made which would otherwise prohibit those uses. If the defendants' use of the land and building on November 10, 1981, the date the plaintiff's zoning bylaw came into effect, was a lawful use under the *Land Commission Act*, which until that point had governed the use of the lands in question, then the defendants use became a lawful non-conforming use protected by s. 722 of the *Municipal Act* . . . The defendants right to continue such protected use would have vested by the time the bylaw came into effect. As a result, unless and until the protection of the Act was lost, the defendants use would remain a lawful non-conforming use unaffected by the plaintiff's bylaws.

[37] With respect to the term "use", I refer to Justice Wedge's review of the term as it was defined in the bylaw at issue before her in *Sanders*. She found that the wording of the applicable sections of the zoning bylaw was unambiguous and the definition of "use" broad at page 1544.

[38] Finally, I examine the term "residence" as it has been considered elsewhere in the authorities provided to me, for example in *Okanagan-Similkameen (Regional District) v. Leach*, 2012 BCSC 63, Justice Dardi dealt with the impact of a bylaw amendment in circumstances where the defendants owned a vacation home that was zoned as residential single-family one zone. The defendants stayed at the vacation home approximately three months during each year and advertised the property on a vacation rental site and rented it out for about five weeks each year, except for one year when they were renovating the property. The Regional District sought a declaration that the defendants were using the property as a commercial tourist accommodation contrary to the bylaw.

[39] In considering lawful non-conforming use at paragraph 117, Justice Dardi refers to *Sunshine Coast (District of) v. Bailey* (1995), 15 B.C.L.R. (3d) 16 (S.C.), which was affirmed on appeal, and she stated:

> [117] In *Sunshine Coast (Regional District) v. Bailey,* (1995), 15 B.C.L.R. (3d) 16 (S.C.) at para. 31, the Court described the purpose of the law of non-conforming use and observed that the courts have adopted a liberal approach

to interpreting the statutory lawful non-conforming use exemption in favour of the user:

> Presumably, it is the concept of fairness that supplies the underlying rationale for the statutory non-conforming use exemption, for its liberal interpretation by the courts through development of the "commitment to use" doctrine, and for the accompanying proposition that any doubt as to prior use ought to be resolved in favour of the owner. To prohibit completion of a land development project to which there has been an unequivocal commitment, including significant physical alteration to the site, savours of unfairness because it is tantamount to giving the zoning bylaw retroactive effect, to the prejudice of the owner.

Application to the Facts

[40] I turn then to a consideration of "use for its intended purpose as determined from the building permit" in the context of subsections 528(1) and (4). In so doing, I have adopted a purposive approach. The central interpretative question is whether the building permit authorized short-term rentals.

[41] As stated above, the city admits that the Building was lawfully under construction at the time of the amendment, and that prior to the amendment, short-term rental use was a permitted use. In other words, but for the amendment, the petitioners would have been permitted to use their units for short-term rentals. Further, had the Building been operational at the time of the amendment, the petitioners would have been granted lawful non-conforming use status.

[42] Having reviewed the building permit and the zoning bylaws applicable to the Building, it is my view that the city's interpretation is too narrow. The city's suggestion here would require me to ignore express terms of the building permit, including the zone designation. In addition, the city's submission would require me to adopt an interpretation that would require me to ignore the purposive and liberal approach mandated in the municipal law jurisprudence.

[43] The permit scope of the building permit states "residential complex". However, that does not end the interpretive exercise. Importantly, the building permit states the Building exists in Zone CA-3, Central Area General Commercial District, which by definition incorporates CA-4, Central Area Commercial Office District.

[44] In my view, and much like the analysis undertaken by Justice Dardi in *Okanagan-Similkameen*, I am required to consider that residential designation within the context of the zoning provisions expressly identified in the building permit. Prior to the amendment, the bylaw and the definitions then applicable permitted residential use and the bylaw allowed for short-term rentals.

[45] Section 528(4) specifically deemed the Building lawfully under construction at the time of the amendment to be (a) existing and (b) then in use for its intended purpose as determined from the building permit authorizing its construction.

[46] The building permit allows for a residential complex within Zone 3-CA. In my view, a plain reading of s. 528(4), the issue to be determined is not whether short-term rental is the Building's intended purpose as determined from the building permit. Rather, the issue to be determined is whether residential complex in Zone CA-3 is the building's intended purpose as determined from the building permit. That is what the building permit authorized and that is what should be considered, not whether the building permit expressly stated that some units may be used for short-term rentals. In my view, when I consider that these are residential units in a zoning district that permitted short-term rentals at the time of the amendment is sufficient for the petitioners to meet their burden. The respondent does not dispute that short-term rentals were a permitted use in Zone CA-3 prior to the amendment and the Building would have been granted lawful non-conforming use status but for the fact it was a building under construction.

[47] In my view, the petitioners have established, for the purpose of s. 528, that the residential units of the Building maybe lawfully used as vacation rentals. The city relied on evidence related to the application for a parking variance. It is my view that the parking variance application does not detract from the interpretation set out here. In other words, the parking variance application does not change the interpretation of what was authorized by the building permit as I have found here.

[48] Again, I am mindful that municipal legislation must be interpreted in a purposeful fashion. In this regard, I acknowledge that the result of the interpretation

of s. 528(4), as advanced by the petitioners, is that other buildings lawfully under construction before September 21, 2017, could seek the same declaration. However, as the petitioners submitted, if the city wanted to curtail vacation rentals of residential units in this zone, it could have inserted the available restrictions accordingly. In other words, the building permit could have included a provision to the effect that the residential units cannot be used as short-term rentals.

[49] I address briefly here the testimony of Ryan Morhart. During the hearing, the petitioners applied to strike specific paragraphs of affidavits filed by the city and that application was granted in part. At the same time, the petitioners sought leave to cross-examine Ryan Morhart, the chief building official and manager of permits and inspections for the city. I granted leave to cross-examine Mr. Morhart on a limited basis. I have found that Mr. Morhart's testimony does not impact these reasons in any way. I have also not found it necessary to refer to the reply affidavit filed by the petitioners. In other words, I have found the reply affidavit and Mr. Morhart's testimony do not assist in the interpretation of the relevant provisions before me.

[50] In the present case and in consideration of the whole of the building permit and the bylaw, a plain reading of s. 528 favours the interpretation advanced by the petitioners.

[51] The petitioners advance an alternative argument invoking the doctrine of commitment to use. In light of the interpretation set out above and having resolved the dispute in the petitioners' favour, I will not deal with this alternative argument.

Conclusion

[52] In conclusion, I accept the interpretation of the Building Permit Bylaw and s. 528(4) as advanced by the petitioners in the context here. Accordingly, and in light of the parties' positions regarding jurisdiction, the petitioners are entitled to the following declaratory relief:

a) a declaration that the Building is lawfully under construction and was at the time of the adoption of City of Victoria Bylaw No. 17-084;

b) a declaration that the residential units disclosed in the drawings attached to the building permit are deemed to exist for the purpose of s. 528 of the *Local Government Act*; and

c) a declaration that the residential units disclosed in the drawings attached to the building permit are lawfully used as vacation rentals pursuant to s. 528 of the *Local Government Act*.

[53] Unless either party wishes to make submissions on the issue of costs, the petitioners are entitled to their costs.

"Winteringham J."