IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Muir et al v. 403570 B.C. Ltd. et al v. Penticton (City) et al,***
2003 BCSC 0575

Date: 20030414
Docket: 33256
Registry: Kamloops

Formerly No. 5512
Penticton Registry

Between:

William Muir, Evelyn Muir, Barry Wade, Lise Wade and Judy Ursulan

Plaintiffs

And

403570 B.C. Ltd., Donald Lloyd and William Robinson

Defendants

And

The City of Penticton and Ian Stout

Defendants by Counterclaim

Before: The Honourable Mr. Justice R. M. Blair

Reasons for Judgment

Counsel for the Defendants	R. Burke
Counsel for the Defendants by Counterclaim	F. R. Scordo & D. E. McCabe
Date and Place of Trial/Hearing:	July 15, 16, November 28, 29 & December 20, 2002 Kamloops, B.C.

[1] This case follows the 1991 purchase by the defendants, 403570 B.C. Ltd., Donald Lloyd and William Robinson, ("the developers") of the Shoreline Motel (“the Shoreline”) in Penticton, its conversion into a strata development and the subsequent sale of strata units to the plaintiffs.

[2] The plaintiffs commenced this action on April 2, 1992 claiming that the developers induced them to purchase the Shoreline strata units by fraudulently or negligently misrepresenting that the units could be utilized for residential purposes, knowing that the City of Penticton's zoning bylaw precluded such residential use. The plaintiffs planned to reside permanently in their respective strata units.

[3] The developers settled the plaintiffs' claims, but pursue a counterclaim against the City of Penticton and its public works manager, Ian Stout, (collectively "the City"). The developers allege in their amended counterclaim filed December 18, 2001, that the City wrongfully advised B.C.'s Superintendent of Real Estate ("the superintendent") that the City's zoning bylaw 67-85 ("the bylaw") precluded the use of the Shoreline strata units for residential purposes. The developers allege the City's statements constituted an injurious falsehood, a negligent misstatement, or statements negligently made. The City says the statements are true and denies the developers' allegations.

[4] The developers apply, under Rule 18A of the **Rules of Court**, for judgment that s. 39 of the bylaw was unlawful, or that the 1991 use of the Shoreline as a motel included residential use, or the use of the Shoreline for residential purposes was lawful as being a pre-existing use before the City enacted the bylaw. The City applies for judgment under Rule 18A dismissing the developers' claims as lacking a foundation in fact or in law. The applications proceeded together due to the common factual matrix.

BACKGROUND

[5] The developers in 1991 purchased the Shoreline which, like other Penticton motels, rented its units nightly during the summer and monthly during the winter. The City accepted such usage as falling within the definition of motel use. The Shoreline was located in an area defined by the bylaw as commercial tourist, referred to as CT1.

[6] The developers’ plan to convert the Shoreline into 45, later 47, strata units required City approval. The developers’ April 22, 1991 application for City approval noted that the Shoreline was zoned CT1 and that the use of the property was "Motel Resort". The developers filed with the application a letter confirming that the Shoreline operated as a motel including off-season monthly rentals. The developers wrote that the property, after upgrading and sale of the strata units, would be available to monthly tenants after

conversion in the same manner it had been in years past and further stated:

> The overall plan for conversion is to substantially upgrade this property to appeal to the recreation/investor who will utilize the suite for personal holidays and leave the balance of the time in a rental pool to make the unit available to the vacation tourist and off-season occupant.

[7] The developers wrote on May 9, 1991 to the City that they intended to provide strata unit purchasers with a motel rental pool agreement to bring the units into the market for those times that the owners would not be using their units.

[8] The City's council on May 10, 1991 approved the strata conversion and later at the developers' request the City endorsed its approval on the strata plan prepared by the developers for filing at the land title office. On the strata plan, under the heading Statutory Declaration the developers declared that:

> The strata plan is entirely for motel and or residential use.

The developers then filed a Disclosure Statement dated June 17, 1991 with the superintendent and ¶4 (b) states:

> (b) **Intended Use:** The Development will be utilized as a motel and/or for residential use.

[9] Mr. Stout subsequently noted the intended use found in the disclosure statement and feared that the words "and/or for residential use" suggested that the City in approving the

strata conversion also changed the zoning for the Shoreline property from CT1 commercial tourist, to a zoning which permitted full-time residency. Mr. Stout did not consider the strata conversion altered the uses permitted under the CT1 zoning and, specifically, that CT1 zoning did not permit permanent, full time residency. Mr. Stout consulted the City's solicitor who replied on July 10, 1991 that the conversion did not change the zoning of the Shoreline property. The solicitor assisted Mr. Stout by drafting a letter to the developers advising them of the City's concerns with the disclosure statement. Counsel also recommended the City forward a copy to the superintendent.

[10] Mr. Stout discussed ¶4(b) of the disclosure statement with the developer, Mr. Lloyd, on July 11, 1991 and confirmed their discussion in his July 12, 1991 letter ("the July 12, 1991 letter") to Mr. Lloyd. In his letter which reflected the draft prepared by counsel, Mr. Stout confirmed that the developers' application to the City for approval of the strata conversion declared there would be no change in use which would remain as "motel resort". Mr. Stout's letter is a crucial part of the developer's claim and it reads as follows:

> Further to our telephone conversation yesterday, I am writing in regards to the Disclosure Statement in respect to the above noted strata subdivision which was made as of the 17th day of June, 1991 and filed with the Superintendent of Real Estate.
>
> As I mentioned, we noted that paragraph 4 (b) declares intended use as "the development will be utilized as a motel and/or for residential use." Your application to the City Council as the

> approving authority, with respect to this strata subdivision declared no change in use and in fact sets out in paragraph 2(b) the use of the subject property as "motel resort". Your letter of April 22, 1991 which accompanied the application confirmed that there would be no change in use. Also, in our telephone conversation yesterday, you again confirmed that there would be no change in use.
>
> Again, as I indicated yesterday, the subject property is zoned CT1. Section 39 of the City Zoning Bylaw #87-65 permits motel use in the CT1 zone. Section 6 defines "motel" to mean a building or buildings containing housekeeping or sleeping units designed to provide temporary accommodation for the travelling public. Section 33 provides that the only uses permitted are those listed in respect of each zone and uses not listed in respect of a particular zone are prohibited. Section 3 provides that it is an offence to violate any provision of the zoning bylaw.
>
> The City, as I mentioned, is concerned that the disclosure statement with respect to the intended use is misleading. Lest there be any misunderstanding, we wish to emphasize to you that in approving this strata subdivision the approving authority did not approve a change in use.
>
> Again, you indicated yesterday that there would be no change in use and that the investors were considering operating the motel through a motel franchise operation.
>
> I appreciate this reassurance and have taken the liberty of providing a copy of this letter to the Superintendent of Real Estate for his information.

[11] Mr. Lloyd in his affidavit filed October 18, 2002 took issue with Mr. Stout regarding their July 11, 1991 discussion and the July 12, 1991 letter later became the basis of the developers' action against the City. The developers did not respond immediately to Mr. Stout's letter, but did write to the City on October 7, 1991, thanking it and its staff, including Mr. Stout, for the cooperation given the developers during the strata conversion. The developers advised that 43

of the Shoreline's 47 strata units had been sold during the previous summer. The superintendent on July 18, 1991 wrote to the developers' solicitor and, relying on the City's July 12, 1991 letter, directed the developers to amend the disclosure statement and advise all purchasers and prospective purchasers of the amendment.

[12] The developers responded to the July 12, 1991 letter and the superintendent's direction of July 18, 2001 some seven months later when their solicitor wrote on February 26, 1992 to the superintendent and the City addressing the developers' concerns. Mr. Lloyd stated in his October 12, 1994 examination for discovery that the plaintiffs' complaints started in January 1992 at which time he became concerned about the July 12, 1991 letter.

[13] The plaintiffs commenced the action against the developers in April 1992 alleging fraud, negligent misrepresentation, breach of duty and breach of contract, arising from their purchase of Shoreline strata units. The plaintiffs' concerns flowed from their inability to use their strata units as permanent residences. The developers on May 4, 1992 voluntarily provided an undertaking to the superintendent not to market the remaining Shoreline strata units, an undertaking subsequently withdrawn in May 1993 following which the developers sold the remaining five strata units.

[14] The developers resolved the plaintiffs' claims and seek to recover from the City the losses which the developers

attribute to the City’s actions, including the costs incurred by the delay in selling the remaining strata units, the costs related to the settlement of the plaintiffs' claims, and their legal costs.

The Developers' Rule 18A Application

(1) Validity of s. 39 of Zoning Bylaw 87-65

[15] The developers submit that s. 39 of the bylaw is invalid as its intentions cannot be reasonably ascertained because it fails to properly describe the permitted uses of the property located within the commercial tourist CT1 zone. The developers submit that s. 39 allows the construction of buildings, including motels, within the CT1 zone, but fails to identify the permitted uses for which the buildings can be used.

[16] In ***Service Corp. International (Canada) Ltd. v. Burnaby (City)***, [2001] B.C.J. No. 2576 (C.A.), Mr. Justice Lambert cites the Supreme Court of Canada's decision in ***R. v. Nova Scotia Pharmaceutical Society***, [1992] 2 S.C.R. and at ¶24 states:

> . . . the test for the degree of imprecision required before an enactment should be declared void for vagueness and uncertainty was whether, in all the circumstances, the provision in question gave "an adequate basis for legal debate, that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria.” In my opinion that test, drawn as it was from previous decisions of the Court, including municipal law decisions, and

> resting on the flexibility required to meet the social ends of the legislation, must now be regarded as the dominant test for vagueness in the interpretation of municipal bylaws.

[17] Lambert J.A. wrote that Mr. Justice Romilly in ***Sundher v. Surrey*** (1995), 30 M.P.L.R. (2d) 250 (B.C.S.C.) neatly stated the test in the following language:

> Thus, the test for vagueness is whether the provision in the by-law is so uncertain that it does not provide an adequate basis for reaching a conclusion about its meaning by reasoned analysis applying legal criteria and taking into account the context of the legislative enactment.

[18] I apply that test in considering the developers' submissions regarding the uncertainty which they say surrounds s. 39 of the bylaw. Although the developers' submissions concentrate on s. 39, the bylaw must be considered as a whole to determine, if possible, the intention of the legislative body in enacting the bylaw. If such an intention can be found the wording of the bylaw, particularly s. 39, must be considered in order to determine whether it is capable of accomplishing its intended purpose.

[19] While I appreciate the dexterity of counsel's submission concerning the fine differentiation between buildings and uses, the various sections cannot be read by themselves, but must be construed in the context of the whole of the bylaw, particularly the definitions found in s. 6 together with sections 33 and 39 of the bylaw which state in part:

> 39. CT1 (Tourist Facilities).
> a) Permitted Uses - CT1 Zone
> (ii) motel
> (xi) buildings and structures ancillary to the uses permitted in Section 39. a)(i) to (viii), including one dwelling for the owner or caretaker, provided that it be attached and under same roof as the permitted commercial use and is provided with a separate entrance from ground level.
>
> Permitted Uses
> 33.In each zone created under Section 30 of this Bylaw:
> (a)the only uses permitted are those listed in respect of each zone under the heading "Permitted" Uses" in Section 35 and 42 of this Bylaw; and
> (b)uses not listed in respect of a particular zone are prohibited.

The definitions of motel and dwelling found in s. 6, state:

> "motel" means a building or buildings containing housekeeping or sleeping units designed to provide temporary accommodation for the travelling public.
>
> "dwelling" means a self-contained set of habitable rooms containing living quarters and kitchen and sleeping facilities for only one family and which complies with the British Columbia Building Code.

[20] Section 33 (a) and (b) provides that the only uses permitted in a zone are those listed in respect of that zone under the heading "Permitted Uses" in sections 35 and 42 of the bylaw and uses not listed in respect of a particular zone are prohibited. Although the bylaw refers to "sections 35 and 42", this is obviously an error and should, to make sense, be read as "sections 35 to 42". Section 39 (a) contains the heading "Permitted Uses - CT1 Zone" with s. 32 of the bylaw

directing that the heading form part of the bylaw. S. 39 allows motel use in the CT1 zoning in the area in which the Shoreline is located, but makes no mention of residential use.

[21] The restricted non-residential use contemplated by the City for a motel is reflected in s. 39(a)(xi) which refers to the permitted commercial use of a motel, but then specifically allows a motel to include a dwelling for use by an owner or caretaker as defined in s. 6.

[22] I conclude that the City in creating the bylaw intended that a motel would have the permitted commercial use as reflected in sections 6, 33 and 39, but that the structure could include a single dwelling for the limited purpose of housing the motel's owner or caretaker. Such persons might properly be described as residing in the motel's premises in an area zoned tourist commercial which would not ordinarily permit a residential use.

[23] In enacting Sections 33 and 39 of the bylaw, I find the City used the term "motel" as interpreted in s. 6 and intended to describe both the building and the permitted use to which that building might be put. I find that the City's intentions reflected in sections 6, 33 and 39 of the bylaw are sufficiently certain that they provide a basis for reaching a conclusion about their meaning by reasoned analysis applying legal criteria and taking into account the context of the legislative enactment. I find the bylaw valid.

[24] Although I have found the bylaw valid, I feel bound to address the City's question as to whether the developers' properly brought their challenge to the bylaw before the court. The City says the developers neither pleaded nor challenged the validity of the bylaw prior to the present application and submits that the developers' application failed to comply with the ***Local Government Act***, R.S.B.C. 1996, c. 323. Section 262 provides that an application challenging the legality of a bylaw must be brought within one month of the bylaw's adoption and the application must be heard within two months of the bylaw's adoption.

[25] In ***Re Merry and City of Trail*** (1962), 34 D.L.R. (2d) 594 (B.C.C.A.) the court, dealing with an application to quash a city bylaw for illegality under s. 240 of the ***Municipal Act***, R.S.B.C. 1960 c. 255, held that such an application had to be heard within the two months of the bylaw's adoption. Section 264 of the ***Local Government Act*** provides that a declaratory order relating to a bylaw must not be made unless the application is heard within two months of the bylaw's adoption.

[26] In the instant case, the developers are in essence seeking a declaration as to the meaning and the validity of the bylaw. Their application did not occur within the time permitted by the **Local Government Act** and was therefore not properly before the court.

(2) Zoning Bylaw 87-65: Residential Use of the Shoreline

[27] The developers' motion also seeks a determination of whether the use of the Shoreline as a motel allowed residential use, contending that s. 39 of the bylaw did not prohibit such residential use.

[28] I found that the bylaw allows in CT1 zoned areas the construction and use of buildings as motels, the definition of motel being found in s. 6 of the bylaw. However, the developers submit that in applying for the City's approval for the strata conversion they fully disclosed their intentions relating to use and that in approving the strata conversion the City confirmed that the developers' proposed residential use complied with the bylaw. The ***Condominium Act***, R.S.B.C. 1979, c.61 at s. 9, states that the City, as the approving authority, should not approve a strata conversion unless the building "substantially complies with the applicable bylaws of the municipality".

[29] In ¶33 of their written submissions, the developers state that:

> The defendant's disclosure statement said nothing different than what the application for conversion stated: i.e., the development will be utilized as a motel and/or for residential use.

The developers submit that they fully disclosed their intentions relating to land use, relying on Mr. Lloyd's April 30, 2002 affidavit in which he deposed at ¶8:

> In March 1991 the motel was being used for rentals to tourists during the summer months and for residential use during the balance of the year.

The developers further relied on their strata plan endorsed by the City, which contained the developers' statutory declaration that the strata conversion is entirely for "motel and or residential use."

[30] However, the wording referring to the proposed use of the Shoreline differs between that found in the developers' application to the City and its later disclosure statement. The developers' application stated that the use of the property would be "motel - resort" and in their accompanying letter the developers wrote that the Shoreline has operated as "a motel and in off-season as monthly rental". They wrote that their plan involved upgrading the property and selling the units to the:

> . . . recreation/investor purchaser who will utilize the suite for personal holidays and leave the balance of the time in a rental pool to make the unit available to the vacation tourist and off-season occupant.

[31] Nothing in the material filed to obtain the City's approval indicates that the developers anticipated that the strata units would be used for other than as a motel resort facility. However, Mr. Lloyd acknowledged in his 1993 examination for discovery that he knew some purchasers might use their strata units as year-round residences and admitted

that he did not believe the developers indicated the possibility of such permanent residential use to the City.

[32] City staff checked the developers' application prior to the issue being placed before the City's council and noted in reference to s. 39 of the bylaw:

> 39.(a) permitted use
> (ii) motel - OK

I interpret the "OK" as an indication that the staff reviewed the developers' application which stated that the use of the strata units would be as a motel as noted on the application.

[33] I conclude the City approved the strata conversion based on the use described in the developers' application and their April 22, 1991 letter. Neither of the aforementioned documents mentioned residential use. If the developers intended that the strata units be available for "residential use" they failed to explicitly convey that intention to the City when obtaining approval for the strata conversion.

[34] The developers rely on the City's endorsement of the strata plan as a basis for their claim that the City approved the strata units for residential purposes. The strata plan included the following statement:

> Statutory Declaration
> We, the undersigned do solemnly declare that:
> 1. We are the owner-developers.
> 2. The strata plan is entirely for motel and or residential use.

The developers signed the declaration on June 19, 1991.

[35] The strata plan also includes the following endorsement signed by the City:

> Approval
> I hereby certify that the construction of the building situated on Lot A, D.L. 3, Group 7, Similkameen Division (formerly Yale Lytton) District, Plan KAP ___ has been approved for strata plan development.
> Approved under the Condominium Act.
> This Day of 19 .
> The Corporation of the City of Penticton.

The signing officers were the acting mayor and the City's clerk.

[36] The date when the City endorsed the strata plan is left blank, but the endorsement that the conversion "has been approved", indicates that the City's approval preceded the endorsement of the strata plan. The City's approval of the strata conversion was based on the information contained in the developers' application as checked by the City's staff that the strata units were to be used as a motel resort.

[37] The pertinent approval is that of the City on May 10, 1991, not the endorsement of the strata plan, a document prepared by the developers in which the use had been altered from motel resort, the use approved by the City, to "motel and or residential use". The City did not approve the latter and I conclude that the developers cannot rely on the City's endorsement of their strata plan as support for their

contention that the City approved the strata units for residential use.

[38] The developers also contend that motel use in itself also provides for a residential use, submitting that a motel as defined by the bylaw and as allowed by the City which permitted seasonal monthly tenancies, thereby involved residential use.

[39] The question is whether monthly tenancies, restricted to the winter, can be described as residential. The bylaw does not contain a definition of either "residence" or "residential", but the **Canadian Law Dictionary** (4th Ed.) Yogis, John, defines residence in part as:

> Generally, residence means a person's permanent place of abode and not his temporary place of abode. . . . The mere physical presence of a person in a place does not constitute his residence there but in addition he must have the present intention of remaining there for some time, but not necessarily for all time.

[40] ***Whistler (Resort Municipality) v. Miller***, 2001 BCSC 100, determined whether the municipality's zoning bylaw permitted the owners of detached dwellings located in a single family residential zone to use their dwellings for the accommodation of occasional, temporary, paying and non-paying guests. The defendant owners were renting out their dwelling to persons, usually families, who lived in the dwelling for approximately a week at a time. At ¶23 Mr. Justice Drost stated:

> 23 In my view, it is untenable to suggest that the rental of a detached dwelling to short term paying guests is a normal and customary residential use.

[41] ***Kamloops (City) v. Northland Properties Ltd***. 2000 BCCA 344 dealt with the meaning of "reside" and "residence" in determining whether persons who were mainly overnight visitors could be described as residing in the defendant's property. Madam Justice Newbury wrote at ¶s14 and 17:

> 14 With respect to the meaning of "reside" and "residential", Mr. Clemens' argument is contradicted by dictionary definitions cited to us. They refer to having one's home in a particular place "for a considerable length of time", and define "residential" to mean "occupied mainly by private houses." Clearly if these definitions are correct, the use for which the 32 suites are being rented out does not qualify as "residential".
>
> 17 In my view, no hard and fast line in terms only of length of stay can be drawn as a matter of law. A traveller or tourist may stay in a hotel for a few weeks without being said to "reside" there, just as a person may "reside" in his or her own house for a short period and then find it necessary for some reason to stay elsewhere for an extended period. As the cases decided under the Income Tax Act concerning the phrase "ordinarily resident in Canada" make clear, many factors, in addition to the length of stay, are involved in determining "residence" - whether one lives out of a suitcase or brings all one's possessions to the unit; whether one establishes roots and connections in the local community or remains only a sojourner; whether one is accompanied by family and is employed permanently or semi-permanently, in the area; location of bank accounts and other records . . . .

[42] There is little evidence about the Shoreline's motel units prior to the strata development, but I presume them to have been furnished units although only 31 of the 47 units had kitchens. The developers' April 22, 1991 letter to the City

stated that 15 units were rented on a monthly basis and the occupants were vacating by June 1, 1991 when the daily rental rates came into effect.

[43] I conclude that during some periods before 1991 persons occupied the Shoreline's units on a monthly basis, however there was a transient nature to their occupancy which was limited to the winter and typically ended when the summer rental rates came into effect. The City accepted monthly winter tenancies as motel usage, that being an economic necessity for the motel owners given Penticton’s limited seasonal attraction. However, because of the transient nature of the inhabitants' use, I conclude that such seasonal, monthly usage cannot be described as residential.

(3) Lawful Non-Conforming Use

[44] The developers submit that the monthly, pre-1991 rentals were residential in nature, thereby permitting a continuing residential use after the strata conversion. Section 911 of the ***Local Government Act***, formerly s. 970 of the ***Municipal Act***, R.S.B.C. 1979, c. 290, provides that an established use could continue notwithstanding a change in zoning such as the City's passage of the bylaw.

[45] Section 911(1) of the ***Local Government Act*** provides that if a non-conforming use is discontinued for a continuous six-month period any subsequent use becomes subject to the bylaw.

The party seeking to invoke s. 911 must establish the pre-existing non-conforming use: see ***R. v. Bhinder,*** [1999] B.C.J. No. 2487, 1999 BCCA 617, ¶s22 and 24.

[46] In the present case, there is evidence from Muriel Williams, who, with her late husband, built and operated the Shoreline between 1955 and 1980. They rented out units on a monthly basis during the winter. However, there is a substantial gap between 1980 when Mr. and Mrs. Williams sold the Shoreline and 1991 when the developers acquired it and there is little or no evidence to establish that the same seasonal use continued between 1980 and 1991. Had I concluded that the pre-1991 monthly rentals established a residential use, I would have found that the developers had failed to establish on a balance of probabilities that a non-conforming residential use of the Shoreline's units continued between 1980 and 1991.

[47] The developers' counsel wrote February 26, 1992 to the superintendent that his client advised that there were numerous people who lived at the Shoreline for periods in excess of one year. I give no weight to that submission as there is no evidence supporting the existence of such lengthy tenancies and that information was not provided when the developers sought the City's approval for the strata conversion.

[48] Having determined that monthly, seasonal, transient use is not residential, I conclude that there was no residential use of the Shoreline prior to the passage of the bylaw which would permit a residential use after the 1991 creation of the strata units.

The Developers' Application: Summary

[49] To summarize my conclusions regarding the developers' Rule 18A application, I find:

1. S. 39 of Zoning bylaw 87-65 is valid;
2. Zoning bylaw 87-65 precludes residential use of the Shoreline's strata units; and
3. The developers have failed to establish a residential use of the Shoreline's motel units prior to the passage of Zoning bylaw 87-65.

The City's Rule 18A Application

[50] The City applies for judgment dismissing the developers' claim, submitting that the developers have failed to establish the torts of injurious falsehood, negligent misrepresentation or negligence.

1. Injurious Falsehood and Negligent Misrepresentation

[51] The developers, to prove injurious falsehood must establish the City published a false statement or statements

concerning the developers to a third party, malice, and actual damage. To prove negligent misrepresentation the developers must show a duty of care owed by the City, a breach of that duty by negligent misrepresentation, reliance by the developers on that misrepresentation, and that the developers suffered loss as a result of that reliance.

[52] Pivotal to both torts is a statement found to be either a false statement or a negligent misrepresentation, a statement which the developers claim is found in the July 12, 1991 letter from Mr. Stout to the developers with a copy forwarded to the superintendent. The letter is found at ¶10 of this judgment and there is no reason to repeat its contents.

[53] In my findings addressing the developers' Rule 18A application I determined that the bylaw is valid zoning legislation, that the Shoreline was located within a commercial tourist zone which allowed a motel use, that a motel use did not permit a residential use, and that there was no pre-existing residential use of the Shoreline which might permit residential use pursuant to s. 911 of the ***Local Government Act***.

[54] Given my findings I conclude that the contents of the July 12, 1991 letter contain neither a false statement nor a negligent misrepresentation, but correctly assess the difficulty with the developers' disclosure statement. I find misleading the developers' description in the disclosure

statement that the intended use for the Shoreline to be as a "motel and/or for residential use". Mr. Stout properly described the City's apprehension with the disclosure statement and I conclude that apprehension to be both true and accurate. I find there to be no basis in the July 12, 1991 letter or its publication to the superintendent and others upon which the torts of injurious falsehood or negligent misrepresentation might be founded.

2. Negligence

[55] The developers, in their claim as amended in October 2, 2000, allege as an alternative to negligent misrepresentation that the City negligently informed purchasers that the strata units could not be used as approved by the City, a claim in negligence resting on the City's endorsement of the developers' strata plan and the publication of the July 12, 1991 letter to the Superintendent.

[56] I addressed in ¶s34 and 37 of my reasons the circumstances under which the City endorsed the developers' strata plan, that endorsement following the City's May 10, 1991 approval of the strata conversion based on the developers' representations that the strata units when sold would continue to be used for tourism in the summer and monthly rentals in the winter. The developers made no mention of residential use when obtaining the City's approval, particularly in the context in which it subsequently arose, that being permanent occupancy by the strata unit purchasers.

[57] I am unable to find in either the City's endorsement of the strata plan or the writing and publication of the July 12, 1991 letter a basis on which the City could be found negligent, a tort requiring a duty of care, a breach of that duty, and a loss suffered as a result of that breach.

3. Limitation Periods

[58] The City also submits that the developers, failed to claim negligent misrepresentation and, alternatively, negligence, within the limitation periods permitted by the ***Local Government Act*** and the ***Limitation Act***, R.S.B.C. 1996, c. 266.

[59] The developers submit the City could not advance a limitation argument following Master Bishop's October 2, 2000 order in which he allowed the developers leave to pursue against the City claims for negligent misstatement and, alternatively, for negligence. The City submitted that Master Bishop in granting the order did so without prejudice to the City's ability to argue a limitation defence, however that provision was not included in the filed order. After reviewing the transcript of the proceedings before Master Bishop, I conclude that pursuant to the slip rule found in Rule 41(25) of the **Rules of Court** the filed order should be withdrawn and a new order submitted to reflect Master Bishop's decision to allow the amendment, but leaving open the City's limitation defence.

[60] The City submits that s. 285 of the ***Local Government Act*** provides that actions against a municipality must be commenced within six months of the cause of action arising and s. 286 determines that a municipality is not liable for damages unless written notice setting out the basis of the claim is delivered within two months of the date when the damage occurred. However, s. 286 provides that a failure to give notice may be overcome if the court accepts that there was a reasonable excuse and, in this case, that the City has not been prejudiced in its defence.

[61] The developers did not meet the notice requirements found in sections 285 and 286 and, therefore, I must rely on the saving provision found in s. 286 to determine whether the negligent misstatement and negligence claims can proceed. I do not have before me a reasonable excuse upon which I might exercise the discretion provided in s. 286 and I am also concerned that the failure to provide notice before 2000 of the new claims of negligent misstatement or negligence has prejudiced the City's position.

[62] Although the City was aware of the developers' claim in injurious falsehood in 1993, the torts of negligent misstatement and negligence change the cast of the claim considerably. I conclude that the City's ability to address the evidentiary base of these additional torts was likely prejudiced given the lapse in time. Lacking a reasonable excuse and the prejudice to the City I conclude that this is

not a proper case to utilize s. 286 of the **Local Government Act** to expand the notice provisions of sections 285 and 286(1).

[63] The City further relies on the ***Limitation Act*** as a bar to the additional claims of negligent misrepresentation and negligence, noting that s. 3(2) establishes a two-year limitation period for damages for contract, tort or statutory duty. Subsection 4(1) of the ***Limitation Act*** allows a defendant in an ongoing action to bring a counterclaim after the expiry of two years, provided the counterclaim relates to or is connected with the subject matter of the original action. However, ss. (4) allows a discretion to the court in the amending of pleadings, stating:

> (4) In any action the court may allow the amendment of a pleading, on terms as to costs or otherwise that the court considers just, even if between the issue of the writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time.

[64] In ***ASM Capital Corp. v. Mercer International Inc.***, [1999] B.C.J. No. 1276, 1999 BCCA 353, ¶s19 - 21, Cumming J.A. addressed the discretion found in section 4(4) as follows:

> 19. Section 4(4) of the **Limitation Act** confers a discretionary jurisdiction on the court to permit a defendant to amend a counterclaim to allege a cause of action which has become statute-barred since the commencement of the plaintiff's action, but not before.
>
> 20. The discretion to be exercised by a chambers judge in deciding whether to grant leave to a defendant to amend a counterclaim to plead a cause

> of action that has become statute-barred since the commencement of the original action requires the chambers judge to consider:
> (a) the relative prejudice to the parties;
> (b) the length of delay in seeking the amendment, and
> (c) the defendant's explanation for delay.

[65] Cumming J.A. further noted at ¶21 that the law in B.C. is that there is a presumption of prejudice in favour of the party opposing the amendments.

[66] Although the City's submission follows the making of the amendment application in Chambers, I find the test expressed in ***ASM Capital*** to be applicable, particularly given Master Bishop’s direction that the limitation defences be heard by the trial judge.

[67] In the instant case I find that the City would be prejudiced particularly with respect to the amassing of evidence to respond to these related, but entirely different causes of action, that the delay in advancing these new causes of action has been considerable, and that the reason for the delay has not been satisfactorily explained.

[68] I conclude that the developers' claims of negligent misstatement and negligence to have been brought out of time contrary to the provisions of the ***Local Government Act*** and the ***Limitation Act***.

Summary

[69] I allow the application brought by the City and Mr. Stout and dismiss the defendant's counterclaim.

Costs

[70] I anticipate that in the ordinary course the City and Mr. Stout being successful throughout should have their costs at scale 3. If counsel wish to make submissions on costs they can arrange to speak to the issue.

"R.M.L. Blair, J."
The Honourable Mr. Justice R.M.L. Blair