

Subject: Fwd: Need to properly manage public property - or possibly lose it!

From: Brian Platts <bplatts@shaw.ca>

Date: 10/07/2014 2:45 PM

To: Corrie Kost <corrie@kost.ca>

No Post. FONVCA review.

----- Original Message -----

Subject:Need to properly manage public property - or possibly lose it!

Date:Wed, 09 Jul 2014 23:53:20 -0700

From:Corrie Kost <corrie@kost.ca>

To:Mayor and Council - DNV <Council@dnv.org>

CC:'FONVCA' <fonvca@fonvca.org>

Your Worship & Members of Council,

The attached NSNEWS article and the associated Supreme Court ruling should provide a wake-up call to all municipalities which fail to enforce bylaws on encroachments of public property.

Yours truly,

Corrie Kost
2851 Colwood Dr
N. Vancouver V7R2R3

— Attachments: —

2014 BCSC 1230 District of West Vancouver (Corporation of) v. Liu.pdf	72.1 KB
Owner of West Vancouver waterfront home wins legal wrangle.pdf	63.8 KB

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *District of West Vancouver (Corporation of) v. Liu*,
2014 BCSC 1230

Date: 20140703
Docket: S121927
Registry: Vancouver

Between:

The Corporation of the District of West Vancouver

Petitioner

And

Jie Liu

Respondent

- and -

Docket: S127407
Registry: Vancouver

Between:

Jie Liu

Petitioner

And

The Corporation of the District of West Vancouver

Respondent

Before: The Honourable Mr. Justice W. G. Parrett

Reasons for Judgment

Counsel for the Corporation of the District of West Vancouver
in both actions:

M. Moll
[S. Manhas]

Counsel for Jie Liu in both actions:

D.J. Taylor
and C.P.S. Riley

Place and Date of Trial:

Vancouver, B.C.
December 10-11, 2012

Place and Date of Judgment:

Vancouver, B.C.
July 3, 2014

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INTRODUCTION

[1] This matter involves two court proceedings which have been heard together.

[2] The first is a petition brought by the Corporation of the District of West Vancouver (“the District”) in which it seeks to enforce certain bylaw provisions. The District seeks orders directing the removal of part of an existing dwelling including a living room, retaining walls, decorative ponds, hedges, and a fence that they say obstructs an unimproved District highway.

[3] In seeking this relief the District seeks to enforce provincial legislation that prohibits the obstruction of highways as well as its own bylaws prohibiting unauthorized obstructions.

[4] The second proceeding is a petition brought by the respondent in which she seeks relief under s. 36 of the *Property Law Act*.

[5] In this proceeding Ms. Liu seeks the granting of an easement with respect to the area where any encroaching structures are found to lie, or alternatively, a vesting order requiring the District to sell her that portion of the property found to contain any encroachments.

[6] In the District’s petition, Vancouver Registry No. S121927 (“the enforcement proceeding”) they seek two primary areas of relief:

(1) A declaration that an approximately 431 square foot carport, an approximately 621 square foot family room, a stone patio, six rock retaining walls and two artificial fish ponds (collectively the “Structures”) encroach on that part of land dedicated as highway (the “Road Allowance”) that is:

(i) immediately to the west of land legally described as PID: 011-223-286, Lot 1, Block 31, District Lot 556, Plan 5184; and

(ii) immediately to the east of land legally described as PID: 002-618-912, Lot 4, except that part in Reference Plan 10793, Now Road, Block 32, District Lot 556, Plan 5184;

Contrary to section 46(1) of the Community *Charter* and section s. 8.9.1 of the District of West Vancouver Traffic and Parking Bylaw No. 4370, 2004.

(2) A mandatory order requiring Ms. Liu to remove both the Structures and the hedges and fence nearest the Structures from the Road Allowance within 90 days of the date of the order.

[7] The respondent submits that any of the Structures or improvements that do encroach onto the Road Allowance do not do so unlawfully.

[8] The respondent (and petitioner in the second proceeding) submits that the District is not entitled to injunctive relief and that, in any event, the court should exercise its equitable jurisdiction under s. 36 of the *Property Law Act* to require the District to grant an easement with respect to any encroaching structures.

[9] In the further alternative Ms. Liu submits the court should exercise its equitable jurisdiction to require the District to sell a portion of the property to Ms. Liu and to fix the compensation to be paid to the District.

BACKGROUND

[10] The petitioner, the District, is a municipality incorporated pursuant to the *Local Government Act*, R.S.B.C. 1996, c. 323, having its municipal offices at 750 – 17 Street, West Vancouver, B.C.

[11] The respondent, Jie Liu, is the registered owner in fee simple of land legally described as PID: 011-223-286, Lot 1, Block 31, District Lot 556, Plan 5184 (the “Liu Property”).

[12] Ms. Liu purchased the property by a contract of purchase and sale between her and the vendor, Mr. Tsakok, on May 6, 2011. Under the agreement the completion date was June 8, 2011 and the possession date was fixed for June 9, 2011.

[13] A Road Allowance lies to the west of the Liu property and is a highway within the boundaries of the District. This Road Allowance is part of a section of highway known as 30th Street, which runs between Marine Drive and Burrard Inlet. This portion of the Road Allowance was dedicated as highway by the deposit of Plan 4613 in the Land Title Office on February 14, 1914. Plan 4613 subdivided District Lot 556.

[14] Plan 4613 also shows Block 31 and Block 32. The Road Allowance in question lies between Block 31 and Block 32.

[15] The Road Allowance is undeveloped and has never been passable for motor vehicles although it contains a footpath used by the public to access Burrard Inlet from Park Lane.

[16] The Liu Property is part of a subdivision created by the deposit of Plan 5184 in the Land Title Office on November 4, 1922. Plan 5184 subdivided Block 31 on Plan 4613 into seven lots. Plan 5184 shows Lot 1, the Liu Property, immediately to the east of the Road Allowance.

[17] The unimproved portion of the Road Allowance runs from a point where Park Lane and Proctor Lane meet 182 feet south to Burrard Inlet.

[18] According to the affidavit material the Road Allowance has not been closed by bylaw of the Council of the District.

[19] A chain link fence and a cedar hedge lie to the east of the footpath which the public uses to access

Burrard Inlet and blocks access from the footpath to the Structures.

[20] Gordon Reid, Land and Property Agent for the District commissioned a survey in June of 2011 “. . . in contemplation of a proposal to close that part of the Road Allowance that does not contain the footpath”.

[21] The survey of the Road Allowance by Allan Winter, B.C.L.S., and dated June 19, 2011, indicates that “the Structures” are located entirely, or almost entirely, on the Road Allowance. It is notable that the survey plan in question identifies, on its face, the area of encroachment as “Proposed Closed Road”.

[22] The area of encroachment varies but at points stretches approximately 30 feet into the 66 foot wide Road Allowance.

HISTORICAL DEALINGS BETWEEN THE DISTRICT AND OWNERS OF THE LIU PROPERTY

[23] It is of some interest that title to the Road Allowance vested in the District on January 1, 2004, with the enactment of the Community *Charter*. Prior to that date title to the Road Allowance lay with the Province of British Columbia.

[24] The evidence before the court includes records of dealings between past and present owners of the Liu Property and District employees and designates.

[25] The District relies, in part, on the Affidavit of Randy Maki, the Manager of Permits and Inspections for the District. Mr. Maki has worked for the District in its Permits and Inspection Department in various capacities since 1980.

[26] Mr. Maki attests to the fact that he has reviewed “. . . the building permit records that the District has . . .” for the Liu Property. [Emphasis added.]

[27] He goes on to attest that the file for this property dates back to August 14, 1949, but that the earliest “. . . building permit record that the district has for the Liu Property is from May 30, 1961”. He goes on to add that:

This building permit was for the construction of an addition to the south and the west of the existing building on the Liu property. [Emphasis added.]

[28] Mr. Maki concludes his affidavit with the following paragraph:

6. I have determined that the District has never granted any building permit for a structure to encroach on the Road Allowance. I have determined that none of the building permits issued by the District for the Liu Property provides for the construction, extension or alteration of a structure to be placed on the road allowance.

[29] It is unclear what factual basis led to the formation of this opinion by Mr. Maki.

[30] There is no doubt on the basis of the District’s evidence alone that as of 2005, some six years prior to Ms. Liu’s purchase of the Property, the District knew of what they then claimed to be an “unauthorized encroachment”.

[31] In Gordon Reid's affidavit he explains:

- (1) that he is the land and property agent for the District;
- (2) that at the times he visited the property, most recently on October 19, 2011, ". . . it was obvious to me, even without the benefit of a survey, that the Structures encroached on the Road Allowance".

[32] Mr. Reid goes on in para. 19 of his affidavit to attest:

19. I do not know when each of the Structures was constructed.

The material portion of Mr. Reid's affidavit concludes with para. 31:

31. I have conducted searches with the District's engineering department to determine whether an encroachment permit had ever been issued for the Liu Property. I did not locate any encroachment permit, and none of my searches indicated that such a permit had ever been issued. I have determined that the District has never granted any permit or other consent for any of the Structures to encroach on the Road Allowance.

[33] In the absence of any factual statements of the basis on which the final opinion in the last paragraph is reached I must conclude it is based on the absence of records in the District files.

[34] Mr. Reid, in his affidavit, attests to the fact that "from the District's records . . ." Terry Lee, the District Building Inspector, became aware of the Structures in 2005. At that time the Liu Property was owned by Raoul Tsakok who eventually sold the property to Ms. Liu six years later in 2011.

[35] In 2005 Mr. Lee began an exchange of correspondence with Mr. Tsakok. Mr. Reid, in para. 20 of his affidavit, characterizes the exchange of correspondence in this way:

. . . From 2005 to 2008, District employees and Mr. Tsakok corresponded regarding the removal of the Structures from the Road Allowance or the possibility that Mr. Tsakok could purchase the land containing the Structures.

[36] It is, perhaps, more useful to look at the actual exchange of correspondence rather than this self-serving characterization of it.

[37] On May 20, 2005 Terry Yee wrote to Raoul Tsakok. The body of this letter reads:

RE: 2998 Park Lane, West Vancouver
Family Room/Carport and Fencing Built on District Property

It has come to our attention that a family room/carport structure, has been constructed on the 30th Street road allowance. We have no records of any permits issued for this work.

The District is requesting that all structures, including the chain-link fence erected on District property be removed.

We understand that the property has recently been listed for sale and we are requesting that you inform all prospective purchasers of this non-conformity.

Please advise us of when this work will be completed and we respectfully request a reply within 15 days from the date of this letter.

[38] On May 25th, 2005, Mr. Tsakok replied referring to Mr. Yee's letter of May 24th, 2005. His reply is as follows:

With reference to your letter dated May 24th, 2005 regarding the above-subject property, I wish to make the following statements:

1. The property is not for sale nor do I have any plans to list the property for sale.
2. I was told by Mr. Scott in 1987, the owner at the time, that he had a grandfathered agreement with the city of West Vancouver. He resided at this address for more than 25 years and had approval for the structure and pool, and that a copy of the permits could be found at municipal hall. The family room and carport have been there for years as evidenced by the tall hedges and trees.
3. When I purchased the property ten years ago, the structure in question was as it is today. I obtained the required permit for landscaping around 1998. The existing pool at the bottom of the property was turned into a pond, and we sought and obtained permission from the city arborist for removal of approximately ten large cedar trees from the property. This property has greatly enhanced West Vancouver's waterfront. According to your aerial photograph of the property, the pond bordering the water is off the property boundaries on two sides; however, the municipality granted us the permit to convert this pond without going to the Board of Variance.
4. We submitted a survey upon applying for the landscaping permits, and the mentioned structure existed then. The property was inspected many times during construction before the final inspection, where all work performed passed the required regulations without any queries. I fully depended on the knowledge and experience of municipal employees in this regard and believed it is ingenuous for any question of unconformity to be brought forth at this time.
5. Is there a new zoning by-law at the planning department that I am not aware of? I do know that there are many non-conforming structures in West Vancouver, including Park Lane.

Finally, I would like to stress that gardening is a great hobby of mine and this property has been landscaped with careful planning and research. I have been enhancing the property continuously with beautiful shrubs, bonsai, palm trees and floral displays gathered from ideas picked up along my business travels, and it would cause great hardship if I were required to remove the structure and attendant landscaping. I originally purchased the property in good faith and later embellished it, relying on the bona fides of the original owner and the knowledge and expertise of West Van municipal employees as related earlier. I believe it would be unjust at this late junction to order the demolition of the structure and other embellishments without requiring all other encroachments in West Vancouver to do the same.

[Emphasis added.]

[39] The District's reply to this letter came nearly a month later on June 22, 2005, and not from Mr. Yee, but from Tim O'Meara, the District's Manager of Permits and Inspections.

[40] The body of this letter is as follows:

RE: 2998 Park Lane, West Vancouver
Encroachment on 30th Street road allowance

Thank you for your letter of May 25th, 2005. We have reviewed our files and we cannot find any evidence of a "grand fathered" agreement which would permit this sunroom/carport in 30th Street

road allowance. If you have any documentation that substantiates an agreement, please forward to this office as soon as possible.

Our records indicate that the original house was built in the late 1940's. A permit for an addition, which included a Board of Variance application/approval for a relaxation [sic] in the front yard setback, was issued in 1961. A further permit for the construction of a koi pond was issued in 1997. The site plan provided (copy enclosed) does not show the encroachment on the 30th Street road allowance, nor does it show any work in the foreshore.

While we appreciate the fact that you have enhanced this property, we cannot allow the encroachment to remain, particularly so as this is District waterfront property. Please advise us of your intention by July 11, 2005.

If you require further clarification please call . . . Your cooperation is appreciated.

[41] Once again Mr. Tsakok replied in a timely manner. His reply is dated July 8, 2005 and the body of his reply reads:

In response to your letter dated June 22, 2005 please be advised that I have no written documentation relating to the grandfathered agreement which permitted the sunroom/carport in the 30th Street allowance. I have only the assurance of Mr. Scott who owned the property for many years before I purchased it. As an aside, I did not purchase the property from Mr. Scott so there would be no purpose in his prevaricating on the matter. I think the point we must all consider of prime importance here is the fact that this encroachment has been in place for more than 25 years. It has been inspected numerous times by municipal employees and no question has been raised about its authorization until now. Mr. Scott (now deceased) who originally built the addition believed wholeheartedly that he had municipal approval of the encroachment and of course the very fact that the municipality did not question his authorization at any time in the last twenty-five years would have verified the grandfathering of the addition.

I purchased the property in good faith relying on the statement of Mr. Scott and on the verifiable evidence that the addition had in fact been there for over twenty-five years without question or comment by the municipality. I can understand that the municipality has a concern when homeowners encroach on municipal rights of way or road allowances but I also believe that through passage of time, in this case more than twenty-five years, such concern cannot be seen as requiring pressing or immediate remediation. In fact, it has been noted that your Park Services Department has been doing an excellent job of maintaining and improving the pedestrian access to the beach through the road allowance and that such access is totally unimpeded by the encroachment.

Perhaps you could interview past or current municipal employees who may have personal knowledge of the grandfathering of the addition over twenty-five years ago to ascertain the truth of the matter. Obviously any demand by the municipality to remove the addition would impose upon me a personal serious financial penalty. One that is far beyond the results of any alleged harm that has been done or is alleged to have been done to the municipality considering its silence on the matter for over twenty-five years. The facts of the matter are that the property in question including the addition have enhanced rather than detracted from the space including the 30th Street road allowance. I would suggest in closing that we arrange to meet to discuss alternatives to removal of the addition with a goal of regularizing the placement of the addition in the road allowance. I sincerely believe that the addition was in fact approved by the municipality at the time it was constructed and that we should work towards a mutually satisfactory way of evidencing this fact on your files. I can be reached at . . . after the 18th of July as I will be out of town until then. Thank you for your attention.

[Emphasis added.]

[42] After the District received this reply, according to their own documents, they retreated to stony silence

for nearly three years.

[43] It was not until May 7, 2008 that the next correspondence from the District is sent. This letter is over the signature of Gordon Reid, Land Agent.

[44] Between May 20, 2005 and May 7, 2008, a period of nearly three years, they have authored a total of three letters, each by a different official.

[45] Mr. Reid's correspondence is as follows:

RE: Encroachment at 2998 Park Lane

We have been attempting to identify and deal with the properties that have road right of way encroachments, and give the owners options of how to bring them into conformity to the current bylaws. We know there is a current encroachment area being used as staff have visited the site and their recommendations are to ask if you would be interested in purchasing the unopened road allowance to the west of 2998, which would be sold at market value. The only other option available at this time would be to move the encroachment to bring the lands back into conformity. Please let us know if you'd like to purchase this area as we will need to advise the public and obtain Council approval or will remove the encroachment from District lands.

We look forward to discussion with you and ask that you contact the undersigned at . . .

[46] According to the District's material and, apparently, their file, nothing further was done until the summer of 2011. After more than a further three years had passed they served "a notice of requirement to remove structures on Raoul Tsakok at his Vancouver residence".

[47] This statement in para. 26 of Mr. Reid's affidavit does not indicate the address at which he was served or the date of service. It does, however, go on to state:

It was at this time the District learnt [sic] that he had sold the Liu Property to the respondent.

[48] This recital outlines the District's efforts to deal with this situation between May 20, 2005 and ". . . the summer of 2011 . . .": This is a period of more than six years. Over that period the District's efforts consisted of writing three letters, each of which was written by a different official. That six year delay without any effective action resulted in Ms. Liu purchasing the property and taking possession on June 9, 2011.

[49] To complete the circle the District wrote to Ms. Liu by correspondence dated August 30, 2011. This letter is over the signature of Raymond Fung, Director of Engineering and Transportation. Mr. Fung, as noted, is the fourth different official to author a letter on this matter. Not one of the four wrote more than one of the four letters over the six year period.

[50] In passing, I note that each of the four letters has a different file reference, sometimes only slightly different, but each is different.

[51] Mr. Fung's letter is as follows:

RE: Encroachment on the 30th Street Road Allowance
Located at 2998 Park Lane, West Vancouver

It has recently come to the District's attention that you have purchased the residential property at 2998 Park Lane, West Vancouver (the "Property") from Mr. Raoul Tsakok, the previous owner. We write regarding the issue of various encroachments associated with the Property. I invite you to contact Gordon Reid, Land and Property Agent at . . . in order to discuss this issue. As these encroachments have existed for some time, no immediate action is required however this matter will have to be resolved within six months.

Encroachments on Road End

You should be aware that various encroachments extend from the Property onto the District's 30th Street road end adjacent to the Property (the "Road End"), (See Attachment). These encroachments are substantial and include your family room with attached garage connected to your house on the Property (the "Structural Encroachment"). There are other encroachments on the Road End as well. All of the encroachments were constructed and installed by previous owners of the Property for the use and enjoyment of the Property. The District's consent to the construction and installation of the encroachments was neither given nor sought. The Structural Encroachment, which has a foot print of about 1,050 square feet, was constructed without a building permit.

The District informed the previous owner, Mr. Tsakok, of these encroachments in 2005 and in 2008 the District formally offered to sell a marketable portion of the Road End to Mr. Tsakok. The portion of the Road End that was offered for sale contained the above-noted encroachments. The sale/consolidation, if completed, would have addressed all outstanding issues between the District and Mr. Tsakok regarding the unauthorized encroachments on the Road End. Mr. Tsakok did not accept the District's offer and subsequent attempts by the District to negotiate a sale with him were unsuccessful.

Accordingly, the Council of the District authorized staff to deliver notice pursuant to Section 8 in the District's Encroachment Bylaw No. 3050 to the previous owner requiring complete removal of all the encroachments on the Road End, the filling up of any excavation made, and the return of the area encroached upon to the same condition as the balance of the Road End by no later than January 31, 2012. With the sale of the property, this deadline will now be February 29, 2012 to provide you with sufficient notice and response time.

Despite the foregoing, the District is prepared to discuss with you the possibility of negotiating the sale (and consolidation with the Property) of an appropriate marketable portion of the Road End for the encroachments. We believe that such a sale would be in the best interest of all concerned and would satisfactorily resolve all issues relating to the unauthorized encroachments. We must advise however, that if such a sale has not been negotiated by February 29, 2012, or, alternatively, if you fail to complete all of the removal work to the satisfaction of the District Engineer by February 29, 2012, the District may at any time thereafter, without further notice, bring proceedings to enforce its rights with respect to the Road End including seeking injunctive relief for the removal of all of the encroachments and awarding of costs.

We look forward to discussing the above issues with you at your earliest convenience.

[52] One other piece of correspondence is of interest in this protracted exchange. Among the exhibits to Ms. Liu's affidavit are found a few internal emails from the District. One of these consists of an email exchange from Tim O'Meara to Doug Leavers dated May 16, 2005. The email is copied to Steve Nicholls, Susan Graham and Terry Yee.

[53] The material portion of the email is found in the first paragraph which reads:

We have not been able to confirm when this garage was constructed. The garage structure extends well into the unopened road allowance on 30th (see Westmap). The original house predates our records (30's). There was a Board of Variance/building permit approved for a small addition in the

60's but this seems to be unrelated. There was another permit issued for a koi pond issued in 1997 but again the site plan is (intentionally?) vague.

[54] What is most notable about this statement is the apparent mixing of facts (We have not been able to confirm when this garage was constructed) with opinions which appear to have no foundation in fact (. . . building permit approved for a small addition in the 60's but this seems to be unrelated [Emphasis added]).

SUBMISSIONS

Submissions on behalf of the District

[55] The District's claim for relief is founded on the statutes and bylaws governing the dedication, ownership and regulation of public highways and the District's authority to enforce those statutes and bylaws.

[56] The District submits that there are two issues before the court –

- (a) Are the Structures, the fence and the hedge unauthorized obstructions of land dedicated as highway?
and
- (b) Is the District entitled to an injunction requiring the removal of the Structures, fence and hedge?

[57] The heart of the argument of the District can be found in para. 67 of their written submissions:

67. The material fact in this proceeding is that there is an unauthorized and substantial obstruction of a District highway the Structures, the fence and the hedge. The additional facts related to the age of the Structures, and the respective historical knowledge, conduct, intentions and representations of the parties does not affect the District's entitlement to a statutory injunction.

[58] The District's submissions go on to assert that the Structures are clearly encroaching on the Road Allowance and are "unauthorized obstructions of a District highway contrary to both s. 46 of the Community Charter, s. 8.9.1. of the Traffic and Parking Bylaw, and s. 2 of the Encroachment Bylaw.

[59] The District says that no agreement or permit to encroach on the Road Allowance has been issued pursuant to the District's bylaws.

[60] The District goes on to submit that no building permit was issued but that, even if one was issued, such a permit does not grant a right to encroach.

[61] The District submits that in pursuing the remedies it seeks it is merely seeking the statutory remedy it is entitled to in the public interest.

[62] In response to Ms. Lui's petition the District submits that the following issues arise –

- (a) May s. 36 of the *Property Law Act* be applied to regularize an unauthorized obstruction of a highway?
- (b) Do statutory considerations applicable to a highway favour a removal order regardless of typical

equitable considerations?

- (c) Do equitable considerations favour a removal order?
- (d) If a removal order is not granted, what compensation is payable to the District?

[63] The District submits that the following factors suggest that s. 36 relief is not available to remedy a statutory contravention on a highway:

- (a) The *Property Law Act* makes no particular mention of dedicated highways, notwithstanding the fact that highways are not typical fee simple property;
- (b) The right to apply for relief is only available after a contravention of a statute has been committed. Section 36 does not provide for prior permission to encroach, and thereby obstruct, a highway;
- (c) An easement or vesting order is effectively a court-ordered closure of a road without public notice. Pursuant to section 40 the public is notified of municipal-ordered road closures;
- (d) The relief under section 36(a) and (b) is similar to the common law claim of prescription, however subsection 35(4) of the *Community Charter* provides that a municipality's possession of highways is not affected or derogated by an claim of prescription; and
- (e) The general prohibition in *Community Charter*, s. 42 applies to all persons, yet the relief under the *Property Law Act* is available only to a neighbouring owner. An owner may be allowed to obstruct an adjacent highway, whereas a non-owner's similarly sized and placed obstruction must be removed.

[64] The District submits that the *Property Law Act* should be interpreted in light of the fact that the legislature has "required by statute, that highways, including the Road Allowance, be free of unauthorized obstructions, unless authorized by enactment".

[65] The District goes on to submit in para. 132 of their written submissions:

. . . The district says that the authority to obstruct should be a permission granted prior to construction, not permission obtained after a contravention has been committed.

[66] In paras. 133 and 134 of those submissions they advance the following propositions:

- 133. Section 40 and 41 of the *Community Charter* provides for the closure of highways and removal of highway dedication through legislative procedures with public notice and government approval requirements. Subsection 35(8) of the *Community Charter* provides for the Provincial right of resumption. Absent clear express application to highways, section 36 of the *Property Law Act* application should not be applied to grant the Court an alternative power to effectively close large parts of dedicated highway or remove highway dedication.
- 134. Furthermore, subsection 35(4)(a) of the *Community Charter* expressly provides that a municipality's title to a highway is not diminished by a claim in prescription. The District says that this express statutory exclusion of any claim through adverse occupation supersedes the application of the *Property Law Act* to make [sic] otherwise make an unlawful occupation lawful.

[67] The District submits there is no equitable reason why relief should be granted under s. 36 and override the public interests in the Road Allowance.

[68] In terms of compensation, the District submits that if Ms. Liu is entitled to an interest in part of the Road Allowance pursuant to the *Property Law Act*:

. . . she should be required to pay, at a minimum, the market value for that interest. [Emphasis added.]

[69] No portion of the argument addresses what amount more than market value should be considered or what principles would apply to such a consideration.

[70] The District, in the end, submits that a removal order should be made. Such relief, they submit, is supported on an equitable basis, and, more importantly, on a statutory basis.

Submissions on Behalf of the Respondent Liu

[71] The respondent, Ms. Liu, submits that contrary to the issues identified by the District and their focus on statutory remedies, the issues here are –

- (a) Are all of the Structures owned by Ms. Liu, or any improvements on such property, unlawfully encroaching on the property owned by the District? [Emphasis added.]
- (b) If some or all of the Structures on the property owned by Ms. Liu or any improvements do encroach on property owned by the District, is it appropriate in all of the circumstances to require Ms. Liu to remove the Structures and improvements?
- (c) Is the District entitled to an injunction?
- (d) Should the court exercise its equitable jurisdiction under s. 36 of the *Property Law Act* to require the District to grant an easement to Ms. Liu with respect to the property where the encroaching Structures or any improvements are located?
- (e) If so, what compensation should be paid by Ms. Liu to the District for the easement?
- (f) In the alternative, should the court exercise its equitable jurisdiction under s. 46 of the *Property Law Act* to require the District to sell any portion of the property to Ms. Liu?
- (g) If so, what compensation should be paid by Ms. Liu to the District as compensation for the property?

[72] The respondent submits that the District has not offered any specific evidence on the date when the carport and family room were constructed but, they submit, these structures have been in place for many years.

[73] In 1997 they submit that the District granted authorizations and permits for further alterations and modifications. Throughout this whole process no issues were raised by the District concerning encroachments or any other issues.

[74] The documents of the District and their failure to seek removal of the Structures at any time before this

petition was filed in 2012 support the respondent's submission that the Structures do not unlawfully encroach upon the District's property.

[75] The respondent submits that in all of the unique circumstances in this case it is not appropriate, in any event, to compel the removal of the Structures.

[76] It is submitted that the court should consider the private hardship which would be caused and balance that hardship against the public interest the District says it is serving.

[77] In weighing these interests the respondent submits the court should weigh the historical use of the "Road Access" which was for access to the waterfront. There is, they submit, no evidence or suggestion that the encroachment has, in any way, disrupted or affected that use.

[78] The respondent also submits that it is "perfectly clear that the District has no specific or principled need for the lands in dispute". This is clear, they submit, from the long series of negotiations between the parties for sale of the District Lands to Ms. Liu.

[79] The respondent submits this is the "rare case with exceptional circumstances" where the court ought to exercise its discretion to find that the public interest concerns are outweighed by the equitable considerations and the private hardship.

[80] The respondent submits that there is no bar to granting relief under s. 36 of the *Property Law Act* even where the case deals with encroachments on highways. They submit that the law is clear that the court retains a limited discretion to deny the District injunctive relief.

[81] In considering s. 36 relief, the respondent submits that s. 32 [now s. 36] was enacted to provide a basis, on equitable grounds, for resolving disputes over encroachments.

[82] The respondent submits that on a proper application of the balance of convenience test it is not at all equitable to require the removal of the Structures.

DISCUSSION

[83] In *Osoyoos (Town) v. Nelmes*, 2009 BCSC 704, [2009] B.C.J. No. 1053, Barrow J. had for consideration a case involving somewhat similar issues.

[84] The defendant in that case had built a retaining wall without obtaining a building permit. The plaintiff sought a declaration that the defendant had breached its Building Bylaw and s. 46(1) of the *Community Charter*, S.B.C. 2003, c. 26. In addition they sought a mandatory injunction compelling the defendant to remove the retaining wall.

[85] The defendant sought relief under s. 36 of the *Property Law Act*, R.S.B.C. 1996, c. 377.

[86] In considering the application of s. 36, Barrow J. found, at para. 22:

[22] This section provides a method by which encroachments may be regularized. On its face, it is

not limited to encroachments involving two private property owners, although I am not aware of any instance in which it has been invoked to regularize an encroachment on public property. In applying s. 36, the court is to take a “broad, equitable approach” (*Taylor v. Hoskin*, 2006 BCCA 39 at para. 53, 265 D.L.R. (4th) 132). Among other things, the court is to consider the expense of removing the encroaching structure and whether, if not removed, the structure would adversely affect the use or value of the land on which it encroaches (see generally: *Barrow v. Landry*, [1998] B.C.J. No. 1601 (S.C.), aff’d 1999 BCCA 143). Assuming, without deciding that s. 36 is available to the court to remedy an encroachment on public property, it should not, in my view, be applied in a manner that would enlarge the limited discretion the court has to decline statutorily authorized injunctive relief. Rather, the approach should be to first determine whether the injunction should be issued, and if it is determined that it should not, then s. 36 may be invoked to address the encroachment. By proceeding in this manner, the public interest which constrains the discretion to refuse an injunction will be respected. Resorting to s. 36 first, and in the manner that it is usually applied, would not give the public interest its due.

[87] In my view, this is the correct procedural approach where, as is the case here, public lands and the public interest component is engaged.

[88] What is different in the present case is that the initial issue revolves around whether the Structures are ‘unlawfully encroaching’ or as the District frames it ‘unauthorized obstructions’.

[89] With the greatest of respect to the submissions of the District they seem to skip past and gloss over this issue.

[90] In their written submissions they touch on it at para. 25:

The District says it did not issue a building permit for the construction of the Structures on the Road Allowance.

[91] The first issue that must be addressed in these petitions is identified in nearly identical terms by both parties:

The Petitioner (District)

Are the Structures, the fence, and the hedge unauthorized obstructions of land dedicated as highway.

The Respondent (Liu)

Are all of the Structures on the property owned by Ms. Liu, or any improvements on such property, unlawfully encroaching on the property owned by the District?

[92] It is evident that although the District uses the term “unauthorized” and the respondent the term “unlawfully encroaching” they are each referring to the same issue.

[93] Regretfully it is not at all as clear referring to their submissions that they are addressing the same issue.

[94] The two main affidavits on which the District relies are that of Gordon Reid (affidavit #1) and that of Randy Maki (affidavit #1), both of which were sworn on March 14, 2012.

[95] Once again I will extract the material paragraph of each of these affidavits:

Gordon Reid – para. 31:

I have conducted searches with the District's engineering department to determine whether an encroachment permit has ever been issued for the Liu Property. I did not locate any encroachment permit, and none of my searches indicated that such a permit had ever been issued. I have determined that the District has never granted any permit or other consent for any of the Structures to encroach on the Road Allowance. [Emphasis added.]

Randy Maki – para. 6:

I have determined that the District has never granted any building permit for a structure to encroach on the Road Allowance. I have determined that none of the building permits issued by the District for the Liu Property provides for the construction, extension or alteration of a structure to be placed on the road allowance. [Emphasis added.]

[96] I first observe that the opinions highlighted in both paragraphs extracted above provide the court with no real factual basis for the conclusions and the opinions expressed.

[97] I also note that at the centre of each of these opinions is the very issue on which this court has been asked to conclude initially either that the 'obstructions are unlawful' or that they are "unauthorized encroachments".

[98] Mr. Maki, at paras. 3, 4 and 5 of his affidavit, presumably describes the basis for the unequivocal opinion he expresses:

3. I have reviewed the building permit records that the District has for the land with the civic address of 2998 Park Lane, West Vancouver B.C. and legally described as PID: 011-223-286, Lot 1 Block 31 District Lot 556 Plan 5184 (the "Liu Property"). The file for the Liu Property dates back to August 14, 1949. Attached to this my Affidavit as Exhibit "A" are true copies of all building permit history records cards, all building permit applications and drawings, all letters of assurance, and all variance appeal records that the District has for the Liu Property.
4. The earliest building permit record that the District has for the Liu Property is from May 30, 1961. This building permit was for the construction of an addition to the south and west of the existing building on the Liu Property. The file also contains a letter to R.W. Scott to [sic] from the secretary of the District's Zoning Appeal Board dated May 25, 1961. This letter confirms the granting of zoning permission to construct the south and west addition on the Liu Property, subject to conditions.
5. I reviewed the District's building files for documents that would purport to grant permission to an owner of the Liu Property to construct or maintain a structure on the dedicated highway immediately to the west of the Liu Property known as 30th Street (the "Road Allowance"). The District's building permit files include a building permit issued on April 4, 1997 for a fish pond located entirely on the Liu Property. The District has no record of a building permit for a pond to be located partially or entirely on the Road Allowance.

[99] I have reviewed all of the documents produced and marked Exhibit "A" to Mr. Maki's affidavit. As stated in his affidavit the earliest building permit record amongst these documents is from May 30, 1961.

Apparently related to that building permit record are various documents related to the Zoning Board of Appeal and a hearing that related to the then owner, Mr. R. W. Scott, seeking permission to add to his nonconforming dwelling.

[100] One document, at p. 35, of the exhibits advises that at a meeting of the Zoning Board of Appeal on May 24, 1961 it was the decision of the Board that:

Provided a building permit is obtained within 90 days of this date, and provided the addition conforms to the yard requirements of the bylaw, Mr. Scott be granted permission to add to the south and west of his nonconforming dwelling . . .

[101] A second document, at p. 1, of the Exhibits records the issuance of Building Permit B9480, six days later on May 30, 1961.

[102] No such building permit is produced and if the copy of the plan, at p. 42 of the exhibits relates to that decision and building permit, it is completely illegible.

[103] What is clear from these various documents is that the District's building permit records for the Liu Property are incomplete to put it kindly.

[104] There is no apparent record or permit for the initial construction of the original house or the garage.

[105] It is equally clear that the May 30, 1961 building permit referred to by Mr. Maki in para. 4 of his affidavit was for an addition to the existing home.

[106] It is difficult if not impossible to see how Mr. Maki, having reviewed these documents, concluded and formed the opinion expressed in his affidavit at para. 6.

[107] There is no factual basis for the opinion expressed and it is both inadmissible and of no evidentiary value.

[108] It is interesting to observe that in the respondent Ms. Liu's affidavit #1 sworn on October 11, 2012, she exhibits correspondence between the District and Mr. Tsakok, the previous owner of the property and, as Exhibit H to her affidavit, a copy of an internal email exchanged among officials at the District, including Doug Leavers, Tim O'Meara, Steve Nicholls, Susan Graham and Terry Yee.

[109] Mr. Yee and Mr. O'Meara are, of course, two of the three authors of the three letters to Mr. Tsakok referred to earlier in these reasons.

[110] The email exchange took place on May 16, 2005. The first of the three letters written over the signature of Terry Yee was apparently dated May 20, 2005, four days after the email.

[111] The material part of the email is that attributed to Mr. O'Meara:

From: Tim Omeara
Sent: May 16, 2005 12:06 PM
To: Doug Leavers

Cc: Steve Nicholls; Susan Graham; Terry Yee
Subject: RE: Proctor Park encroachment/2998 Park Lane

Doug et al,

We have not been able to confirm when this garage was constructed. The garage structure extends well into the unopened road allowance on 30th (see Westmap). The original house predates our records (30's). There was a Board of Variance/building permit approved for a small addition in the 60's but this seems to be unrelated. There was another permit issued for a koi pond issued in 1997 but again the site plan is (intentionally?) vague.

I have suggested to Terry that we write to the owner putting them on notice that we never approved this structure and that the encroachment be removed. The property was recently listed for sale so we would ask the owner to disclose the encroachment to potential purchasers and cc the listing agent, Allen Angel in our letter.

Susan has a copy of a proposed foreshore encroachment for the koi pond from 1998. The encroachment extends partways in front [sic] of the 30th street road allowance.

Thoughts/suggestions?

[112] It is not explained in the materials how Mr. O'Meara apparently changed his 'opinion' that "the original house predates our records (30's)" as expressed in his email to that he expressed in his June 23, 2005 letter to Mr. Tsakok "Our records indicate that the original house was built in the late 1940's".

[113] What is apparent from the building permit record card is that from time to time from 1949 until at least 1997 the then current owners of the property were in contact with the District and took out, as required, various permits for work on the property.

[114] It is difficult to understand how building inspectors or other employees of the District over that time frame could not have been aware of what Gordon Reid describes in para. 17 of his affidavit:

. . . It was obvious to me, even without the benefit of a survey, that the Structures encroached on the Road Allowance . . .

[115] The opinion expressed by Mr. Reid in para. 31 of his affidavit falls into the same category as that expressed by Mr. Maki. It is improper and inadmissible given the demonstrably incomplete state of the District's records.

[116] At the very least, Mr. Reid and counsel for the District were obliged to provide the basis and the facts on which he relied to express the categorical opinion he did.

The Construction of the Structures

[117] The District, despite their statutory duties, which are part of the statutory powers they seek to enforce, offer little in the way of specific evidence as to the date of construction of the Structures.

[118] In addition, they offer no explanation in their material for the absence of the 1961 building permit or any apparent records concerning the original construction.

[119] Instead, they simply offer unequivocal opinions of two of their officials that the District didn't do

something that likely predates either of their involvements in the District's affairs.

[120] In 1961, according to the documents which were produced, the Zoning Board of Appeal granted permission for the then owner, Mr. R.W. Scott (now deceased) to construct additions "to the south and the west . . ." of his existing dwelling.

[121] I note in passing, firstly, that the Zoning Board of Appeal was apparently established by the District's own bylaws as is evident from their decision and held their hearings in the Municipal Hall.

[122] Secondly, the encroachments at issue here are to the south and west of the residence.

[123] Doing the best I can with the evidence before the Court I conclude that the Structures which clearly encroach into the Road Allowance have existed in their present locations, with one exception, since at least 1961.

[124] The exception appears to be the pond to the south constructed under a permit in 1997.

[125] Over the course of no less than 51 years these encroachments remained in place without apparent complaint or action from the District despite how obvious Mr. Reid says the encroachment is.

[126] I conclude that these encroachments were neither unauthorized nor unlawful.

[127] In reaching this conclusion I have considered and am mindful –

- (a) that the District has produced no building permit issued according to their own records after the 1961 Zoning Board of Appeal decision;
- (b) that the District has produced no 'inspection' reports, records or documentation for either the 1961 or the 1997 work carried out on the property;
- (c) there has been no disclosure of any document plan or permit disclosing when the carport and family room were constructed;
- (d) in Mr. Tsakok's correspondence with the District he described the many inspections carried out by District employees without concerns or complaints. These assertions to the District are uncontradicted and, indeed, without response;
- (e) in the same correspondence Mr. Tsakok described the constant presence of District Parks employees maintaining the footpath along the side of the encroachment for public use accessing Burrard Inlet;
- (f) the complete absence of any explanation for how District employees have overlooked such an obvious encroachment for so many years' leads to the inference that they did not overlook it but knew it was authorized;
- (g) there are no documents or materials addressing or explaining the periods of apparent inaction by the

District:

- (i) 1961-2005 (44 years)
- (ii) 1997-2005 (8 years)
- (iii) 2005-2008 (3 years)
- (iv) 2008-2012 (4 years)

[128] Yet another matter that has gone without explanation by the District as they proceeded with this petition is that Ms. Liu has been receiving two tax notices for this property from the District – one for the property itself and one for the foreshore. The 2012 Property Tax Notice for the latter received gives the property address as “F/S 2998 Park Lane” and the legal description as “Foreshore Directly In Front Of Lot 1, Block 31, D.L. 856, Plan 5184”.

[129] This is not a case which turns on claims of adverse possession or similar claims, but rather one in which the District has failed on the threshold issue of establishing that the encroachments in this case are unauthorized or unlawful.

[130] It is unnecessary given my finding on the threshold issue to go on and consider whether or not a mandatory injunction should issue in the circumstances or whether s. 36 of the *Property Law Act* has application.

[131] The District’s petition is dismissed.

[132] With respect to the petition brought by Ms. Liu I find that the encroachments in this case were authorized and that the respondent, Ms. Liu, has an easement with respect to them for the life of the buildings.

[133] I would allow the petition to the extent of issuing the above declaration.

[134] The respondent will recover her costs from the District.

“W. G. Parrett, J.”

north shore news

Owner of West Vancouver waterfront home wins legal wrangle

[Jane Seyd](#) / North Shore News

July 9, 2014 12:00 AM

• [North Shore News](#) • (news)



The home at the centre of a legal fight between a property owner and the District of West Vancouver. Photo file, North Shore News

The owner of a West Vancouver waterfront home has been spared the prospect of dismantling parts of her house after winning a court case against the municipality.

<http://www.courts.gov.bc.ca/jdb-txt/SC/14/12/2014BCSC1230.htm>

In a recent court decision, a B.C. Supreme Court judge tossed out a request from the District of West Vancouver to force homeowner Jie Liu to either take down portions of the house or pay the municipality for encroaching on public land.

Instead, the Justice Glen Parrett ruled the buildings - including a 400-square-foot carport and 600-square-foot family room, plus a patio, fish ponds and retaining wall - can stay.

Parrett also ruled the municipality will have to pay Liu for her legal costs.

The court case concerns a house at 2998 Park Lane, which sits next to municipal land used as beach access at the foot of 30th Street.

Over the years, parts of the home, including the carport, family room, and fish ponds, were built on district land.

Two years ago, in October 2012, the municipality took the case to court, arguing the structures were all built without permits and encroach on public land.

Municipal staff argued successive homeowners of the property had taken over public land for their private benefit.

Lawyers for Liu argued the district had authorized the structures, because municipal staff knew about them for decades and didn't do anything about them.

Liu bought the house in 2011. She maintained the previous owner, Raoul Tsakok, told her that the structures had been permitted under a grandfather agreement.

Lawyers for Liu added none of the buildings prevented the public from using the adjacent water-access trail and that "public interest concerns in the case" were outweighed by hardship that would be suffered by Liu if she were forced to take the buildings down.

In granting Liu permission to keep the buildings, Parrett said the district's records on the property were incomplete and there was little evidence about when any of the structures were built.

Most of them, however, have remained in place for more than 50 years without any complaints from the municipality, he noted, leading him to conclude the buildings were authorized.

He added both Liu and previous owners of the home have paid taxes on the entire property for years.

The three-bedroom two-bathroom house is currently listed for sale at \$5.5 million.

www.twitter.com/JaneSeyd (<http://www.twitter.com/JaneSeyd>)

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