

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *TWS Holdings Ltd. v. The Owners, Strata Plan KAS 2521*,
2026 BCSC 938

Date: 20260522
Docket: S47275
Registry: Penticton

Between:

TWS Holdings Ltd., Dale Keith Lamb and Rene Gary Wayne Bourque

Petitioners

And

**The Owners, Strata Plan KAS 2521 and
His Majesty the King in Right of the Province of British Columbia**

Respondents

Before: The Honourable Justice Laurie

Reasons for Judgment

Counsel for the Petitioners:

M.S. Moorhouse

Counsel for the Respondent, The Owners,
Strata Plan KAS 2521:

M. Fischer

Place and Date of Hearing:

Kelowna, B.C.
June 5 and October 16-17, 2025

Place and Date of Judgment:

Kelowna, B.C.
May 22, 2026

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INTRODUCTION

[1] The petitioners, TWS Holdings Ltd., Dale Keith Lamb, and Rene Gary Wayne Bourque, seek to amend a “Phased Strata Plan Declaration” and extend the time for electing whether to proceed with Phase 5 of Strata Plan KAP67720 (the “Strata Plan”) pursuant to s. 232 of the *Strata Property Act*, S.B.C. 1998, c. 43 [SPA]. In addition, they seek a utilities easement over the existing utilities to allow Big White Utilities (“BWU”) the authority to complete the utilities hook-up when construction is completed.

[2] The subject development is known as Perfection Ridge, which is associated with the Big White Ski Resort. It was meant to have five phases. However, the developer never completed the fifth and final phase (“Phase 5”).

[3] The petitioners obtained legal title to the undeveloped Phase 5 (the “Remainder Lot”) through foreclosure proceedings. They wish to develop the Remainder Lot separately from the existing strata.

[4] The respondent, the Owners, Strata Plan KAS 2521 (the “Strata”) opposes the orders sought.

BACKGROUND

[5] On April 29, 2003, the original developer filed in the land title office the Phased Strata Plan Declaration under Instrument No. KV045630 (the “Original Declaration”). The Original Declaration describes the proposed development as consisting of two phases. Phase 1 was to include five 3-bedroom townhouses and Phase 2 was to include eighteen 3-bedroom townhouses. In paragraph 3, the Original Declaration states that the developer will elect to proceed with each phase on or by the following dates:

Phase 1	Election has been made to proceed with this phase
Phase 2	September 30, 2003

[6] The Original Declaration was subsequently amended as follows:

- a) on May 6, 2004, under Instrument No. KW05425;
- b) on June 6, 2005, under Instrument No. KX071632 (the “Second Amended Declaration”); and
- c) on February 6, 2007, under Instrument No. LB14242 (the “Third Amended Declaration”).

[7] Phase 5 first appeared in the Second Amended Declaration. That Declaration states, in respect of Phase 5 that the date of commencement of construction was May 15, 2006, and the date of completion of construction was December 14, 2006. In paragraph 3, it states that the developer will elect to proceed with each phase on or by the following dates:

Phase 5 Election has been made to proceed with this phase.

[8] The Third Amended Declaration sets out the proposed development of the five phases as follows:

- a) Phase 1 was to include five 3-bedroom townhouse-style strata lots;
- b) Phase 2 was to include eight 2-bedroom plus den apartment-style strata lots;
- c) Phase 3 was to include four 4-bedroom plus den apartment-style strata lots, and one 3-bedroom detached house strata lot;
- d) Phase 4 was to include two 4-bedroom plus den townhouse-style strata lots; and
- e) Phase 5 was to include three 4-bedroom plus den townhouse-style strata lots.

[9] The Third Amended Declaration states that the estimated commencement date in respect of Phase 5 was “Completed”, and the estimated completion date was November 30, 2008. Paragraph 3 states that the developer will elect to proceed with each phase on or by the following dates:

Phase 5 Election has been made to proceed with this phase.

[10] Phases 1 to 4 of the Strata Plan were completed between 2003 to 2007. Although construction commenced on Phase 5 and a partial foundation was built, as mentioned, it was never completed.

[11] The petitioners purchased the Remainder Lot in foreclosure proceedings pursuant to an Order Approving the Sale dated May 3, 2021. The title to the Remainder Lot transferred to the petitioners in November 2021.

[12] On August 20, 2021, pursuant to s. 234(1) of the SPA, the petitioners gave notice to the Strata of their intention to apply to amend the time for making an election to proceed. As mentioned, the petitioners wish to develop the Remainder Lot separately from the Strata. Therefore, if the extension sought is granted, they intend to elect to not proceed with the development of Phase 5.

ISSUES

[13] The main issues to be decided are:

- a) Does s. 232 of the SPA permit an amendment to extend the time to elect, after an election to proceed has been made or conclusively deemed to have been made?
- b) If so, should the Court grant the extension sought?
- c) Should the Court grant a utilities easement in favour of the petitioners?

DISCUSSION

Does s. 232 of the SPA permit an extension of time to elect to proceed, after an election to proceed has been made or conclusively deemed to have been made?

Statutory Provisions

[14] The SPA provides:

Transfer of owner developer's interest

220 If an owner developer transfers the owner developer's interest in land described in a Phased Strata Plan Declaration, the owner developer's rights

and responsibilities under the declaration and this Act transfer to the new owner developer.

Deemed election to proceed

231 On the date contained in the Phased Strata Plan Declaration for the election to proceed with a phase, the owner developer is conclusively deemed to have elected to proceed with that phase as set out in the declaration unless

- (a) an amendment to the declaration has been approved in accordance with section 232 or 233, or
- (b) an election not to proceed has been made and filed under section 235.

[Underline added].

Amendment of declaration to extend time for election

232 (1) An owner developer who wishes to amend a Phased Strata Plan Declaration to extend the time for making an election to proceed with the next phase must apply to an approving officer for an amendment extending the time in which to make the election.

(2) The approving officer must not allow a declaration to be amended to extend the time for the election

- (a) more than once, or
- (b) for more than one year from the date stated in the declaration, except in accordance with a court order under subsection (3).

(3) On application of an owner developer, the Supreme Court may order an approving officer to grant the extension of time requested.

The Election to Proceed

[15] The parties agree that there was no election made before the deadline of September 30, 2003. Therefore, pursuant to s. 231 of the *SPA*, there was a “conclusively deemed” election to proceed with Phase 5.

[16] The parties disagree on whether the notations that the “election has been made to proceed with this phase” on the Second and Third Amended Declarations constitute an express election to proceed, and the significance of any such express election.

[17] The Strata contends that in addition to a “conclusively deemed” election to proceed, there was also an “express affirmative election to proceed” as reflected on the Second and Third Amended Declarations. It submits that the authorities relied

upon by the petitioners are distinguishable because they do not involve an express election to proceed.

[18] The petitioners say that it is unclear whether the notation that an election has been made was merely an acknowledgement that a conclusively deemed election had already occurred or intended to be an express election to proceed. In any event, they submit that there is no difference between an election to proceed and a conclusively deemed election to proceed as they communicate the same fact. The petitioners assert that either can be amended pursuant to s. 232.

[19] I agree that the record is unclear as submitted by the petitioner. The language in the declarations appears to contemplate that a date will be provided for an election to be made. No date was provided. Instead, what appears to be a reference to a past election to proceed was indicated. The only evidence on the record of a past election to proceed with Phase 5 was a conclusively deemed election to proceed.

[20] In any event, I also agree with the petitioners that it makes no difference in this case whether there was an election to proceed or a conclusively deemed election to proceed as either may be amended under s. 232 as discussed below.

Extension of Time to Elect

[21] The petitioners rely on the following authorities in support of their position:

- *Lakewood Development Ltd. v. Surrey (City)*, 1999 CanLII 6182 (BCSC) [*Lakewood*],
- *Whiskey Landing Developments Ltd. v. The Owners, Strata Plan VIS 6411*, 2022 BCSC 445 [*Whiskey Landing*], and
- *Ruth v. Maple Sunshine Holdings Group Inc.*, 2020 BCSC 44.

[22] In *Lakewood*, Master Nitikman granted the petitioner an extension of time, pursuant to ss. 78(1) and (2) of the *Condominium Act*, R.S.B.C. 1996, c. 64 [CA]

(now the SPA), in which to elect not to proceed with the remaining phases of a multiple-building phased apartment development, after the petitioner was deemed to have elected to proceed under s. 78(7) of the CA: *Lakewood* at paras. 30-31.

[23] Subsections 78(1) and (2) of the CA (now ss. 232 of the SPA) provided that:

(1) If an owner developer does not wish to elect whether or not he or she will proceed with the next phase on the date stated in Form E, or wishes to amend Form E, the owner developer may apply to the approving officer for an extension of time in which to make the election or for approval of an amendment to Form E.

(2) The approving officer must not extend the time for more than one year from the date stated in Form E, without the approval of the court.

[24] Subsection 78(7) provided that:

(7) If the owner developer does not inform the strata corporation, the approving officer and the land title office of the owner developer's election not to proceed, the owner developer is deemed to have elected to proceed.

[25] In concluding that an extension of time to make an election was available after the deeming provision has been triggered, the Court observed that s. 78(1) did not specify a time within which an application may be made to the approving officer, nor did it specify the time within which the approving officer may exercise their discretion to grant an extension of time or approve an amendment. He further noted that if time restrictions were intended, it would have been a simple matter for the legislature to provide those in the CA.

[26] The Court also considered s. 79(6) of the CA (now s. 236 of the SPA) which provided:

(6) If the owner developer does not proceed with the next phase within a reasonable time or at a reasonable rate, the strata corporation may apply to the court for an order that the owner developer complete the phase by a fixed date, or that the owner developer elect not to proceed with that phase. (Underline added).

[27] The Court found that s. 79(6) provided confirmation that it had jurisdiction even after a deemed election had taken place: *Lakewood* at para. 25.

[28] The petitioners rely on *Whiskey Landing* to submit that despite the slightly different wording in the SPA, the reasoning in *Lakewood* ought to be followed and that it is open to the court to order an extension of time to elect after the date of election has passed.

[29] In *Whiskey Landing*, a prior owner developer filed a Phased Strata Plan Declaration (“Form P”) at the land title office in 2007 to develop a parcel of land in Ucluelet in two phases. Phase 1 was substantially completed in 2008. The deadline for election in respect of Phase 2 passed without an election having been made. Therefore, the prior owner developer was deemed to have elected to proceed with Phase 2 in 2008. However, Phase 2 was never developed.

[30] In 2011, the petitioner purchased the Phase 1 and 2 lands through a foreclosure proceeding. As a subsequent purchaser of the remainder lands for Phase 2, they inherited the rights and responsibilities of the previous developer. However, the 2007 Form P no longer complied with the district’s 2011 community plan. To develop Phase 2, a new development permit was required and the Form P needed to be amended.

[31] Although the respondent Strata was opposed to the extension, the parties in *Whiskey Landing* agreed that the Court *could* order an extension of time for election under s. 232(3) of the SPA even after the date for election has passed. In accepting that this was open to him, Justice Edelmann (then of this Court) stated in para. 13:

...I note that in *Lakewood Development Ltd. v. Surrey (City)*, 1999 CanLII 6182 (BCSC), Master Nitikman found that an equivalent section under the *Condominium Act*, R.S.B.C. 1996, c. 64 permitted the court to extend the developer’s time for election after the date the developer was deemed to have elected to proceed under the phased strata plan declaration. Although the wording in the *Condominium Act* was slightly different, the reasoning has been subsequently applied in making such orders under s.232 of the SPA (see *Ruth v. Maple Sunshine Holdings Group Inc.*, 2020 BCSC 44 [*Ruth*]). I accept that it is open to this Court to order an extension of time to elect after the date of election has passed.

[32] In *Ruth*, the original owner developer filed a declaration of their intention to develop a parcel of land through a two-phase strata plan. The declaration stated that

the election for the second phase was to be done by a certain date. That date passed with no election being made.

[33] The new owner-developer argued that the original development plan for the second phase was no longer feasible; therefore, it needed an extension of time to elect to proceed. The respondent owners of the neighbouring property and the strata opposed an extension of time because they anticipated that Maple Sunshine would elect not to proceed in accordance with the declaration, which would impact their interests.

[34] Justice Dley found that the strata's arguments were premature. If the owner developer elected not to proceed, the appropriate time for the strata to seek a declaration that such an election was unfair pursuant to s. 235(5) of the *SPA* would be after the election took place. The Court allowed the extension sought pursuant to s. 232(3) of the *SPA*: *Ruth* at paras. 77, 81-82.

[35] In the case at bar, the Strata primarily argues that the original developer made an "express, affirmative election to proceed with Phase 5", which binds the petitioners. The Strata submits that the express election distinguishes this case from the case law relied upon by the petitioners.

[36] The Strata also argues that the phrase "conclusively deemed to have elected to proceed" in s. 231 of the *SPA* has never been interpreted properly. It submits that the case law has not considered the change in the language of the legislation from "deemed" (under s. 78(7) of the *CA*) to "conclusively deemed"; therefore, pursuant to *Hansard Spruce Mills (Re)*, [1954] 4 D.L.R. 590, 1954 CanLII 253 (B.C.S.C.), the Court is not bound by the conclusions in *Whiskey Landing* and *Ruth* that the court may grant an extension of time to elect to proceed after there has been a conclusively deemed election to proceed.

[37] The Strata contends that the addition of the word "conclusively" means that the election is irrebuttable and final. It argues that the change in the wording of the deeming provision was intentional because the legislature retained the word

“deemed” in other provisions of the SPA, for example, ss. 238(2) and 291(4). The Strata asserts that the change in the wording demonstrates specific legislative intent to require a successor on title to complete any phases which have been the subject of a “commitment” on a Phased Strata Plan Declaration or to have been conclusively deemed to be “committed to proceed”.

[38] Dealing with the Strata’s primary argument, I do not agree that any express election to proceed would render the reasoning in the cases of *Lakewood*, *Whiskey Landing*, and *Ruth*, inapplicable. The SPA does not appear to treat an express election and one that was conclusively deemed differently, and the effect is the same.

[39] The Strata argues that the difference is that the petitioners were aware of the election to proceed when they acquired the Remainder Lot as it was a charge on title. It submits that the Strata reasonably relied on the owner-developer’s “binding commitments” to complete Phase 5, and strata owners have made purchasing decisions based on this reliance.

[40] Again, I don’t agree that this is a significant distinguishing factor. Further, I note that the petitioner in *Whiskey Landing* also had disclosure of the deemed election to proceed before purchasing the remainder lands: *Whiskey Landing* at paras. 7-8.

[41] I now turn to the Strata’s argument regarding the application of the principles in *Hansard Spruce Mills*. The Supreme Court of Canada discussed these principles in *R. v. Sullivan*, 2022 SCC 19:

[75] Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
2. The earlier decision was reached per incuriam (“through carelessness” or “by inadvertence”); or
3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

[76] First, a judge need not follow a prior decision where the authority of the prior decision has been undermined by subsequent decisions. This may arise in a situation where a decision has been overruled by, or is necessarily inconsistent with, a decision by a higher court (see *Rowe and Katz*, at p. 18, citing *Kerwin*, at p. 542).

[77] Second, a judge can depart from a decision where it was reached without considering a relevant statute or binding authority. In other words, the decision was made *per incuriam*, or by inadvertence, a circumstance generally understood to be “rare” (see, e.g., *The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2017 BCSC 1988, 4 B.C.L.R. (6th) 370, at para. 132). The standard to find a decision *per incuriam* is well-known: the court failed to consider some authority such that, had it done so, it would have come to a different decision because the inadvertence is shown to have struck at the essence of the decision. It cannot merely be an instance in which an authority was not mentioned in the reasons; it must be shown that the missing authority affected the judgment (*Rowe and Katz*, at p. 19).

[78] Third and finally, a judge may depart where the exigencies of the trial required an immediate decision without the opportunity to consult authority fully and thus the decision was not fully considered. An unconsidered judgment is not binding on other judges (*Rowe and Katz*, at p. 18, citing *Spruce Mills*, at p. 592).

[42] I am not persuaded that I ought to depart from the reasoning in *Lakewood*, *Whiskey Landing*, and *Ruth*. In any event, I agree with the reasoning and conclusions in those cases.

[43] Although it was not contentious in *Whiskey Landing*, Justice Edelmann did consider the change in the legislative language and satisfied himself that it was open to him to order the extension of time sought to make an election. After reviewing s. 232 of the *SPA* and referring to the decision in *Lakewood*, he stated in part at para. 13:

... Although the wording in the Condominium Act was slightly different, the reasoning has been subsequently applied in making such orders under s. 232 of the *SPA* (see *Ruth v. Maple Sunshine Holdings Group Inc.*, 2020 BCSC 44 [*Ruth*]). I accept that it is open to this Court to order an extension of time to elect after the date of election has passed.

[44] While the Court’s comments are brief, they must be read in the context of the entirety of its reasons which include a consideration of s. 236 of the *SPA* and the Court’s observation that the *SPA* does not appear to allow a developer to be forced to complete a development: *Whiskey Landing* at para. 20.

[45] In my view, the Strata's contention that a "conclusively deemed" election to proceed is necessarily final and binding, is not supported by the SPA. I have not been directed to any provision in the SPA that allows the court to force an owner-developer to follow through with a phased development.

[46] The Strata's argument is also inconsistent with s. 236 of the SPA which provides:

236 (1) On application by the strata corporation, the Supreme Court may order that the owner developer complete a phase by a set date if

(a) the owner developer has elected to proceed, or is deemed to have elected to proceed under section 231, and

(b) the court is satisfied that the owner developer has not proceeded with the phase

(i) within a reasonable time after the date stated in the Phased Strata Plan Declaration or an amended declaration, or

(ii) at a reasonable speed.

(2) If the owner developer does not comply with the court order under subsection (1), the court may declare that the owner developer be deemed to have elected not to proceed. (Underline added).

[47] As the Court in *Whiskey Landing* noted, while s. 236 allows a strata corporation to apply to the court for an order for a developer to complete a delayed phase, the consequence of non-compliance with the deadline appears to be that the developer is deemed to have elected not to proceed: *Whiskey Landing* at para. 20.

[48] Contrary to the Strata's argument that an election to proceed or a conclusively deemed election to proceed is necessarily final, s. 236 clearly allows a subsequent reversal of that election or deemed election. The Strata acknowledges this but argues that this would only be triggered on application by the strata corporation. It submits that in the absence of such an application, an election or conclusively deemed election to proceed is final. This argument was rejected in *Lakewood* at para. 29. I agree with the Court's comments in *Lakewood* that it would not be reasonable to interpret the SPA in such a way that only the strata corporation can apply to the court after an election or deemed election to proceed.

[49] In *Rizzo & Rizzo Shoes Ltd., (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 at para. 21, the Supreme Court described the modern approach to statutory interpretation:

Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[50] In *The Owners, Strata Plan NES 97 v. Timberline Developments Ltd.*, 2011 BCCA 421, our Court of Appeal described the purpose of the *SPA* as follows:

[16] In general terms, the purpose of the *Strata Property Act* is to lay down clear rules for the creation, registration and transfer of strata titles, and for the delineation of the respective rights and responsibilities of those who develop strata plans, and those who purchase or who may subsequently wish to transfer a strata property.

[51] The case authorities have also held that one of the objectives of the *SPA* is consumer protection: *Zaidi v. The Owners, Strata Plan LMS 3464*, 2016 BCSC 731 at para. 25. In *The Owners, Strata Plan LMS 1495 v. 0753874 B.C.*, 2015 BCSC 2124 at para. 54, Justice Fitzpatrick observed that the *SPA* is designed to protect consumers buying strata lots by providing them with remedies in the event of default by the owner developer.

[52] In considering the words “conclusively deemed” as used in s. 231 of the *SPA* in their grammatical and ordinary sense and in the context of the legislation as a whole, including its scheme, object, and the intention of Parliament, in my view, the restrictive interpretation advanced by the Strata is unsupported. The *SPA* does not appear to allow an owner developer to be forced to complete a development, as illustrated by s. 236.

[53] The language of s. 232 must also be considered. Section 232 does not say that an owner developer can only apply for an extension before the deadline to make

an election. If the legislature intended to restrict an owner-developer's ability to seek an extension of time such that it must be made before the deadline, it could have done so by amendment at some point since *Lakewood* was decided more than 25 years ago.

[54] I agree with the petitioners that "conclusively deemed" in s. 231 of the *SPA* means that an election to proceed has been made. If there is no amendment to vary that election, then it would be final. However, "conclusively deemed" does not preclude an amendment pursuant to s. 232 to extend the time for election in order to elect not to proceed.

Should an extension of time to elect be granted?

[55] The petitioners submit that the primary factor relevant to an amendment application is the existence of common facilities. In this case, it is not disputed that there are none. They also submit that they have a right to develop their property independently, subject to applicable bylaws. Further, they have legitimate concerns regarding the costs of joining the Strata based on high strata fees, an operating deficiency, a reserve fund deficiency, and a 2023 special levy of \$320,000 for repairs. They submit that they hired a designer to confirm that a design could be made that would abide by the necessary bylaw, setbacks, and snow removal requirements for the Remainder Lot. The petitioners also submit that while their reasons for wanting to develop the Remainder Lot separately are not trivial, there is authority that a preference or economic benefit can be sufficient to allow an amendment.

[56] The Strata argues that an extension of time to elect should not be ordered. It submits that unless the petitioner can demonstrate that completion of Phase 5 has become impossible or "dramatically infeasible", an extension should not be ordered.

[57] The Strata points to several factors that should lead the Court to deny the amendment sought, including that: (a) an access and utilities easement would not be necessary if the petitioners complete Phase 5; (b) the current expenses and strata fees are not that high; (c) a newer building could have more issues than an older

building; (d) if something goes wrong involving owners in the Remainder Lot travelling over the Strata's common property, the Strata would like to pursue remedies through mechanisms available under the SPA; (e) the Strata would like to enforce its parking bylaws against the petitioners or residents within the Remainder Lot; (f) there might be an issue with an existing retaining wall or flooding; (g) there will be issues related to snow removal and ski access if the Remainder Lot is developed separately; and (h) a separate development may run into issues with setbacks, snow storage, and fire truck turnaround.

[58] In the alternative, if the Court grants the orders sought by the petitioners, the Strata seeks the imposition of "extensive conditions" as outlined in the Strata's written submissions to address the Strata's various concerns, which I won't repeat here.

[59] In all of the circumstances, I consider it appropriate to grant amendment and the extension of time sought by the petitioners to make an election.

[60] I accept the petitioners' submission that the purpose of Part 13 of the SPA is consumer protection in the context of common facilities, and the existence of common facilities is an important factor in determining whether to grant an amendment or extension of time as requested, under s. 232(3). That there are no common facilities here is a significant factor in favour of granting the extension of time sought.

[61] I do not accept the Strata's contention that the petitioners must demonstrate impossibility or significant infeasibility of developing Phase 5 to be granted an amendment or extension of time under s. 232 of the SPA. No authority has been provided for this contention. Further, this argument appears to be premised on the Strata's assertion that once there has been an election to proceed, that election is final and binding on the petitioners, which I have rejected.

[62] Courts have granted a s. 232 amendment where market conditions no longer favour completion of a phase of development. For example, in *Lakewood*, the

petitioner no longer wished to proceed with the remaining phases as the market for condominiums was not good.

[63] In this connection, the significant length of time between the election to proceed and the amendment petition, and that the petitioners are subsequent purchasers of the Remainder Lot, also informs the context of the present petition. I accept that the petitioners have concerns related to costs that they are likely to incur by proceeding with the development of Phase 5.

[64] The SPA provides mechanisms to protect the interests of the Strata and owners in earlier phases when a developer elects not to proceed. For example, s. 235 permits the strata corporation to apply to the Supreme Court to consider whether the owner developer's election not to proceed is unfair to the strata corporation. The primary focus of s. 235 is the impact of an election not to proceed on the construction of common facilities and the cost of maintaining those facilities: *Whiskey Landing* at paras. 14-15.

[65] Similarly, s. 237 of the SPA provides that if the owner developer elects not to proceed with a subsequent phase, the remainder lands may only be developed in accordance with the applicable bylaws, and that in approving the development of the remainder lands, the municipality or regional district may take into consideration the development already constructed, and treat the development of the subsequent phase as if it were a part of the phased development rather than a separate parcel.

[66] In my view, the concerns raised by the Strata do not constitute a sufficient reason to deny the amendment sought by the petitioners. The Strata is not without remedy under the SPA. Any new development will be required to abide by local bylaws and the Strata's concerns including regarding snow removal and ski access, in my view, may be considered pursuant to s. 237. As the Court in *Ruth* stated, as long as a property owner abides by local government requirements, it should be free to develop its lands: *Ruth* at para. 73.

[67] For the foregoing reasons, I grant the amendment and extension of time sought by the petitioners under s. 232(3) of the SPA.

Should a utilities easement be granted in favour of the petitioners?

[68] With respect to the petitioners' application for a grant of a utilities easement, upon reviewing the record, I am of the view that there is an absence of a proper evidentiary record upon which I could grant a utilities easement. This is largely because the evidence that the petitioners rely on consists of inadmissible hearsay. In these circumstances, in my view, it would be appropriate to adjourn the application generally to give the petitioners an opportunity to marshal the required evidence in admissible form.

[69] The petitioners rely on the affidavit of Rene Gary Wayne Bourke affirmed on January 9, 2025, in which he deposed at para. 30 that:

Todd Simpson, the director of the petitioner TWS Holdings Ltd., emailed Maurice Valcourt from Big White Waste Water Utility Ltd., and Big White Water Utility Ltd., to ask about hooking up utilities to our future development.

[70] A copy of the email correspondence in 2023 is attached as "Exhibit H" to the affidavit. The petitioners rely on this evidence to submit that the utilities provider has confirmed that they require a utilities easement in their favour to be allowed to complete the hook-up.

[71] Mr. Bourke also deposed at paras. 31-32 that:

31. In June 2024, myself and the other petitioners hired Precision Radar Scanning to confirm the location of utilities in relation to the Lands. On June 12, 2024, Precision Radar Scanning issued a report confirming the location of the water, sanitation, and electrical lines (the "Utilities Report")...

32. Referenced in the Utilities Report is a "Lot plan provided by Big White Wastewater Utility Ltd.", which delineates the proposed location of water, sanitation, and electrical lines (the "Lot Plan")...

[72] The Utilities Report described in para. 31 and the Lot Plan described in para. 32 are attached as "Exhibit I" and "Exhibit J" to Mr. Bourke's affidavit, respectively. The petitioners rely on these exhibits to demonstrate the location of the water,

sanitation and electrical lines. They submit that the foundation for Phase 5 was partially built and “the utilities were brought up the foundation” but not hooked up.

[73] Relying on *Elite Mortgage Corp. v. Derewenko*, 2019 BCCA 125 at para. 28, the Strata emphasizes that affidavit hearsay evidence is not available to an applicant seeking a final order. The Strata submits that the petitioners have submitted significant evidence that offends the prohibition regarding hearsay. As an example, it points to the email correspondence in Exhibit H.

[74] In my view, the petitioners rely on hearsay evidence contained in Exhibits H and I (at least), for the truth of its contents.

[75] I note that Mr. Bourke was not a party to the email exchange in Exhibit H. Therefore, the statements attributed to the representative of Big White Water Utility Ltd., is not only hearsay but double hearsay.

[76] The Utilities Report in Exhibit I is also problematic. It contains inadmissible hearsay evidence from the report’s author. The issue is compounded by the report’s lack of clarity and the petitioner’s reliance on Mr. Bourke’s interpretation of the report. The Utilities Report contains brief and cryptic “survey notes” that include vague language such as “assumed sanitation service line” and “suspected electrical and communication services”. Further, while Mr. Bourke deposed that the report *confirmed* the location of the water, sanitation, and electrical lines, the report itself does not say that. If Mr. Bourke was making an inference, the basis upon which the inference was made was not provided or explained, including Mr. Bourke’s qualifications to interpret the Utilities Report.

[77] In the circumstances, I find that the petitioner has not submitted a proper evidentiary foundation for their application. However, given the record, I am of the view that it would be appropriate to give the petitioners a chance to submit a proper record. I therefore adjourn the petitioners’ application for a utilities easement generally. To be clear, I have not assessed the petitioners’ easement application on the merits.

CONCLUSION

[78] The petition for amendment pursuant to s. 232(3) of the SPA to extend the time to elect to proceed with Phase 5 is granted.

[79] The application for a grant of utilities easement is adjourned generally.

[80] Pursuant to s. 232 of the SPA, the approving officer will grant the extension of time for electing whether to proceed with Phase 5, to May 22, 2027.

[81] The petitioners are permitted to file a new Form P accordingly.

[82] The petitioners will make the appropriate applications regarding dates of commencement and completion pursuant to s. 233 to the approving officer.

COSTS

[83] The petitioners seek increased costs because of the volume of alleged irrelevant material filed by the Strata. I am not persuaded that increased costs are warranted.

[84] Costs of the petition is awarded in favour of the petitioners on Scale B.

“Laurie J.”