COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Society of Fort Langley Residents for Sustainable Development v. Langley (Township),* 2014 BCCA 271

Date: 20140703
Docket: CA041346

Between:

Society of Fort Langley Residents for Sustainable Development, David M. Abreo, Diane Erika Morrison and Vicky L. Fraser

Respondents
(Petitioners)

And

Township of Langley

Appellant
(Respondent)

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia dated October 25, 2013, Chilliwack Docket No. S26696

Counsel for the Appellant:	D.R. Bennett, Q.C. E. Lambert
Counsel for the Respondents:	R.J. Stewart, Q.C.
Place and Date of Hearing:	Vancouver, British Columbia June 24, 2014
Place and Date of Judgment:	Vancouver, British Columbia July 3, 2014

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Goepel

Summary:

A third party seeks to construct a mixed-use building in Fort Langley, which has been designated as a heritage conservation area by the appellant Township. The proposed development exceeds the height and lot coverage requirements established for the heritage conservation area under the Local Government Act. The Township issued a heritage alteration permit pursuant to s. 972 of the Act to facilitate the development. However, s. 972(4) prevents the Township from using such a permit to vary the "density of use" of the property. In the court below, the respondent Society had the heritage alteration permit set aside. The chambers judge concluded that increasing the height and footprint of a building increased the density of use.

Held: Appeal allowed.

The Township's power to regulate the density of use of land and buildings is distinct from its power to regulate the siting, size, and dimensions of buildings. Only variations to the former are restricted by s. 972(4) and courts should not impute restrictions on density of use from a bylaw that only restricts the siting, size, and dimensions of buildings. The proposed development complies with the residential density of use provisions in the applicable bylaw and, given the distinction in powers, there are no commercial density of use provisions for the heritage alteration permit to vary.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I.

[1] Statewood Properties Ltd. wishes to construct a three-storey mixed use commercial and residential building in Fort Langley, a heritage conservation area ("Heritage Conservation Area") established by the respondent Township under the *Local Government Act*, R.S.B.C. 1996, c. 323 (the "*LGA*"). The proposed development exceeds the height and lot coverage regulations established for the Heritage Conservation Area by the Township under the *LGA*. The Township has issued a heritage alteration permit (the "HAP") under the *LGA* purporting to vary the applicable regulations within the zone to permit the development.

[2] The question before the chambers judge on an application for judicial review brought by the petitioners, was whether the HAP varied the "use or density of use" for the subject lands contrary to s. 972(4)(a) of the *LGA*.

[3] The broad issue before the chambers judge, and this Court on appeal, is whether a permit varying siting, size and dimension regulations under a zoning bylaw can be said in these circumstances to represent a variation of "use or density of use" within the noted prohibition. It is a prohibition which, in slightly different terms, limits a municipal council's jurisdiction to issue other permits under the *LGA*, notably "development permits" under s. 920, "housing agreements" under s. 905, "development variance permits" under s. 922, and "land use contract amendments" under s. 930.

[4] Development permits and development variance permits have been in place in British Columbia in local government legislation since 1985, as has the prohibition against varying use or density of use by their terms. Oddly, the question now before the Court has never been decided.

[5] The learned chambers judge adopted what might be regarded as a common-sense approach to the issue. He essentially concluded that by permitting a taller building covering more of the lot, the Township had indeed unlawfully varied the density of use for this parcel of land. He quashed the HAP (2013 BCSC 2273).

[6] The Township appeals and submits that when the legislative scheme is subjected to a more nuanced analysis, so-called "common sense" must give way to an approach that recognizes the distinctive powers which a municipal corporation enjoys under the *LGA* in the exercise of its zoning power and what the Township has carefully done in the particular exercise of its power in creating the C-2 zone within which the lands lie.

[7] Essentially, the Township urges that the Court should not impute "density of use" regulations into the council's express promulgation of "siting, size and shape" regulations under the *LGA*.

[8] I have concluded that the Township is correct. In the legislative scheme created by the *LGA* and the Township in its C-2 zone under the zoning bylaw, the

height and lot coverage of the building and its uses contemplated by this particular application do not impact the "density of use" otherwise permitted in the C-2 zone.

II.

[9] It is never trite law to recall a number of basic principles when approaching the construction of municipal legislation.

[10] First, it is common ground that the standard of review to be applied to a consideration of the HAP issued by the elected municipal council in the context of this matter is correctness. It is a true jurisdictional issue whether council varied density of use contrary to the statutory prohibition in s. 972(4)(a) of the *LGA*.

[11] Second, it is always salutary to remind oneself of the basic principles of statutory interpretation applicable in construing this species of delegated legislative authority.

[12] Counsel, of course, cited the Supreme Court of Canada's decision in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, and then noted Tysoe J.A.'s reformulation of the direction in the context of a municipal law case in *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494 at para. 13:

> ... the words of an [enactment] are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the [enactment], the object of the [enactment], and the intention of [the legislative body that passed the enactment].

[13] Again, in the context of municipal empowering legislation and bylaws enacted pursuant thereto, this Court said in *Neilson v. Langley (Township)* (1982), 134 D.L.R. (3d) 550 (at 554 per Hinkson J.A.):

> In the present case, in my opinion, it is necessary to interpret the provisions of the zoning by-law not on a restrictive nor on a liberal approach but rather with a view to giving effect to the intention of the Municipal Council as expressed in the by-law upon a reasonable basis that will accomplish that purpose.

[14] In *United Taxi Drivers'Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, Mr. Justice Bastarache stated for the Court (at paras. 6 and 8):

> 6 The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. ... The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced...
>
> ...
>
> 8 A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. ...

[15] These common law rules must be married with the expressions of intent by the Legislative Assembly.

[16] Generally, in s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 we are told that:

> 8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[17] Specifically, under s. 4(1) of the *Community Charter*, S.B.C. 2003, c. 26, we are directed so:

> 4(1) The powers conferred on municipalities and their councils under this Act or the *Local Government Act* must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.

[18] Frankly, the Court can take the hint – municipal legislation should be approached in the spirit of searching for the purpose broadly targeted by the enabling legislation and the elected council, and in the words of the Court in *Neilson*, "with a view to giving effect to the intention of the Municipal Council as expressed in the bylaw upon a reasonable basis that will accomplish that purpose".

[19] To that end, it is important to stress the purpose for the power to issue heritage alteration permits. It is noted that the creation of a heritage conservation area, and the guidelines which then regulate development within it in an effort to preserve the identified heritage values of the area, are all imposed by the municipal council, in this case, that of the Township of Langley. From this perspective, these

are self-imposed limits on what the Township could otherwise authorize by way of development in the affected area.

[20] Section 972, in its relevant provisions, reads:

> 972(2) The heritage alteration permit may, in relation to protected heritage property or property within a heritage conservation area, vary or supplement provisions of one or more of the following:
>
> (a) [Repealed 2000-7-184.]
>
> (b) a bylaw under Division 7, 10 or 11 of Part 26;
>
> (c) a permit under Division 9 of Part 26;
>
> (d) a bylaw or heritage alteration permit under this Part.
>
> ...
>
> (4) The following restrictions apply to subsection (2):
>
> (a) the use or density of use may not be varied;
>
> ...

[21] Clearly, subject to the limits imposed by s. 972(4), the purpose of the s. 972(2) power is to permit the elected council to vary zoning bylaw regulations that might otherwise apply to frustrate development which council perceives as otherwise appropriate in light of the goals and objectives of the heritage conservation area designation. The provision allows the Township some flexibility in administering the strict requirements of the zoning bylaw.

[22] It seems to me that one should not too readily deny a municipal council that flexibility in its treatment of any particular application. Indeed, as counsel for the Township stresses, it is an express purpose of the *LGA* “to provide local governments with the flexibility to respond to the different needs and changing circumstances of their communities” (per s. 1).

III.

[23] This brings me to the heart of the Township’s submissions on appeal and, again, it rests on the discrete and distinct powers accorded to council under the zoning power set out in s. 903 of the *LGA*:

> 903(1) A local government may, by bylaw, do one or more of the following:
>
> (a) divide the whole or part of the municipality or regional district into zones, name each zone and establish the boundaries of the zones;
>
> ...
>
> (c) regulate within a zone
>
> (i) the use of land, buildings and other structures,
>
> (ii) the density of the use of land, buildings and other structures,
>
> (iii) the siting, size and dimensions of
>
> (A) buildings and other structures, and
>
> (B) uses that are permitted on the land, and
>
> (iv) the location of uses on the land and within buildings and other structures; ...

[24] The submission is essentially founded on the fact that the delegated authority in s. 903(1)(c) contemplates at least two very distinct powers: the ability to regulate "the density of the use of land, buildings and other structures" and "the siting, size and dimensions of buildings and other structures". Quite simply, the Township says that when exercising the latter power, it should not be inferred that it is rather exercising the former.

[25] Next, to the bylaw and the C-2 zone which, it is said, reflects this dichotomy. It provides:

> Uses Permitted
>
> 602.1 In the C-2 Zone only the following *uses* are permitted and all other *uses* are prohibited:
> (1) *accessory buildings and* uses
> (2) *assembly uses*
> (3) *commercial uses*
> (4) *group children's day care*
> (5) *hotels* (deleted "motels" - 27/07/98)
> (6) *Licensee Retail Store* subject to the provisions of the "Liquor Control and Licensing Act" and Regulations pursuant thereto

(7) *Liquor Primary Use* subject to the provisions of the "Liquor Control and Licensing Act" and Regulations pursuant thereto
(8) *refund container return centre* up to a maximum size of 280 m^2 (3000 ft)
(9) *residential uses* accessory to a *commercial use* and subject to Section 602.3.

Commercial Uses

602.2 All business shall be conducted within a completely enclosed *building* except for parking, loading, display, eating areas and seasonal uses, where accessory to a permitted *use*. No storage areas shall be located in any required front yard setback.

Residential Uses

602.3 (1) An accessory *residential use* may be located above the first floor of the building, and shall have a *gross floor area* no greater than twice the *gross floor area* of the *non-residential use* contained within the same building.

(2) The maximum number of *dwelling units* shall not exceed one *dwelling unit* per 135 m^2 of *lot area* (74 units per hectare).

Lot Coverage

602.4 *Buildings* and *structures* shall not cover more than 40% of the *lot area*, except that where at least 50% of the required parking spaces are within the *building* or underground, *lot* coverage may be increased to a maximum of 60%.

Siting of Buildings and Structures

602.5 Except as provided for in Sections 104.4, 104.15 and 105.1(2*), no building* or *structure* shall be sited less than:

a. 0 metres from a *front lot line*;
b. 3.0 metres from a rear *lot line* except where the rear *lot line* abuts an SR, R, MH-1 or RM zone the minimum rear yard setback shall be 7.5 metres; and
c. 0 metres from a *side lot line* except where the *side lot line* abuts an SR, R, MH-1 or RM zone the minimum side yard setback shall be 3.0 metres.

Height of Buildings and Structures

602.6 Except as provided for in Section 104.5 the *height* of *buildings* and *structures* shall not exceed 12 metres.

Parking and Loading

602.7 Parking and loading shall be provided in accordance with Section 107.

> Subdivision Requirements
>
> 602.8 All *lots* created by *subdivision* shall comply with Section 110 of this Bylaw and the Subdivision and Development Servicing Bylaw 2011 No. 4861 as amended.
>
> Landscaping. Screening and Fencing
>
> 602.9 Landscaping areas, landscaping screens and fencing shall comply with Section 111.

[26] The Township submits that its council has carefully exercised its zoning powers in a manner wholly consistent with the distinction between regulations affecting "density" and regulations affecting "siting, size and dimensions of buildings and structures".

[27] It is noted that the density of residential uses is expressly regulated in s. 602.3 by reference to a limit on gross floor area and the maximum number of dwelling units per 135 square metres of lot area. No such density restrictions are imposed on commercial uses in s. 602.2. It is accepted by the petitioners that the proposed development honours the residential density provisions of the C-2 zone. The remaining relevant provisions of the C-2 zone cover what are, it is submitted, clearly matters going to the siting, size and shape of buildings and structures, an exercise of the distinct power set out in s. 903(1)(c)(iii) of the *LGA*.

[28] I agree with the thrust of the Township's submission. In my view, the distinction drawn between the regulation of the "density of the use of land, buildings and other structures" pursuant to s. 903(1)(c)(ii) and the regulation of the "siting, size and dimensions of buildings and other structures" pursuant to s. 903(1)(c)(iii) neatly reflects harmony with the scheme of the *LGA* and the zoning bylaw.

[29] "Density" is defined in the *LGA* in a most unhelpful manner in s. 872 by reference to the same word:

> "density", in relation to land, a parcel of land or an area, means
>
> (a) the density of use of the land, parcel or area, or
>
> (b) the density of use of any buildings and other structures located on the land or parcel, or in the area;

[30] The chambers judge, however, adopted a dictionary definition which the parties accept, as do I: “the quantity of people or things in a given area or space”.

[31] Clearly, the C-2 zone limits the number of residential units (i.e., things) within a given area of space (and thereby, indirectly, the number of people within that space), but it is silent on the density of commercial uses in that space.

[32] While the HAP varies the lot coverage permitted, from 60% to 67%, and the permissible height of the building, from 2 storeys to 3, it does so in a manner which preserves the express density limits set out in the C-2 zone in respect of residential uses. As noted, there is no commercial density provision in the bylaw for the HAP to vary.

[33] In my view, in the circumstances of this HAP and this zoning bylaw, the Township council has not contravened s. 972(4) of the *LGA* and I would, accordingly, allow the appeal.

“The Honourable Chief Justice Bauman”

I AGREE:

“The Honourable Madam Justice MacKenzie”

I AGREE:

“The Honourable Mr. Justice Goepel”