IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Society of Fort Langley Residents for Sustainable Development v. Langley (Township),* 2013 BCSC 2273

Date: 20131211
Docket: S26696
Registry: Chilliwack

Between:

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

Petitioners

And:

Township of Langley

Respondent

Before: The Honourable Mr. Justice Groves

Reasons for Judgment
In Chambers

Counsel for the Petitioners:	R.J. Stewart, Q.C.
Counsel for the Respondent:	D.R. Bennett E. Lambert
Place and Dates of Hearing:	Chilliwack, B.C. October 24-25, 2013
Place and Date of Judgment:	Chilliwack, B.C. December 11, 2013

Introduction

[1] After a hearing on the 24th and 25th of October 2013 at Chilliwack, in regards to this petition, I directed that a Heritage Alteration Permit No. 100685 (the "HAP") issued by the Township of Langley ("Langley") on the 20th of November 2012 be set aside, on the terms sought in the Further Amended Petition to the Court dated the 9th of October 2013. Additionally, I ordered that the respondent pay the petitioners' costs.

[2] Recognizing that the matter was of a considerable importance to the petitioners and also notably to a non-party, the developer who applied for the HAP, and noting that a building was under construction or about to be under construction, I gave very brief Reasons for my decision, indicating that further written Reasons would follow.

[3] These are those written Reasons.

Overview

[4] The petitioners, Society of Fort Langley Residents for Sustainable Development (the "Society"), as well as the individual petitioners applied to set aside the HAP on essentially two bases:

1. That the HAP was a nullity because the application form for the HAP was not completed as required;
2. That the HAP was invalid because it did not complied with the Fort Langley Official Community Plan Bylaw 1979 No. 1842 (the "FLOCP"), it did not complied with the Fort Langley Building Façade Design Guidelines (the "Façade Guidelines") and it unlawfully varied the use of the land, or unlawfully varied the density of the use of the land, contrary to the provisions of the *Local Government Act*, R.S.B.C. 1996, c. 323 ("*LGA*").

History

[5] The respondent Langley is a municipality incorporated pursuant to the provisions of the *LGA* and the *Community Charter*, S.B.C. 2003 c. 26.

[6] The Society was incorporated in May 2013 and its stated purpose is, and I paraphrase here, to keep the character of the Fort Langley community consistent with its historical originals as a commercial, tourist, and recreational area. The individual petitioners are members of the Society whose properties are located in the Fort Langley Heritage Conservation area.

[7] Langley is a large township and there are a number of sub communities within the boundaries of Langley which has a special community or neighbourhood designations. Fort Langley is perhaps the best known of these. Fort Langley is one of the oldest communities established in British Columbia and has a significant history and character.

[8] The properties in question in this litigation are properties located at 9202 and 9224 Glover Road in the Fort Langley area and are owned by Statewood Properties Ltd. ("Statewood"). The land is zoned Community Commercial Zone (C-2) under the terms of the Langley Zoning bylaw. The land in question is situated within the Fort Langley Historical Conservation area.

[9] The *LGA* in part 27 allows local governments to designate areas as heritage conservation areas. It is not disputed that Langley has through its official community plan created the Fort Langley Heritage Conservation area and the lands in question fall within the Fort Langley Heritage Conservation area. As such, a variance, which Statewood required for their proposed development, can only be achieved through the Heritage Alteration Permit process.

[10] The *LGA* in part 27, Division 5, deals with Heritage Alteration Permits. Section 972 of the *LGA* is germane to my analysis in these Reasons. It reads as follows:

> **Division 5 — Heritage Alteration Permits**
>
> **Heritage alteration permits**
>
> **972** (1)A local government or its delegate may issue a heritage alteration permit authorizing alterations or other actions if the authorization is required by
>
> (a) this Act or by a bylaw or order under this Act,
>
> (b) a heritage revitalization agreement, or
>
> (c) a covenant under section 219 of the *Land Title Act*.
>
> (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.
>
> (3) A permit issued under this section prevails over a bylaw or permit referred to in subsection (2) to the extent of any conflict.
>
> (4) The following restrictions apply to subsection (2):
>
> (a) the use or density of use may not be varied;
>
> (b) a flood plain specification under section 910(2) may not be varied;
>
> (c) in relation to property within a heritage conservation area, the permit must be in accordance with the guidelines established under section 970.1(2)(b) for the heritage conservation area.

[11] Statewood, who is not a party to this litigation, desired to build a three-storey (43.5 foot) high structure on the lands in question. The building proposed is to be of mixed use with approximately 13,000 square foot at retail grade, almost 14,000 square foot of office on the second floor, and ten residential unit apartments on the third floor. In order to facilitate such a use of the land, a HAP was required and Statewood made an application for such.

[12] This give rise to the first argument advanced by the petitioners. It is conceded by the Township that the application submitted does not include the requisite Schedules B and K, which the application form suggests are mandatory and their absence would render the application unacceptable.

[13] I do not accede to the grounds advanced by the petitioners in this regard for reasons which would become clear later in my Reasons when I discuss the law associated with judicial review of the actions of the municipality.

[14] It is not disputed by Langley, generally speaking, that in order for this proposed development to proceed, the zoning provisions in effect in this Heritage Conservation area would have to be amended, specify the Zoning bylaw in the heritage designated area of Fort Langley require building to be no more than two stories high. The height restrictions are found in section 602.6 of the Community Commercial Zone (C-2) bylaw.

[15] Additionally, the zoning bylaws applicable in the Fort Langley Heritage Designation Area contemplated coverage of the land to be, at maximum, 60 percent of the lot. This is also found in the Community Commercial Zone (C-2) bylaw.

[16] Finally, there are restrictions in the zoning bylaws about setbacks at the rear of the property line which are found in s. 602.5 of the Community Commercial Zone (C-2) bylaw.

[17] Statewood, under their proposal for the lands required a variance of the setback provisions, as well as a variance of the height restrictions and the maximum use of the land provisions. The variance on height was from two storeys to three, and the variance on use of land was from 60 percent to 67 percent.

[18] The petitioners argued first that Langley at the meeting in which they considered the HAP did not specifically amend the zoning bylaws. I find that they purported to do so at the meeting. I would not accede to the petitioners' grounds for setting aside the HAP on that basis.

[19] However, the petitioner further argued, and I agreed, that Langley, when they approved this HAP, breached s. 972(4)(a) of the *LGA*.

[20] The *LGA* allows under s. 972(2)(b), through the HAP process, amendments to zoning bylaws. However, s. 972(4)(a) places restrictions on what a council can do under a HAP. This section prohibits council from varying the use or density of use of the lands subject to the HAP.

[21] The *LGA* does not define the term “density of use”.

[22] I find that Langley actions, in allowing a building to have, for lack of a better term, a footprint in excess of the 60 percent maximum noted in the Zoning bylaw and allowing a building to be in excess of the two stories allowed in the Zoning bylaw, in this case, a three-storey building, had the effect of changing the density of use of the subject lands.

[23] The concise Oxford English Dictionary has an applicable definition of density of follows: “the quantity of people or things in a given area or space”.

[24] The use of the term “density of use” in the *LGA*, must be considered in the context of what this HAP purported to do in regards to the lands in question.

[25] Under the applicable zoning, the footprint on the properties in question must at maximum be 60 percent of the area of the land. Additionally, the building must not be more than two stories high. So the question in its simplest terms is therefore, has Langley changed the density of use of this parcel of land by allowing a footprint in excess of 67 percent of the area of the land and by allowing a building to three storeys high rather than two. Common sense, and any reasonable interpretation of density of use, suggest that they have. They are allowing a building that is approximately 50 percent higher than the current zoning allowed and they are allowing an increase, although a modest increase, in the footprint of the building on the lands in question.

[26] Council's actions, I find as fact, have increased the density of use of the lands in question, an action which is expressly prohibited, or beyond their power under s. 972 of the *LGA*. As such, the HAP must be set aside.

[27] Clearly, Langley has the authority to amend the Zoning bylaw through the usual process of public hearings and public consultations. I need not set out the distinction in these Reasons between that process and a HAP process. Suffice to say, that changing a zoning requires significant notice to property owners affected, it appears some community consultation, and requires a different process for council's consideration of the matter rather than, for a lack of a better term, the "one-off" process associated with an individual HAP. Of note, it is certainly open to Langley Council to amend the Zoning bylaw in the usual way, and that would not be an affront to the relevant sections of the *LGA* as I found it to be in this case.

[28] Essentially, council should they choose, may amend the Zoning bylaw as it affects the density in use of this particular land by changing the Zoning bylaw itself. They cannot do it through a HAP as the *LGA* restricts them, in fact prohibits them, from varying the density of use of the land in a Heritage Conservation area through an HAP.

Standard of Review

[29] I need not say much in regards to the standard of review because all parties have agreed on what it is. However it needs to be addressed as least briefly in these Reasons.

[30] In terms of a standard of review, I agree and rely on the submissions of the respondent in regards to the general applicable principles of local government law. In the case of *Nanaimo City v. Rascal Trucking Ltd.*, 2000 SCC 13, the Supreme Court of Canada endorsed a broad and purposeful approach to interpretation of local government powers. Court should display a degree of judicial deference in reviewing the decisions of local governments. As the Supreme Court of Canada noted in *Nanaimo* at paras. 35:

> In light of the conclusion that Nanaimo acted within its jurisdiction in passing the resolutions at issue, it is necessary to consider the standard upon which the courts may review those *intra vires* municipal decisions. Municipal councillors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing *intra vires* decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the *intra vires* decision of municipalities be reviewed upon a deferential standard.

[31] I will stop here to say that in regard to the first challenge to the HAP raised by the petitioners, Langley in processing the application for the HAP without the required schedules B and K is a minor oversight, an oversight they were aware of no doubt when the application proceeded. It was an *intra vires* decision of Langley. A deferential standard of review is applicable to that decision. I would not vary it.

[32] Further, the *Nanaimo* decision is additionally informative as it considers an earlier decision of the Supreme Court of Canada in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231:

> … as more recently expressed in *Shell*, *supra*, *per* McLachlin J., at p. 244:
>
> > Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.

[33] Noting as I do the language in *Nanaimo* and *Shell*, I find that Langley in purporting to vary the density of use of the lands in question through the HAP process, acted beyond its powers as set out in s. 972 of the *LGA*. The standard of review is correctness as I find that the Langley acted *ultra vires* its powers.

[34] For the above-noted reasons, the HAP No. 10065 is set aside and the petitioners being successful are entitled to their costs on Scale B.

"The Honourable Mr. Justice Groves"