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HOT TOPICS IN PLANNING LAW - A REVIEW OF 2014'S JURISPRUDENCE

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Jay Lancaster

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2014 has been a year of a number of important court decisions of interest to local governments, several of which are particularly relevant to planning and land use. In this paper, we will discuss four of those decisions, and the implications for local governments.

I. SOCIETY OF FORT LANGLEY RESIDENTS FOR SUSTAINABLE DEVELOPMENT V. LANGLEY (TOWNSHIP), 2014 BCCA 271

The first decision we will review is also the first time the Court of Appeal addressed the question of what is "density" for the purpose of interpreting a restriction on the use of a permit to vary density.

Local governments are generally prohibited from varying density from that prescribed in the zoning bylaw when issuing certain permits, including development permits, development variance permits, housing agreements, land use contract amendments, and heritage alteration permits.

In this case, the Township of Langley had issued a heritage alteration permit to allow for a mixed-use development in the Fort Langley heritage conservation area. The development consisted of residential units above commercial / office space.

The heritage alteration permit varied the maximum building height from two stories to three and increased the permissible lot coverage from 60% to 67%. When the issuance of the permit was challenged by the Society, the lower court quashed the heritage alteration permit on the grounds that it had unlawfully varied density by varying the permitted height and lot coverage. In concluding so, the BCSC took what it referred to as a "common sense" approach and applied a dictionary definition of density to mean "the quantity of people or things in a given area or space". The Township appealed.

The Court of Appeal allowed the appeal thereby overturning the lower court's decision. The BCCA accepted the dictionary definition referred to above but took a narrower approach to its meaning. The Township had argued that the scope of the prohibition on varying density had to be determined by reference to the distinctive powers a municipality has under section 903 of the *Local Government Act*, being the zoning power. Section 903(1)(c) contemplates, in part, two distinct powers, namely 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.

The Township noted that its zoning bylaw reflected the structure of s. 903 by expressly regulating density in one subsection in the applicable commercial (C-2) zone (headed "Residential Uses"), which made reference to a limit on gross floor area and a maximum number of residential units. However, no such density restrictions were imposed by the zoning bylaw for commercial uses in the zone. Rather, the remaining relevant provisions of the C-2 zone included sections headed "Lot Coverage" and "Height of Buildings and Structures", and were matters going to siting, size and shape of buildings and structures, but not to density.

The Court of Appeal accepted the Township's argument. While the Court held that the C-2 zone limited the number of residential units (i.e., things) within a given area of space (and thereby, indirectly the number of people within that space), the C-2 zone was silent on the density of commercial uses in that space. As the zoning bylaw was silent on commercial density, there was no commercial density provision in the bylaw for the heritage alteration permit to vary. As such, the Court of Appeal found that the Township had not contravened the prohibition on varying density, and allowed the appeal.

The important take away from this case is that a "common sense" approach to the definition of "density" will be applied in future cases. "Density" is defined in the *Local Government Act* 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;

Moving forward, future issues related to varying of density will likely apply the dictionary definition referred to by the Court, in conjunction with the *Local Government Act* definition, as far as is practicable.

The Court of Appeal's decision also suggests that local governments that wish to create maximum flexibility to use the variance power should organize their zoning regulations in accordance with the organization of s. 903(1)(c) and (d) of the *Local Government Act*, clearly associating each regulation with the relevant enabling provisions. On the other hand, local governments that wish to limit variances that indirectly vary density should not rely on lot coverage and height limits, or subdivision minimum parcel area and frontage regulations, but should translate the density effect of such regulations into easily recognizable limits as floor area ratios and dwelling units or subdivision lots per hectare, and express regulations in both ways.

II. 365089 BC LTD. AND VIEW ROYAL RESIDENCE LIMITED PARTNERSHIP V. TOWN OF VIEW ROYAL, 2014 BCSC 1779

This was a recent decision of the BC Supreme Court that arose out of a zoning dispute between the owners of 15 apartment or condominium units in a 66 unit seniors apartment building known as Lions Cove, located in the Town of View Royal, and the Town, regarding the use of some of the apartments as "assisted living residences" as that term is defined under the *Community Care and Assisted Living Act ("CC&AL Act"*).

The facts, although more complex than the following summary, are as follows: The owners of the 15 apartment units are associated with a company that provides services described as "independent and supportive living services" to seniors living in four buildings on Vancouver Island. In the late 1990's, a 66 unit apartment building was constructed to provide housing for older adults and senior citizens. At both the time of construction and at the time of the hearing, Lions Cove was located in the "Apartment Residential (RM-2)" zone. The definition of Residential Apartment under the zoning bylaw was a fairly typical definition:

> "Residential Apartment" means a building divided into not less than three dwelling units other than Attached Residential; specifically excludes a building used for a Hotel or Motel.

In addition to the residential dwelling units, Lions Cove also contains a lobby, and "amenities block", which includes a lounge, a kitchen with a fridge and multiple ovens, sinks and dishwashers; and a dining/meeting room that was configured with nine tables capable of accommodating up to 45 diners at a time.

From construction until 2002, the entirety of Lions Cove was operated on a non-profit basis by a housing society. In 2002-2003, the Society agreed to lease 12 apartments in Lions Cove to Vancouver Island Health Authority. VIHA's objective was to have those apartments available as homes for seniors who require some support, such as meals, housekeeping, laundry and/or transportation services. These services were provided by the housing society, with additional assistance provided by a home support company for activities such as bathing, dressing and the administering and monitoring of medications. Meals were brought in from a local restaurant and served to the residents in the common amenity room. The monthly rent paid by the occupants was supplemented by VIHA.

In 2003, the housing society that initially operated Lions Cove sold its interests in 15 units to the owners in the petition; the remaining units were sold to individuals. In 2006, 12 of the 15 units owned by the owners were registered with the Office of the Assisted Living Registrar as "assisted living residences" under the *CC&AL Act*.

At the time of building construction, the Town's zoning bylaw did not include reference to "assisted living" as a concept of use. In 2007 the Town amended its zoning bylaw by adding a definition of "assisted living apartment" and permitted this use in a site-specific comprehensive development zone which did not include Lions Cove. The 2007 definition of "assisted living apartment" was as follows:

> "means an apartment use where food, housekeeping, personal services and/or nursing care are provided in addition to the residential use".

The zoning bylaw was further amended in 2012 by the creation of a new zone called "Mixed Residential (RM-3)" in which "assisted living" is one of the listed permitted uses. It is not listed as a permitted use in any other zone.

In 2012 complaints, primarily from owners of units in Lions Cove that were not leased by VIHA, were made to View Royal and to VIHA regarding the activities being carried on in Lions Cove. The basis of the complaints was that the building had effectively been converted into a commercial building or an institutional facility. The Town concluded that the use of the units leased to VIHA did not comply with the zoning bylaw as "assisted living" was not a permitted use in the RM-2 zone in which Lions Cove was located, and directed the Owners to cease the contrary use. The Owners commenced legal proceedings.

The Court found that the Owner's use of the apartments as rental accommodation for persons who are receiving assisted living services was a lawful non-conforming use. The Court held that before the 2007 zoning bylaw amendment added a definition of "assisted living apartment" to the zoning bylaw, no part of the zoning bylaw would lead to the necessary implication that apartments occupied by persons who are provided with or received assisted living services are excluded from the definition of "residential apartments". The definition of "residential apartment" did not distinguish between personal and commercial uses, and as such until the 2007 zoning amendment, the apartments occupied by residents who were receiving or being provided with assisted living services were permitted uses.

After the 2007 amendment to the zoning bylaw, the Town effectively created an exception or carved out a sub-category of residential apartments – those apartments where assisted living services are provided—from the general residential apartment use previously permitted in the RM-2 zone. As such, the Court found that the current use of the 12 units as assisted living was in contravention of the zoning bylaw, but that such use is protected by the lawful non-conforming provisions of the *Local Government Act*.

In the end the result was mixed. The Court declared that the 12 units were lawfully non-conforming, but did not grant the Owner's requested declaration that the entire Lions Cove building could be used for assisted living purposes.

III. TUWANEK RATEPAYERS ASSOCIATIONS V. DISTRICT OF SECHELT AND RAY PARFITT, APPROVING OFFICER FOR THE DISTRICT OF SECHELT, 2014 BCSC

The Tuwanek Ratepayers Association applied for judicial review of the decision of the Approving Officer for the District of Sechelt whereby the Approving Officer approved the preliminary review of Eden Pacific Development Limited's proposed 32.75 hectare, 35-lot subdivision on the basis that the approval was beyond the powers granted to the approving officer under sections 85 to 87 of the *Land Title Act* and for an order quashing that decision.

The Petitioner was an incorporated society composed of members of the Tuwanek neighbourhood, which is located within the District of Sechelt adjacent to and below the proposed subdivision, much of which is located on steep slopes. The Petitioner expressed concerns regarding the steep slope of the subject property, the rock fall hazard, water supply and sewage disposal.

The facts are as follows: in 2007 Eden Pacific proposed a subdivision of its property, much of which is located on a steep slope, into 35 fee simple lots. Due to concerns regarding sewage disposal, in 2011 the subdivision was reconfigured in 35 smaller lots clustered on a gentler sloped portion of the property. The average proposed lot size was estimated at 915 square metres. The steeper portions of the property (approximately 47%) were proposed as park land. The subject property was zoned Rural 1 (RR-1) by the District's zoning bylaw, and designated "Rural Residential" in the Official Community Plan.

There were two key issues decided by the Court. The first issue concerned whether the Approving Officer proceeded under s. 87 of the *Land Title Act* in approving the subdivision, or whether he proceeded to approve a bare land strata plan under s. 243 of the *Strata Property Act* and the *Bare Land Strata Regulations*. The difference was critical, as the lot sizes for the proposed subdivision were either in contravention or compliance with the relevant legislation.

Under the District's zoning bylaw, the minimum lot size in the RR-1 zone was 0.66 ha. Some of the proposed new lots were smaller than 0.66 ha. The petitioner argued that by granting preliminary approval of the subdivision plan for lots that do not meet the minimum lot size required by the zoning bylaw, the Approving Officer exceeded his jurisdiction.

In a bare land strata subdivision, an approving officer shall not approve the strata plan unless in conforms to the relevant zoning bylaw. In terms of minimum lot size however, there is an exception to strict compliance with the zoning bylaw. An approving officer may, as per section 2(2) of the Regulations, approve a bare land strata plan containing strata lots of less than the prescribed minimum lot size so long as the total area of the land in the plan, exclusive of access routes, divided by the number of strata lots, is an area not less than the permitted minimum lot size.

For the Eden Pacific subdivision, the subject property was zoned RR-1 within a minimum lot size under the zoning bylaw of 0.66 ha. The property comprised 32.75 ha, of which 2.75 ha was set aside for access routes and was therefore excluded from the calculation, leaving 30.05 ha. When that amount was divided by 35 lots, the result was 0.86 ha, which exceeded the 0.66 minimum lot size prescribed for the RR-1 zone under the zoning bylaw.

However, for approval of a subdivision plan under s. 87 of the *Land Title Act*, there is no equivalent exception for minimum lot size. Section 87 provides that an approving officer may refuse to approve a subdivision if the subdivision does not conform to "all applicable municipal… bylaws regulating the subdivision of land and zoning", which would include minimum lot size.

While there was conflicting evidence of how the Approving Officer proceeded – in particular at the time the Approving Officer gave preliminary approval – the Court concluded that both the Approving Officer and the developer were acting under the assumption that the subdivision was by way of a bare land strata plan. However, the Court notes that it was not clear that at the time of preliminary approval the Approving Officer had turned his mind to the formula under s. 2(2) of the *Bare Land Strata Regulation* providing the exception to minimum lot size. While the Court recognized that it could set aside the Approving Officer's decision and remit the matter to him for reconsideration, the Court saw no practical purpose in doing so. As such, the petition was dismissed.

The second issue was whether an official community plan is a bylaw regulating the subdivision of land and zoning within the meaning of s. 87 of the *Land Title Act*. As discussed above, s. 87 provides that an approving officer may refuse to approve a subdivision if the subdivision does not conform to "all applicable municipal… bylaws regulating the subdivision of land and zoning", which would include minimum lot size. The OCP prescribed a minimum lot size of 2 ha for the subject property. The Court agreed with the District's position and held that an OCP sets out objectives and policies for the guidance of Council, but does not regulate as contemplated by s. 87 of the *Land Title Act*.

While the issue was moot (as the Court had concluded that the Approving Officer had not proceeded pursuant to sections 85 and 87 of the *Land Title Act*), this decision is a clear indication that where an approving officer does proceed to approve a subdivision under sections 85 and 87, the approving officer is not obliged to consider those provisions of the OCP dealing with subdivision of land.

IV. KELOWNA MOUNTAIN DEVELOPMENT SERVICES LTD. V. CENTRAL OKANAGAN (REGIONAL DISTRICT), 2014 BCCA 369

Our final case provides some useful direction when preparing and applying zoning bylaws. *Kelowna Mountain Development Services Ltd. v. Central Okanagan (Regional District)* is a

decision of the BC Court of Appeal from September 2014. The facts are somewhat relevant, so I will recite them as follows:

A land developer, Kelowna Mountain Development Services Ltd, was the owner of a 160 acre parcel of land on Kelowna Mountain on which it planned to establish a "vineyard park", to attract visitors. The vineyard park was to consist of a total of twelve vineyards, each having different grape plantings and each with its own wine production facility. Features such as suspension bridges, waterfalls, and an underground cave for wine tastings had already been constructed at the time of the hearing.

The subject property was zoned Rural Zone 1 (RU1), the stated purpose of which was to accommodate agricultural and rural uses on parcels that are 30 hectares (approximately 74 acres) or greater and located outside the land reserve. There were 16 types of permitted uses in the RU1 zone, including agriculture, agri-tourism, winery and cidery.

In early 2012, the petitioner applied for and was granted a building permit to construct a building called the Welcome Centre, which included a lobby, retails and incidental uses. When the application for an occupancy permit was submitted, the Regional District had some concerns about whether the uses proposed for the Welcome Centre conformed to those permitted in the RU1 zone. A revised occupancy permit for the Welcome Centre was eventually issued, but the petitioner continued with legal proceedings, challenging the bylaw's definition of agri-tourism as void because, as the petitioners alleged, it was vague and uncertain.

The definition of agri-tourism in the zoning bylaw read as follows:

> *AGRI TOURISM* means land, buildings and structures for the purpose of providing tourist facilities and activities directly associated with working farms and ranches. Agri tourism does not occupy a combined gross floor area of more than 200 square meters nor provide gathering or seating areas for more than 100 people. Typical uses include but are not limited to farm tours, promotional events for farm products, assembly uses, restaurants, and convenience retail stores.

At the lower court and at the Court of Appeal, the petitioner argued that the definition was uncertain and/or vague on a number of grounds (and therefore void). Included in these arguments were the following:

- the definition makes no distinction between principal and accessory uses and nothing in the bylaw indicates agri-tourism is intended to be a principal use;
- the first sentence of the definition is missing words required for make the sentence make sense; and

- the second sentence of the definition is not consistent with the first sentence.

Both the lower court and the Court of Appeal rejected each of the arguments advanced by the petitioner. For the purposes of this paper, it is not necessary to review the analysis undertaken by the Court of Appeal. The important take-away from this decision is the Court's comments with regard to what "uncertain" or "vague" means in the context of a bylaw challenged on those grounds. The following principles were summarized by the Court and provide a useful reminder when drafting or interpreting bylaws:

- Laws need not achieve absolute precision in order to survive a vagueness challenge. However, a law will be found to be unconstitutionally vague if it so lacks in precision as not to provide an adequate basis for legal debate - that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria.

- In the context of municipal bylaws, the test for assessing vagueness asks whether a reasonably intelligent person would be unable to determine the meaning of the bylaw and govern his or her actions accordingly. Mere difficulty in the interpretation of the bylaw is not sufficient.

- A municipal bylaw is not necessarily void for uncertainty merely because its terms may be susceptible to more than one interpretation.

- Municipal bylaws are to be interpreted benevolently and supported if possible.

Ultimately, the petitioner was unsuccessful on appeal, and the Regional District's interpretation of its own zoning bylaw was accepted by the Court.

NOTES