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BULLETIN

THE CONTINUING SAGA OF NON-CONFORMING USE LAW IN BRITISH COLUMBIA: COURT OF APPEAL INTERPRETS SECTION 529 OF THE *LOCAL GOVERNMENT ACT*; SUPREME COURT OF CANADA REFUSES LEAVE TO APPEAL IN A DIFFERENT CASE

Sakinaw Lake might be another casualty in the war waged against hidden gems by social media oversharing. But in case you didn't already know, it's an idyllic body of fresh water where the sounds of nature are interrupted only by the buzz of motorized watercraft, and the replacement of quaint lakefront cottages, built before zoning was introduced, hampered only by a "Kafkaesque" maze of regulatory hurdles and bureaucratic delay. At least, that is what the Supreme Court of British Columbia found following seven days of argument on a question about the Sunshine Coast Regional District's right to enforce against zoning bylaw breaches after it issued a permit to demolish and replace a 4800 square foot "cottage" perched just 30 feet from Sakinaw Lake's natural boundary. The cottage could have remained exactly as it was despite its proximity to the lake because it was built there before any bylaws contemplated otherwise. In other words, it was protected from those bylaws by section 529 of the *Local Government Act:*

> **529** (1) If the use and density of buildings and other structures conform to a land use regulation bylaw but
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> (a) the siting, size or dimensions of a building or other structure constructed before the bylaw was adopted does not conform with the bylaw, or
> (b) the siting, size, dimensions or number of off-street parking or loading spaces constructed or provided before the bylaw was adopted does not conform with the bylaw,
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> the building or other structure or spaces may be maintained, extended or altered to the extent authorized by subsection (2).
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> (2) A building or other structure or spaces to which subsection (1) applies may be maintained, extended or altered only to the extent that
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> (a) the repair, extension or alteration would, when completed, involve no further contravention of the bylaw than that existing at the time the repair, extension or alteration was started…

The SCRD determined that subsection 529 (2) allowed the proposed replacement dwelling on the ground that the work constituted a "repair" as that term is used in that subsection. On that basis

it issued a development permit to Ms. Vanderhaeghe to tear down and replace her cottage without requiring any zoning variances.

You might have thought the SCRD was doing Ms. Vanderhaeghe a favour when it adopted this broad interpretation; otherwise, to rebuild so close to the lake she would have required not just a development permit, but also a variance (to the 20-metre zoning bylaw setback). And if the SCRD was doing Ms. Vanderhaeghe a favour by issuing a DP without requiring any variances, you might have expected her to return the favour, for example by building in accordance with the permit, which she did not do. Instead, after demolishing the old non-conforming structure (which she was authorized to do), she completed the construction of a new house that was bigger, taller and closer to the lake than what her development permit allowed. She also erected a previously unanticipated retaining wall in a riparian area (apparently for emergency erosion control purposes). All of this despite two stop work orders.

The Supreme Court of British Columbia accepted that Ms. Vanderhaeghe's troubles were basically the fault of Regional District staff, beginning with their unreasonable, if favourable to Ms. Vanderhaeghe, interpretation of s. 529 of the *Local Government Act*. The lower court concluded the words "repair", "maintain" and "alter" are not reasonably capable of supporting full demolition and replacement. The British Columbia Court of Appeal patiently considered the Regional District's contrary arguments (including an increasingly common argument that the judge mistakenly applied a "correctness" standard of review after acknowledging that "reasonableness" review was required) but was not persuaded to reach a different conclusion:

> Nor do I see an error in the [lower court] judge's view that what s. 529(1) allows to be "maintained, extended or altered" is "a building or other structure constructed before" the adoption of the bylaw causing the edifice to be non-conforming. This cannot include a new building constructed after the bylaw has come into effect … In my view, "repair" cannot reasonably capture the destruction of a building in its entirety and its replacement with a new building.

What, if anything, should we take from the *Vanderhaeghe* decision? On the s. 529 issue, a non-conforming building or structure may be maintained and repaired (provided no further contraventions are involved), but replacement will require compliance with current zoning regulations, or a trip to the board of variance, or the council or regional board for a development variance permit, or a delegate of the council or regional board for a minor development variance permit (not to be confused with a "minor variance", which is what the board of variance can permit).

Also this week, the Supreme Court of Canada dismissed an application for leave to appeal in another non-conforming use case (*Onni v Ucluelet*), where a landowner wanted to rely on works and services constructed for a bare land strata subdivision as evidence of a commitment to use each of 29 undeveloped strata lots in accordance with a previous and far more generous zoning scheme. That case turned mainly on findings of fact, not so much on questions of interpretation,

but otherwise reinforced the view that intention alone, without actual physical alteration of the subject lands, is insufficient to support a non-conforming use claim.

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