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CLIENT BULLETIN

Court of Appeal resolves "density" conundrum

In the first Court of Appeal decision to address the question of what is "density" for the purpose of interpreting a restriction on the use of a permit to vary density, the Court has reversed a 2013 Supreme Court decision that quashed a heritage alteration permit on the grounds that it impermissibly varied density by varying the permitted height and lot coverage of a building.

The Township of Langley had issued a heritage alteration permit for a property in the Fort Langley heritage conservation area, which varied the maximum building height from two storeys to three and increased the minimum lot coverage from 60% to 67%. The B.C. Supreme Court had taken what it characterized as a "common sense" approach to the question, applying a dictionary definition to determine that "density of use" in s. 972(4)(a) of the *Local Government Act* means the quantity of people or things in a given area or space. Applying that definition, both variances were variances of density, and prohibited by s. 972(4)(a).

The Court of Appeal unanimously applied a "more nuanced analysis" in Langley's appeal of the decision (*Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2104 BCCA 271). It accepted the Township's argument that the scope of the prohibition on varying "density of use" had to be determined by reference to the council's authority to enact, in the first place, the regulations that were being varied: section 903 of the *Local Government Act*, the zoning power. The Court noted that, within s. 903, the power to regulate within a zone the density of the use of land, buildings and other structures is "discrete and distinct" from the power to regulate the siting, size and dimensions of buildings. Langley Township argued that it should not be inferred that, when exercising the latter power to enact the height and lot coverage regulations that had been varied by the HAP, it had actually exercised the former power. In that regard, the Township pointed out that its zoning bylaw reflected the structure of s. 903 by providing in one section (headed "Residential Uses") that accessory residential uses (the building in question had an upper residential storey over commercial and office uses) were limited to a gross floor area of twice that of the non-residential use within the same building and were not to exceed one unit per 135 square metres of lot area, and providing in other sections (headed "Lot Coverage" and "Height of Buildings and Structures, respectively) that lot coverage was not to exceed 60% and height was not to exceed 12 metres. No section of the regulations for the zone in question was headed "Density"; the Court of Appeal appears to have simply accepted the logic of the Township's argument as to which regulations went to "density", by noting 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", while “no such density restrictions are imposed on commercial uses”. It’s certainly true that there was no direct counterpart to the gross floor area rule for commercial uses, but one would have thought that there was at least a bit of room for argument that the Township had chosen to address the density of commercial uses by a combination of lot coverage and height rules to achieve a similar result. However, the Court of Appeal found that the bylaw was “silent on the density of commercial uses”.

Before parsing the zoning regulations against the structure of s. 903, the Court of Appeal made some observations about the purpose of heritage conservation areas and heritage alteration permits, in particular stating that the purpose of the HAP power is to permit the elected Council to vary zoning bylaw regulations that might otherwise apply to frustrate development that the Council perceives as otherwise appropriate in light of the goals and objectives of the heritage conservation area designation. In this context, Chief Justice Bauman concluded that one should not too readily deny a municipal council flexibility in its treatment of any particular application. It remains for other cases to determine whether variances effected by other types of permits that lack such a context, such as development variance permits and board of variance orders, will be interpreted as benevolently.

It also remains to be seen whether other types of regulations that similarly have their origin in subsections of s. 903 other than the power to regulate the “density of use of land, buildings and other structures” can be varied by HAP, development variance permit, development permit or board of variance order. For example, minimum parcel areas and dimensions for subdivision are authorized by another subsection, and historically were authorized by another Division entirely, of Part 26 of the *Local Government Act*. The Court of Appeal’s decision strongly suggests that these regulations may be varied. 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 expressed as floor area ratios and dwelling units or subdivision lots per hectare, and express the regulations in both ways.

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