Inside Canada

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A Trio of Zoning Cases and More

Council Has Broad Discretion to Refuse Reduction in Setbacks
1139652 B.C. Ltd. v. Whistler (Resort Municipality), 2018 BCSC 1806 http://canlii.ca/t/hvmvc

The Petitioner sought to build a residential home on an irregularly shaped lot in Whistler, British Columbia (City). The lot was created by the Surveyor General, and as such, did not follow statutory subdivision requirements. The applicable zoning by-law required minimum front and rear setbacks of 7.6 meters, and a minimum side setback of 3 meters. Due to the irregular shape of the lot, the as of right development permissions allowed a building footprint of only 197 square feet. The Petitioner applied to the Board of Variance for a minor variance to reduce the required setbacks pursuant to s. 536 of the *Local Government Act,* S.B.C. 2015, c.1. The application was denied. Subsequently, the Petitioner unsuccessfully applied to Council pursuant to s. 498 of the *Local Government Act,* S.B.C. 2015, c.1. The Petitioner brought an application for judicial review of Council's decision.

HELD: Application dismissed.

DISCUSSION: The Petitioner raised two issues before the Court: first, the issue of procedural fairness and second, a challenge with the substantive decision of the Municipal council. Both arguments were unsuccessful. With respect to the allegations of procedural unfairness, the Petitioner argued that it was entitled to make representations before Council. This argument was rejected by the Court as no oral hearing was mandated by statute; therefore, the Council was not required to grant the Petitioner an opportunity to be heard. With respect to the substantive challenge, the Petitioner's arguments were once again rejected by the Court. Applying the Supreme Court of Canada holdings in *Dunsmuir v. New Brunswick*, 2008 SCC 9 and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, the Court held that the municipality was entitled to broad discretion when determining this particular application. The Petitioner's attempt to parse the record for small errors by the Council did not affect the overall reasonableness of its decision.

Further Search for Records Required under *MFIPPA*
Appeal MA16-446-2 Township of Oro-Medonte http://canlii.ca/t/hw7ll

This is an appeal stemming from a request made to the Township of Oro-Medonte (Township) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*). *MFIPPA* codifies a legislative regime whereby persons may request access to records held by a municipality (and certain other institutions). *MFIPPA* creates a presumption that records should be disclosed upon request, unless an exemption applies. In this case, the respondent Township received a request from the Appellant to disclose records related to consultations with any Aboriginal group with respect to a specific property. The Township released certain records but refused to release others. The Appellant appealed the refusal to disclose, and further sought an order that the Township did not conduct a thorough search.

HELD: Appeal granted.

DISCUSSION: The Appellant made two contentions before the Adjudicator. First, the Appellant submitted that the Township improperly withheld records that should have been disclosed. Second, the Appellant submitted that the Township failed to conduct an adequate search for records. With respect to the first submission, the Adjudicator determined, after reviewing the impugned records, that they were in fact responsive to the Appellant's request. With respect to the second submission, the Appellant argued that many records that were not disclosed ought to exist, despite the Township's claims to the contrary. In assessing this submission, the Adjudicator considered the broader obligations that the Township has with respect to First

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Endnotes

1. *See Kondrat'Yev v. City of Pensacola*, 903 F.3d 1169, 1179 (11th Cir. 2018) (Newsom, J. concurring).
2. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993).
3. *Lemon*, 403 U.S. at 612-13.
4. *Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n*, 874 F.3d 195, 204 (4th Cir. 2017).
5. *Van Orden,* 545 U.S. at 686.
6. *Id.*
7. *See Marks v. United States*, 430 U.S. 188, 193 (1977).
8. *Id.* at 702-03.
9. *Id.* at 700.
10. *See Kondrat'Yev*, 903 F.3d at 1182 (Newsom, J. concurring) .
11. *Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n,* 147 F. Supp. 3d 373, 387 (D. Md. 2015).
12. *See Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n,* 874 F.3d 195, 210-12 (4th Cir. 2017).
13. *Id.* at 211-12.
14. *Id.*
15. *Id.* at 219 (Gregory, J. dissenting).
16. *Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n,* 891 F.3d 117, 123 (4th Cir. 2018) (Niemeyer, J., dissenting).
17. The Religious Aid Clause of the New Jersey Constitution provides that "[n] o person shall…be obligated to pay … taxes … for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry." N.J. Const. art. I, ¶ 3.
18. *Locke,* 540 U.S. at 715.
19. *Id.* at 725.
20. *Trinity Lutheran,* 137 S. Ct. at 2024 n.3.
21. 181 A.3d 992, 1012 (N.J., 2018).
22. *Id.* at 1006.
23. *Id.* at 1012.
24. *Compare Morris County, Id.* at 1012 and *Caplan v. Town of Acton,* 479 Mass. 69, 103-04 (Mass. 2018) (Kafker, J. concurring) *with Am. Atheists, Inc. v. Detroit Downtown Dev. Auth.,* 567 F.3d 278, 282 (6th Cir. 2009) and *Taylor v. Town of Cabot,* 178 A.3d 313, 323-25 (Vt. 2017).
25. *Am. Atheists*, 567 F.3d at 282.
26. *Taylor,* 178 A.3d at 323. ML

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Nations communities. In particular, the common law 'duty to consult' imposes obligations on the Crown and its delegates, including municipalities. In order to discharge the duty to consult, the Township may be required to follow a consultation process that is consistent with provincial and federal guidelines. Without making a determination as to whether the Township did or did not follow provincial and federal guidelines, the Adjudicator held that the mere existence of these guidelines wase suggestive that certain documents were likely produced in the course of an ostensibly mandatory consultation. Since these documents were not disclosed, the Adjudicator determined that the Township had not conducted a sufficient search for records.

Marijuana Growing Operation Must Relocate

Tay (Township) v. Fan, 2018 ONSC 6375 http://canlii.ca/t/hvp1p

The Township of Tay (Township) brought a motion for interlocutory relief, seeking to enjoin the Respondent from continuing to grow marijuana in a residential structure within the Township. The marijuana cultivation was not illegal *per se* as the Respondent was growing medical marijuana for himself and three other individuals, ostensibly in compliance with the legal regime for medical marijuana cultivation and production. The marijuana growing operation was extensive, involving approximately 800 individual plants. The property was zoned residential and large-scale marijuana production was not explicitly permitted under the zoning by-law. To the contrary, medical marijuana production facilities were permitted in general industrial zones as "processing plants." Despite repeated attempts by the Township to force the Respondent to comply, the Respondent refused. The issue before the Court was zoning.

HELD: Interlocutory injunction granted.

DISCUSSION: It is well settled that the test to be applied on an interlocutory injunction is the three-part test from the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 SCR 199. However, the *RJR Macdonald* test is modified slightly in the context of a municipality seeking to enforce its by-laws. First, the Township was required to demonstrate that it had a strong *prima facie* case that Respondent's conduct breached the zoning by-law. The Court ruled that this branch of the test was satisfied on the facts. Although it is not entirely clear at what point a grow operation reaches the threshold of "production facility," the Court easily determined that the scale of the operation in this case satisfied that threshold. Second, the Township was required to demonstrate irreparable harm. This test was met because the Township was attempting to enforce its zoning by-law in furtherance of the public good. Finally, in considering the balance of convenience the Court weighed the Respondent's right to access medical marijuana with the prejudice suffered by the Township by virtue of its zoning by-law being flouted. To assuage the concerns of the Respondent, however, the Court did delay the injunctions effect for several months to grant the Respondent time to locate an alternative growing facility.

Specific Municipal Purpose Not Required to Support Expropriation

58663 Newfoundland and Labrador Ltd. v. Kippens (Town), 2018 NLSC 223 http://canlii.ca/t/hvzw4

The Applicant brought an application for judicial review of an expropriation affecting the Applicant's lands (Property). The Applicant was a land owner in the Town of Kippens (Town) who had previously applied for, and was denied, permission to develop a residential subdivision on the Property. For a period of time, the Property was used as a turning circle for municipal vehicles. After the Applicant erected a steel barrier preventing such use, the Town commenced the expropriation process in order to construct a temporary turning circle on the Property. The expropriation was approved by the Minister of Municipal

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Affairs and Environment (Minister). The Applicant sought an order quashing the Minister's approval, as well as a declaration that the expropriation was illegal, in bad faith and *ultra vires* the *Urban and Rural Planning Act, 2000*, S.N.L. 2000 c. U-8.

Held: Application dismissed.

Discussion: The Applicant raised multiple issues before the Court, taking what could be described as a scattershot approach. The Applicant argued that a statute enabling expropriation ought to be interpreted restrictively, and in favour of the party subject to the land taking. The Court rejected this position, and instead held that a broad and purposive interpretation of the statute is the correct approach. The Applicant further argued unsuccessfully that the Minister's decision was invalid because the expropriating authority did not clearly identify a proper municipal purpose that was accomplished by the expropriation. The Court appeared to adopt a position that the Town was not required to identify a municipal purpose that would support an expropriation. In any case, the Court found that expropriation for the purpose of providing municipal services, as was stated by the Town, was sufficient. The Applicant further argued unsuccessfully that the proposed turning circle constituted either a subdivision or a development pursuant and that the subdivision or development was contrary to governing law and policy. Finally, the Applicant's argument of bad faith was rejected as it was unsupported by any evidence.

Zoning By-law Must Be Read Harmoniously with Official Plan

Southside Construction v. Ingersoll (Town of), 2018 ONSC 6561 http://canlii.ca/t/hvvnp

The Applicant, a property owns in the Town of Ingersoll (Town) sought a declaration interpreting the zoning by-law applicable to its lands. The Applicant's lands are zoned Highway Commercial (HC)-9, a site-specific designation. A dispute arose between the parties with respect to the interpretation of a specific provision of the applicable zoning by-law which falls under the heading "community shopping center." The term "community shopping center" is not defined in the zoning by-law. The impugned provision provides a limit on the gross leasable commercial floor area of 50,000 sq. feet for a commercial shopping center within the HC-9 zone. Absent a definition of commercial shopping center, the Applicant sought a declaration that accords with its interpretation of the zoning by-law, an interpretation favourable to a contemplated development.

HELD: Application was denied.

DISCUSSION: The Township's submitted interpretation of the applicable zoning by-law is that any project that exceeds the prescribed 50,000 sq. foot limit cannot be built without a zoning by-law amendment and an Official Plan amendment. By the Applicant's interpretation, a defined term found elsewhere in the zoning by-law, "shopping center," which is defined as a building of *six or more* separated spaces, should inform the interpretation of the undefined term "community shopping center". The Court noted that the two interpretations were irreconcilable. In its analysis, the Court first noted that courts will be hesitant to grant a declaration which will resolve a hypothetical issue that may arise at some point in the future. In this case, however, the Court determined that the matter should proceed because the issue raised was not hypothetical, speculative, or merely academic.

The issue before the Court was to resolve a matter that of practical importance to both the parties. In resolving the question of by-law interpretation, the Court stressed the importance of reading a by-law harmoniously with the Official Plan. After canvassing the history of the site-specific zoning by-law applicable to the Applicant's site, as well as the policy behind the Town's Official Plan, the Court was satisfied that the definition of "shopping center" could not be ported into the impugned provision. Accordingly, the declaration sought by the Applicant was not granted. ML

