Citation: Gluska v. The City of Port Moody, B.C.
2002 BCSC 1003

Date: 20020703
Docket: S071334
Registry: New Westminster

2002 BCSC 1003 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JOSEPH A. GLUSKA

PETITIONER

AND:

THE CITY OF PORT MOODY, B.C.

RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE LOO

(IN CHAMBERS)

Joseph A. Gluska:	In Person
Counsel for the Respondent:	C. S. Murdy
Date and Place of Hearing:	19 and 20 June 2002 New Westminster, B.C.

[1] The petitioner, a resident of the City of Port Moody, applies to set aside the City's Zoning By-law 2499 which re-zoned approximately 33.5 acres of land in the Heritage Mountain area of the City’s North Shore to allow for the construction of a secondary school and a community park. There is no dispute that a school and community park on the North Shore is consistent with the City’s official Community Plan.

[2] The petitioner raises four grounds in support of his application:

1. failure to provide proper disclosure of documents, in particular the Contract of Purchase and Sale dated November 2, 2001 between the City and School District No. 43 (“the Contract”);

2. bias on the ground that the City was receiving more than $6 million from the sale and therefore had a financial interest in the re-zoning;

3. bias on the basis that the development approval process was treated differently from other applications; and

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4. refusal by the Chair to respond to questions or listen to representations at the November 13, 2001 public hearing.

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[3] Under the Contract, the City sold approximately 12 acres of the westerly portion of the 33.5 acre site to the School District for a new secondary school for 1,200 students. The community park was to be built on the remainder of the site and a portion of the school site. The sale was subject to re-zoning the lands from Acreage Reserve to Public Service through a joint re-zoning application by the City and the School District.

[4] On November 13, 2001, first and second readings of By-law 2499 were considered and passed by City Council and the public hearing was set for November 27, 2001. The City made a deliberate decision not to include the Contract in the information packages available to the public. Mr. van der Wolf, the City Clerk states, "… the City's corporate position was to ensure that the rezoning and land sale matters were considered separately." The information package did, however, include three preliminary reports or studies prepared for the City as part of the re-zoning process. They were all that Mr. McIntyre, the City's Director of Planning and Development, considered necessary before the public hearing was held. They

were, a traffic and parking study by Ward Consulting Group, an arboricultural study (Phase 1) by DMG Consulting Group, and an environmental overview report by Jacques Whitford Ltd. dated October 5, 2001.

[5] The environmental report addressed the fish and wildlife resource on the site, but did not address any environmental issues relating to septic discharge from lands immediately upgrade of the site.

[6] Mr. Marusyk, a resident and former City Mayor, became aware of the existence of the Contract and about a week before the public hearing, went to City Hall, paid the required $10.00 fee, obtained a copy of the Contract, and brought it to the public hearing.

[7] The petitioner obtained a copy of the Contract from Mr. Marusyk at the public hearing, and it was only then, on reviewing the Contract, that he learned that the site might have septic effluent leachate from the Anmore Green Estates septic fields and a former trailer park septic field immediately upgrade of the proposed community park. He also learned that there would be a change to the number of tennis courts, playing fields, and baseball diamonds that the City was obliged to construct under By-law 1819.

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[8] A brief review of some of the terms of the Contract is necessary:

(a) Paragraph 1 defines the following:

(1) **"By-law 2179 Agreement"** means the Amendment and Assignment Agreement between Her Majesty the Queen in Right of the Province of British Columbia, represented by the Minister of Environment Lands and Parks the Vendor and Park Lane Homes Ltd. dated November 30, 1993 and executed pursuant to the City of Port Moody By-law 2179.

(2) **"Bylaw 1819 Agreement"** means the Termination and Land Exchange Agreement between the Vendor and Carma Developments Ltd. dated August 8, 1996, executed pursuant to City of Port Moody By-law No. 1819 and amendments thereto.

(b) Paragraph 3.1, which deals with the City's representations and warranties, contains the following:

> The [City] covenants and agrees to indemnify and hold the [School District] harmless from and against any and all claims, actions, causes of action, demands, damages, costs including but not limited to solicitor and client costs, and compensation whatsoever that the [School District] may incur or suffer as a result of:
>
> …
>
> (ii) by any breach of allegations of breach of the [City's] obligations under Bylaw 2179…

(c) Paragraph 3.2(e) reads:

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> 3.2(e) The [School District] and the [City] also acknowledge and agree that there may be some septic effluent leachate from adjacent lands within the Village of Anmore onto the Property and the parties shall act reasonably and cooperate with each other to minimize and control any such problems.

(d) Paragraph 8.1 reads:

> **8.1 Construction of Community Use Facilities**
>
> The City will construct the Community Park referred to in the By-law 1819 Agreement and By-law 2179 Agreement and to that end, intends to construct the following community use facilities on the Property and adjacent lands, to the City's standards:
>
> 1. Lit, Artificial Turf Field and Running Track
> 2. Lit, Baseball/Softball Field
> 3. Fieldhouse/Changeroom Facility
> 4. Two Tennis Courts
> 5. Parking
> 6. Pedestrian and Bicycle Pathways
> 7. Site Landscaping Features
> 8. Site Fencing

[9] The public hearing lasted just over two hours and of the 30 to 35 people present, approximately 16 spoke, and were generally equally divided between those in favour and those opposed to the school and community park.

[10] A review of the transcript of the hearing discloses that the petitioner was concerned about the location of the proposed playing fields being directly below the septic

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fields. In response to the petitioner's concerns, the Chair asked Mr. McIntyre whether there were any septic fields on the site. Mr. McIntyre's response is as follows:

> MR. McINTYRE: … That item came up through the due diligence process in looking at the site at the staff level. There's a known problem next door in Anmore, and so the necessary site investigations were done. Which, by the way, the site has been looked at in a number of different perspectives; tree cover, geotechnical, environmental. And so this was yet another aspect of the site that was investigated.
>
> We have a -- we've received a preliminary draft report on that, and that's being finalized now and it would certainly be the intent that any recommendations coming out from that report would be incorporated into the design to make certain that we would not be intercepting or somehow disseminating septic effluent into a sports field area.

[11] Mr. Specht, a resident, and the petitioner, also voiced concern that the proposed park facilities differed from what the City was obliged to construct under By-law 1819, or what has been referred to as "the 286 agreements", and Mr. Specht raised questions about any financial implications. Under the 286 agreements, the City was committed to building three baseball diamonds, three playing fields, and three tennis courts. Failure to do so may result in monies being paid back to the developer, Barbican Developments Ltd. Under the

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proposed re-zoning, the City would be building only two baseball diamonds, two playing fields, and one tennis court.

[12] At the hearing, Mr. McIntyre answered as best he could, based on the available information, but the Chair made it clear that the hearing was not a time for debate, but a time to:

> … get the views of the residents on the use of that property. In other, do you wish to see a school there, do you wish to see a community park there. That's what we are here for tonight.

[13] On December 11, 2001, third and fourth readings of By-law 2499 were considered and the By-law was enacted.

[14] At the conclusion of the two day hearing before me, I asked the petitioner for his primary concerns. He has two: 1. as a teacher who may teach in the school, and as a parent whose daughter may attend the school, he is concerned about the environmental impact of the leachates from the upgrade Anmore lands; and 2. as a citizen and a taxpayer, he is concerned with the loss of two baseball diamonds and two playing fields which the City is obliged to construct as part of the community works under By-law 1819. As he puts it: how would he have known about the leachate and that the residents were going to be “short changed” one baseball diamond, one

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playing field, and two tennis courts, unless he had a copy of the contract?

[15] The real issues on this application are whether procedural fairness and fair disclosure was maintained in accordance with the principles enunciated by the B.C. Court of Appeal in ***Pitt Polder Preservation Society v. Pitt Meadows (District)*** 2000 BCCA 415, 77 B.C.L.R. (3d) 54. In that case the Court of Appeal reviewed a number of authorities and concluded at paragraph 54:

> … in order to provide the opportunity for informed, thoughtful, and rational presentations in relation to proposed land use and zoning bylaws it is necessary that interested members of the public have the opportunity to examine in advance of a public hearing not only the proposed bylaws but also reports and other documents that are material to the approval, amendment or rejection of the bylaws by local government.

[16] In ***Wild Salmon Coalition v. North Vancouver (City)*** (1996), 34 M.P.L.R. (2d) 122 (B.C.S.C.), the City was also the vendor of land which was the subject of a re-zoning application. Grist J. stated:

> 44 … Municipal councils through the course of their duties will meet measures which not only include resolution of competing concerns but may often involve generation of revenues or conversely, expenditure of public resources. All of this is part of their function and mandate. In the course of a public meeting called pursuant to s. 957, so

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> long as procedural fairness and fair disclosure is maintained, the court should not intervene.

[17] The Jacques Whitford Ltd. preliminary environmental overview makes no mention of leachate from the Anmore site. The City contends that is because “the specifics of the environmental issues”, details of the recreational facilities and other planning issues were dealt with during the North Shore Development Authorization (“NSDA”) process, a development approval process described as “unique” to the City’s North Shore. The NSDA takes place **after** the re-zoning has occurred. It involves no public hearing, but the City says that it invites the public to attend a public information meeting although by law it is not required to do so.

[18] **After** the public hearing and **after** the City adopted By-law 2499, there came into existence a report dated January 31, 2002, from Jacques Whitford Environment Ltd. dealing with the septic-related risks of the site. I can only assume it was the finalized report Mr. McIntyre was referred to when he spoke at the hearing about the draft preliminary report on the “known problem next door in Anmore.”

[19] A review of the January 31, 2002, report discloses that subsurface and groundwater investigation began around the middle of December 2001, and various samples were collected.

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The "limited data" confirmed evidence of “septic discharge migration” from Anmore, but the concentrations of bacteria were “not high enough to be considered a health risk at the present time.”

[20] Should the City ought to have disclosed the Contract to the public as part of the information package? It would be fiction to think that City Council did not consider the Contract when it came to deciding whether to vote in favour of changing the zoning. After all, the sale of the land to the School District was the reason why the re-zoning was needed in the first place. The minutes of the December 11, 2001 Council meeting were not in evidence, but common sense says that the Contract was “material to the approval, amendment or rejection of the by-laws by the local government”.

[21] While I am inclined to find that the Contract ought to have been disclosed to the public as part of the information package in advance of the hearing, I must ask myself whether it would have served any useful purpose. In other words, a copy of the Contract would not have provided, in the words of ***Pitt Polder*** at paragraph 54, “the opportunity for informed, thoughtful, and rational presentations.” All the Contract did was raise questions which could not be answered because the information and reports were not yet in existence.

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[22] Wallace J. in ***Karamanian v. Richmond (Township)*** (1982), 38 B.C.L.R. 106 (S.C.), quoted in ***Pitt Polder***, *supra,* at paragraph 49:

> 49 In *Karamanian v. Richmond (Township)*, *supra*, Wallace J. said that the statutory requirement to hold a public hearing includes the requirement that the local government fully disclose the relevant information considered by the council in proposed zoning bylaws requiring a public hearing. In that case, the undisclosed documents were the reports and recommendations of the planning committee and the planning department along with the supporting documents, all of which had been considered by council in arriving at their decision to adopt the bylaw. With respect to the purpose of the statutory provision requiring a public hearing, Wallace J. said, at 766:
>
> > In my view, the purpose of the Legislature in enacting s. 720 [now section 890(1)] was to provide a forum at which all aspects of the by-law might be reviewed so that members of the public, having become aware of the by-law's purpose and effect, would be in a position to make representations to the council of the manner and extent it affected property owned by them. To make an intelligent assessment of the effect of a by-law on one's property and to be able to question proponents of the by-law one should be informed of the matters considered by the planning committee, the rationale for their recommendation, and such other relevant material considered by council when it adopted the committee's recommendations and decided a public hearing be held. Anything less than full disclosure of the relevant information restricts the scope of the analysis and the consequent representation a homeowner might otherwise make to council at the public meeting. Leaving homeowners

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> ignorant of pertinent information in the possession of the council frustrates the objective of a public meeting and denies those homeowners whose property is affected by the by-law a full opportunity to be heard at a fair and impartial public hearing.

[23] Hinkson J.A. in ***Eddington v. Surrey (District)***, (26 June 1985) Vancouver CA002329, B.C.J. No. 1925 (C.A.) quoted in ***Pitt Polder*** at paragraph 50:

> In my opinion, it is important that at the public hearing the material that is to be considered by council in due course in determining whether or not to enact the by-law is available to the public for informed discussion.

[24] In this case, the relevant information and material detailing the park facilities and the septic migration from neighbouring lands, was not in existence prior to the adoption of the By-law. The City contends that there is no statutory requirement that any of the studies or details had to be obtained before the public hearing.

[25] However, the residents then had little or no information on which they could make their representations - or at least an intelligent representation - on how their interests in property might or would be affected.

[26] I find this aspect of the case troubling, as it may mean that the hearing was not a real hearing or a meaningful

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hearing in the sense that much of the information was not yet in existence, and would not come into existence until after the By-law was passed. I know of no case authority, and none was cited to me on the extent of any duty by a local authority to see that information is in existence before a public hearing so that homeowners are afforded a reasonable opportunity to be heard on how their interests in property might be affected, particularly when the local authority is itself seeking the re-zoning. However, the application before me was not argued on that basis and I will therefore not deal with it.

[27] With reluctance, the application of the petitioner is dismissed. The parties have indicated they wish to make submissions on costs, and they may do so.

"L.A. Loo, J."
The Honourable Madam Justice L.A. Loo

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