

CANADA / JUDGMENT

Alberni-Clayoquot (Regional District) v. Berrow

2020 BCSC 1676

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1676 Alberni-Clayoquot (Regional District) v. Berrow

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Alberni-Clayoquot (Regional District) v. Berrow,

2020 BCSC 1676

Date: 20201106

Docket: S-199042

Registry: Vancouver

Between:

Alberni-Clayoquot Regional District

Petitioner

And

Leland Berrow

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Petitioner (via videoconference):

M.R. Voell

Respondent on his own behalf (via videoconference):

L. Berrow

Place and Date of Hearing:

Port Alberni, B.C.

October 20, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 6, 2020

- [1] The petitioner alleges the respondent has failed to comply with the Regional District of Alberni-Clayoquot Building Bylaw No. PS 1005-5 and related relief under the Local Government Act, R.S.B.C. 2015, c. 1 and the Community Charter, S.B.C. 2003, c. 26. The petitioner seeks their enforcement.
- [2] The petitioner abandons the relief sought respecting the use of a trailer as a dwelling unit on the respondent's property contrary to the Regional District of Alberni-Clayoquot Zoning By-Law 1971.

Background

- [3] The petitioner, the Regional District of Alberni-Clayoquot (the "Regional District"), is a regional district under the laws of British Columbia. The respondent is the registered owner of property within the Regional District legally described as:

PID 005-984-564 Lot 4, District Lot 204, Alberni District, Plan 4600, Except Parcel A (DD 25164N) (the "Property")

- [4] The Property is within Electoral Area D of the Regional District, is located on Sproat Lake, and is subject to Sproat Lake Official Community Plan, Bylaw No. P1310 (the "OCP"). The Property was and is subject to the following Regional District Bylaws:
- a) Regional District of Alberni-Clayoquot Building Bylaw No. PS 1005-5, Consolidated 2012 (the "Building Bylaw"); and
 - b) Regional District of Alberni-Clayoquot Zoning By-Law 1971 (the "Zoning Bylaw").
- [5] The Property is zoned Acreage Residential District (RA 1).
- [6] The OCP establishes several development permit areas, including Development Permit Area I - Riparian Areas Protection ("DPA I"). Subject to some exceptions, no one may conduct development in a development permit area without first obtaining a development permit from the Regional District.

- [7] The respondent purchased the Property in 2017. That part of the Property that lies within 15 meters of the high-water mark of Sproat Lake falls within the boundaries of the DPA I. Lakeshore Road passes over the upper riparian area.
- [8] The respondent has carried out certain work on the Property.

Issue

- [9] At issue is whether the work carried out on the Property by the respondent is development of the property requiring a development permit or, because of its nature, is exempt work that does not qualify as development and, hence, does not require a permit. Also, at issue is the need for a building permit for any such work.

Position of the Petitioner

- [10] The petitioner alleges the respondent has developed the Property without obtaining a development permit. The alleged work includes:
- a) constructing a rock wall along the shoreline of Sproat Lake;
 - b) adding a significant amount of sand to the Property abutting the aforementioned rock wall;
 - c) establishing a driveway on the Property from Lakeshore Road toward Sproat Lake;
 - d)
 - e) constructing a second retaining wall on the Property;
 - f) depositing a significant amount of fill on the Property, including soil and sand; and
 - g) removing trees from the Property.
- (the "Developments")
- [11] The petitioner also submits the respondent has failed to obtain a building permit required for the Developments.

Position of the Respondent

- [12] The respondent submits that the work relating to the driveway, the rock wall at the lake edge and the upper retaining wall were all matters of maintenance and repair or emergency procedures, hence were exempt from requiring development and building department permits. He also raises allegations he has been targeted by the petitioner because of a neighbour's complaints about his work on the Property and a lack of cooperation from the petitioner, neither of which are relevant to the issues before the Court.

Law

[13] As the petitioner raises issues related to both development permits and building permits, I turn to the applicable statutory provisions first.

Development Permits

[14] Section 488 of the Local Government Act provides that the OCP may designate development permit areas to protect the natural environment and to protect development from hazardous conditions.

[15] Where the OCP designates an area as a development permit area, an owner or developer is prohibited by s. 489 from constructing any structures or altering land without first obtaining a development permit from the local government. However, s. 20.3 of the OCP does exempt certain activities from requiring a permit:

20.3 Development Permit Exemptions

The following activities are exempt from requiring a development permit. Despite the exemption provisions, owners must satisfy themselves that they meet the requirements of any applicable federal or provincial regulations.

- i. Form and character of buildings that do not involve multi-family residential, commercial or industrial uses.
- ii. Interior or structural alterations or repairs to a permanent building or structure on an existing foundation to an extent that does not alter, extend or increase the building's footprint or height.
- iii. Planting or replanting of native trees, shrubs or ground cover for slope stabilization, habitat improvement, soil stabilization or erosion control.
- iv. Routine maintenance of existing landscaping, lawn, paths, gardens or driveways.
- v. The removal of invasive plants or noxious weeds listed on the Coastal Invasive Plant Committee's website, provided that measures are taken to avoid sediment or debris being discharged into the stream or onto the foreshore and the area is replanted with native species.
- vi. The removal of trees determined by a Certified Arborist or Registered Professional Forester, or another professional certified to do tree-risk assessments, in consultation with the Fisheries & Oceans Canada if the trees are located within a riparian setback, that represent an imminent safety risk.
- vii. Stream enhancement and fish and wildlife habitat restoration works carried out under provincial or federal approvals, on provision of evidence of such approvals to the ACRD.

viii. Emergency procedures to control or reduce immediate threats to life or property, such as those described in the Provincial Emergency Program and in compliance with federal and provincial legislation, including:

- a) emergency actions for flood protection and erosion protection;
- b) removal of hazard trees;
- c) clearing of an obstruction from bridge, culvert or drainage flow in accordance with the Water Act;
- d) bridge and safety fence repairs in accordance with the Water Act; and
- e) limbing, pruning and topping of trees where a minimum of 60% of the original crown of any tree is retained to maintain tree health and vigour as prescribed by a professional arborist.

ix. Public works and services constructed following best management practices for the specific concern with the DPA.

x. Forestry activities on private lands that are managed under the Private Managed Forest Land Act.

xi. Activities permitted by the provincial government on Crown forestry lands.

xii. Farming activities on land within the Agricultural Land Reserve.

xiii. Pump houses of not more than 9.2 m².

xiv. Paths for pedestrian use up to 1.0 metre in width provided all of the following are satisfied:

- (a) are constructed exclusively of pervious natural materials with no concrete, asphalt, pavers or treated wood;
- (b) do not entail structural stairs;
- (c) entail removal of streamside or lakeside vegetation;
- (d) do not impair stream bank or lakeshore stability;
- (e) do not impact sensitive habitat; and
- (f) are specifically designed to discourage motorized vehicle use.

Building Bylaw

[16] Section 3(1) of the Building Bylaw states that "[n]o person shall, unless exempted by this bylaw or other enactment, commence or continue to construct a building or structure without first obtaining a Permit for that purpose from the Building Inspector."

[17] Section 3(8) provides that "[n]o person shall do any work or carry out any construction contrary to a provision or requirement of this Bylaw and the Building Code."

- [18] Section 2(h) defines "construction" as including reconstruction, installation, repair, alterations, demolition and moving.
- [19] Section 18 of the Building Bylaw provides that violating the Building Bylaw is an offence.

Statutory Authority to Enforce

- [20] Under s. 416(1) of the Local Government Act, if a bylaw establishes a regulation or requirement to be observed in a regional district, a person who contravenes the regulation or requirement commits an offence punishable in the same manner as if the bylaw had expressly forbidden persons from doing or refraining from doing the act.
- [21] Section 418 of the Local Government Act provides that the authority of a regional district to require that something be done includes the authority to fulfill the requirement at the expense of a person who fails to take the required action.
- [22] Section 420 of the Local Government Act provides that Division 4 [Enforcement by Civil Proceedings] of Part 8 of the Community Charter applies to regional districts.
- [23] Under s. 274 of the Community Charter, the Regional District may enforce its bylaws and the provisions of the Local Government Act by way of a civil proceeding.

Discussion

- [24] It is not disputed that the OCP designates part of the Property as falling within the DPA I, nor that the respondent did not obtain a development permit before construction of the Developments. As noted, at issue is whether the work performed by the respondent fell within the exemptions provided by s. 20.3 of the OCP.
- [25] The respondent also constructed the Developments without first applying for or obtaining a building permit.
- [26] The respondent submits that none of the applicable legislation defines the word "development". A development is defined in the Concise Oxford English Dictionary as "the process of developing or being developed" and "an area of land with new buildings on it". It is clear from the words used in the applicable legislation that it is to encompass both the activity of developing land and the resulting changes to the land so the local community can ensure such is carried out in a planned and orderly way.
- [27] The respondent also submits the upper retaining wall is not within the area of the DPA I, nor that it is his land, but rather that of the Crown.
- [28] The evidence shows an overview of the riparian area in question which extends from the high-water mark and over and past the road right of way. The works of the defendant exist on the lake side of the protected area, which is clearly within the protected area.

- [29] I turn now to the disputed works, that is the construction of a rock wall along the shoreline of Sproat Lake, the adding of sand to the Property abutting the rock wall, establishing a driveway on the Property from Lakeshore Road toward Sproat Lake, the construction of a second retaining wall and the deposit of sand and soil and the removal of trees.

Rock Wall on Shoreline and Sand Fill

- [30] The respondent submits he simply repaired the existing wall on its existing foundation and denies increasing its footprint. As a result, he submits it is exempt under s. 20.3(ii) of the OCP as "structural alterations or repairs to a permanent building or structure on an existing foundation to an extent that does not alter, extend or increase the building's footprint or height". He argues that, as the wall originally existed, it was only a matter of repair.
- [31] However, the evidence does not show that to be the case. The respondent in his own material refers to statements from two neighbours regarding the state of the wall before the work. One described it as eroded and damaged with "pieces of metal/brick/concrete/logs placed to try and fix the problems". The other states "[t]original old rock wall, located close to the water line, had mostly collapsed into the mud and grass and was causing the beach area to slowly wash away from the storms. The previous owners (going back who knows how long) had attempted to fix the problems by placing brick, rebar, old concrete, railway ties, logging truck rims, galvanized conduit tubing, (basically whatever they could find) on top of the old wall. I think we pulled about 4 trailer loads of junk off the beach between July and October 2017". The respondent also deposes "a good portion of the rock wall had already eroded and fallen into the lake mud. It had become unstable and overgrown into the landscape" and that the "repaired rock wall has significantly protected the property and structures against erosion damage".
- [32] The petitioner provides a photograph dated November 7, 2017 while the work was underway showing a substantial rock wall with sand and rock infill and significant other rock not yet placed. A later photograph dated May 1, 2018 shows those rocks no longer present and a completed rock wall with significant infill of sand.
- [33] The respondent appears to say he replaced old rocks with new. It is clear from the evidence of both the petitioner and the respondent that the existing wall was no more than a foundation. The new wall is made of the granite rocks brought in by the respondent. He relies on an affidavit from a construction company who noted they loaned him an excavator for two weeks "to rebuild the wall with granite boulders". I am satisfied the respondent built a new wall. The work done was far beyond what is meant by repair. The activity carried out was the type of work caught by the development bylaw as requiring a development permit. The exemptions for alterations or repair do not apply.
- [34] Nor has the respondent established the work was exempt under s. 20.3(viii) respecting emergency procedures taken to control or reduce immediate threats to life or property. The previous owners had lived on the Property without the repairs for many years. While I

accept there was a need for the work to be done, it has not been shown as addressing any immediate threats to life or property. It may have been a form of preventive maintenance but the work unfolded over time after consultations with others, not as an emergency response to an urgent threat.

- [35] The respondent denies placing new fill. However, he does not explain, if so, how the substantial area encompassed between the new wall and the upland area is now filled in with sand to the top of the wall. On the evidence, sand that was not present previously is now filling the area. The photograph taken during construction shows infill below the top of the wall under construction while the photograph after completion shows the infilled area level with the top of the new wall.

Driveway

- [36] The driveway enters the portion of the respondent's property on the water side of Lakeshore Drive. Previous to its development it divided into two driveways, one of which has now been removed, and the other that remains proceeds to the lakeshore. The respondent submits the driveway was pre-existing. That is not in dispute. He states he repaired it only by placing gravel on the remaining driveway he retained.

- [37] Again however, the evidence of the respondent is that what was done was not simply repair but rather rebuilding. He deposes:

Both driveways were old, and poorly constructed- they were mostly loose gravel with wood pilings, rebar, old broken concrete, metal pipes, railway tracks to reinforce the bank of the drive. Upon property purchase the one drive had failed and was eroding into the lake causing considerable lake sediment. Subsequently repairs were made and over 6 dump trailers of garbage, logs, steel and foreign material were removed and only a single drive remains and is currently in use.

- [38] It also appears the completed driveway is wider than its predecessor.

- [39] I am satisfied that the work on the driveway was one of reconstruction not repair, hence does not fall within the exemption relied on by the respondent.

Second Retaining Wall and Deposit of Fill and Sand

- [40] The second retaining wall is on an area away from the lakeshore and closer to the road. The petitioner submits the respondent constructed the upper retaining wall as the photographic evidence shows no retaining wall existed and then, post construction, it did. The respondent submits, firstly, the area involved is Crown land that it is not within the riparian area and, secondly, that the work done is not a retaining wall, is not structural and is merely decorative landscaping.

- [41] The respondent has produced photographs of the second retaining wall area showing the embankment with no retaining wall and what is now in place. They speak for themselves. It is a retaining wall, it was not in place earlier, it does retain fill and, on the evidence, is within the riparian area. Given it is new construction, the evidence shows as well it has been backfilled with fill and sand. It is not merely "decorative". As it is within the riparian area it is under jurisdiction of the Regional District. The evidence does not establish it is Crown land as opposed to the land of the respondent.

Removal of Trees

- [42] The two trees in issue were located near Lakeshore Road but still within the riparian area. The respondent acknowledges they were removed stating that they provided no bank stabilization, were dead having been topped by the previous owner and that he consulted with Highways and then planted 30 trees to stabilize the roadway. He submits they were also on Crown land, again with no evidence that is the case.
- [43] The respondent asserts the trees were dead or dying, hence the exemption permitting planting or replanting of native trees for slope stabilization was permissible. The petitioner however disputes they required removal and that the photographs do not show they were dead or dying. I find the trees were not dead, nor has it been established they were dying.
- [44] In any event, the removal of trees requires a report from a Certified Arborist or Registered Professional Forester, which the respondent did not obtain. Hence, it was an act that was not one of the exemptions. Replanting does not authorize removal of trees before doing so.

Conclusion

- [45] The respondent's submission overall characterizes any work done to a structure previously present as one of repair or maintenance and hence exempt. That is, the "structures" in issue were pre-existing and therefore do not qualify as "developments" no matter what their condition.
- [46] I do not agree. It is not correct to simply assert a structure was there before and that replacing it does not require a development permit. That interpretation of the applicable legislation is incorrect. The respondent's definition of "to repair" is far too broad and, when read in the context of the development bylaw, inconsistent with its purpose. His interpretation would undermine the bylaw's intended protection of riparian areas.
- [47] The Building Bylaw requires a building permit even if a development permit is not required. It applies to construction, which includes reconstruction, installation, repair, alterations, demolition and moving of structures. The respondent failed to obtain a building permit for the rock wall, the retaining wall (including removal of trees) and the driveway construction.
- [48] I find the petitioner has established on a balance of probabilities that the defendant has breached the Building Bylaw and s. 489(b) of the Local Government Act.

Declarations and Orders Made

[49] I make the following declarations and orders:

- a) A declaration that the respondent, Leland Berrow, is in breach of the Building Bylaw.
- b) A declaration that the respondent is in breach of s. 489(b) of the Local Government Act.
- c) An order pursuant to s. 274(1) of the Community Charter requiring the respondent to demolish or otherwise remove the Developments referred to in these reasons from the Property with a legal description of Lot 4, District Lot 204, Alberni District, Plan 4600, Except Parcel A (DD 25164N), PID 005-984-564, within forty-five (45) days of the pronouncement of this order, unless the respondent has obtained a building permit and a development permit from the petitioner.
- d) An order pursuant to s. 274(1) of the Community Charter restraining and enjoining the respondent from carrying out any work regulated under the Building Bylaw without first obtaining a valid and subsisting building permit from the petitioner for the rock wall and the retaining wall
- e) An order that, should the respondent fail to demolish the Developments as required by this order, the petitioner is authorized, by its employees or contractors, to remove or demolish the developments at the expense of the respondent.

[50] The approval of the respondent as to the form of the order is dispensed with.

Costs

[51] The parties requested leave to make written submissions as to costs, which is granted. The petitioner shall provide written submissions on costs not to exceed five pages within 10 days of the date of these reasons, and the respondent shall file his written submissions within 10 days thereafter not to exceed five pages. If the petitioner wishes to reply, they shall do so within five days of receipt of the respondent's costs submissions, not to exceed three pages in length.

"The Honourable Mr. Justice Punnett"

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