

CANADA / JUDGMENT

Cowichan Valley (Regional District) v. Stack

2018 BCSC 2073

COURT

Supreme Court of British Columbia

DECIDED

26 November 2018

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2018 BCSC 2073 Cowichan Valley (Regional District) v. Stack IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Cowichan Valley (Regional District) v. Stack, 2018 BCSC 2073 Date: 20181126 Docket: DUN-S-S-17303 Registry: Duncan Between: Cowichan Valley Regional District Petitioner And Patrick Joseph Stack and Mary Magdalen Stack Defendants Before: The Honourable Mr. Justice Baird Reasons for Judgment Counsel for the Petitioner: K. Crawford Counsel for the Defendants: L. Leblanc Place and Dates of Hearing: Duncan, B.C. November 6 & 7, 2018 Place and Date of Judgment: Duncan, B.C. November 26, 2018

- [1] The Cowichan Valley Regional District ("CVRD") has brought this petition for a statutory injunction to prevent the respondents, Patrick and Mary Stack, from using their property on Shawnigan Lake Road, Cobble Hill, for the operation of a commercial sawmill, because, in its view, this use violates the CVRD's Zoning Bylaw #9851986 (the "Zoning Bylaw").
- [2] In particular the CVRD seeks the following orders:
- (1) A declaration that the respondents are using or permitting the use of their property for the milling, processing, and storage of wood and wood products, or for the storage of lumber, logs, wood, equipment, and machinery, in contravention of the Zoning Bylaw;
 - (2) An order that the respondents cease using or permitting the use of the property for those purposes;
 - (3) An order that the respondents remove from the property all sawmills, equipment, machinery, lumber, logs, timber, wood products, and all other goods and materials associated or connected with the non-permitted uses alleged;
 - (4) An order that, if the respondents fail to remove such items by a specified date then the CVRD or its agents or contractors may, without further order of the court, enter onto the property and effect such removal at cost to the respondents, which costs, if unpaid, may be added to the tax roll of the property as unpaid taxes; and
 - (5) Costs.

- [3] The respondents, for their part, submit that their sawmilling activities constitute a "home-based business" as that term is defined in the Zoning Bylaw. They also claim that much of the lumber milled on site is being used for building improvements on the property for which the CVRD has issued permits. The improvements in question consist of a second residential structure on the property in which the respondents' daughter, Morgan Stack, now lives, and a large garage with a suite above it into which the respondents propose to move in December.
- [4] The property is just under three acres in size. It is located in Electoral Area "B" of the CVRD and is zoned R-2 Suburban Residential. The uses permitted in this zone are:
- (1) Single family dwelling or mobile home;
 - (2) Agriculture horticulture;
 - (3) Home-based business;
 - (4) Bed and Breakfast accommodation;
 - (5) Daycare nursery school accessory to a residential use; and
 - (6) Small suite or secondary suite.
- [5] "Home-based business" means an occupation, business, trade or professional practice which is carried on for remuneration or financial gain within a wholly enclosed building or structure, and which is accessory to the residential use of the property, as defined in the CVRD's Zoning Bylaw No. 985. Section 4.2 of the Zoning Bylaw states that property in Electoral Area "B" shall not be used except as specifically permitted by the bylaw.
- [6] While the respondents purchased the property in 2010 and have been working the sawmill on it ever since, they have never lived there. When I asked how they could conceivably be operating a "home-based business" when the property is not, in fact, their home, their answer was twofold: first, Morgan Stack is involved in the operation of the business, and she makes her home on the property; and second, the respondents are poised imminently to move onto the property themselves.
- [7] By way of background, the respondents are directors and shareholders of a company called PM Mobile Milling Limited (the "Company"). It is conceded that this is a sawmilling business which has been in operation for quite some time. I am satisfied that the company really comes down to Mr. Stack. He does all the work on the operational side while Mrs. Stack does the books off-site at home. Morgan Stack may help out here and there, but she is a full-time nurse, and I am satisfied on the evidence that her role in the Company, if any, is minor.
- [8] I note that Morgan Stack was added as a director of the Company only on March 25, 2016. This was after the CVRD had told the respondents to shut down their sawmill operation, and the respondents had applied for and been denied an amendment to the Zoning Bylaw to permit the business to continue. To the extent that Morgan Stack is involved in the business

at all, I am satisfied that it is something that has happened quite recently, and then only for the purpose of claiming that at least one member of the company makes a home on the property.

- [9] Mr. Stack's sworn discovery testimony gives a clearer picture. He said that Morgan Stack is not an employee of the Company and does not receive employment income from it. Mr. Stack insisted repeatedly that the Company was his alone; that he and the Company were one and the same. I find that Mr. Stack is not only the directing mind of the Company, but is more or less solely responsible for the operation and maintenance of the sawmill, its related equipment, and all materials and supplies required to run the business. The Company owns a logging truck, a couple of large pickups customised for lumber transport, a forklift, an excavator, and a backhoe. I am satisfied on all the evidence that these assets are put to daily commercial use on the property.
- [10] In recent years the CVRD has received complaints from the owners of two neighbouring properties about the respondents' sawmill operation. I would emphasise that, although the area in question is semi-rural, and the properties are quite large, it is nevertheless a residential and not an industrial zone. The neighbours complain that the Company's milling activities are conducted every weekday from 8:00 a.m. to 4:00 p.m. all year round. There is a great deal of noise and dust created thereby. They are disturbed in the quiet enjoyment of their properties by the constant whine of chainsaws, the din created by bucking and ripping up logs, the racket of the forklift as it lifts and moves logs, and the annoying beeping sound that modern day commercial vehicles make when they are in reverse gear.
- [11] I don't blame the neighbours in the least for being annoyed by this. Who settles in a residential area expecting there to be a commercial sawmill next door? I have seen many photographs taken by an employee of the CVRD showing the state of the respondents' property at intermittent intervals from 2015 to a couple of weeks ago. To my eye, the place looks very much like a sawmill with a home on it rather than a residential property accommodating a home-based business. The mill itself is housed in a large outbuilding, there are vehicles and heavy equipment parked hither and thither, and most of the photos depict large stacks of raw logs and processed lumber on the property. All of this is clearly visible from Shawnigan Lake Road.
- [12] In my view the CVRD is 100% correct in taking the position that commercial sawmilling and the storage and distribution of wood products, which together are clearly the Company's main functions, are not permitted in an R-2 Suburban Residential zone. Sawmilling is an activity that is permitted in other zones in Electoral Area "B", but I agree that it is prohibited as a "home-based business" in the R-2 zone. The "home-based business" regulations are set out in s. 5.12A of the Zoning bylaw. On all of the evidence, the following is a list of ways in which the respondents' commercial milling activities run afoul of these regulations:
- (1) The business is not conducted or contained within a wholly enclosed accessory building;

- (2) The business is clearly not subservient and incidental to the use of the property for residential purposes;
 - (3) The business has varied the residential appearance of the property;
 - (4) The business produces noise, dust, additional waste, increased traffic, and constitutes a nuisance to its neighbours;
 - (5) The business involves the exterior storage of material and equipment that is used directly or indirectly in the processing, servicing, or sale of a product;
 - (6) The maximum floor area used by the business exceeds 90 square metres when vehicle, equipment and lumber storage space is included.
 - (7) The business on the property is not being conducted by a person who is a full time resident on the property.
 - (8) The business qualifies as a "machine shop", and this and similar uses are specifically not permitted as "home-based businesses."
- [13] It is wholly untenable, moreover, to suggest that commercial sawmilling and its incidents, including receiving raw logs harvested elsewhere, processing and storing lumber for a fee or re-sale, and running heavy equipment and machinery for eight hours every day, constitute a customary or common accessory use to a residential property.
- [14] However, as I was saying during the hearing, for people to build and finish their homes using their own skills and equipment is both customary and acceptable: *East Kootenay (Regional District) v. Augustine*, 2017 BCSC 322 at paras. 48 and 53. I conclude that Mr. Stack's use of his sawmill for the non-commercial purpose of constructing or completing permitted improvements on the property is an admissible accessory residential use.
- [15] In the result, although Mr. Stack is permitted to carry on milling wood on the property for this limited purpose, I hereby declare that use of the property for any purpose related to commercial sawmilling is in contravention of the Zoning Bylaw, and I order the respondents to cease and desist from using the property for any such purpose effective immediately.
- [16] If there is a lawful basis, in the circumstances, for making the other orders sought in the petition, it was not explained to me, and accordingly I decline to make them. In my view the CVRD has been prevailingly successful and will have its costs on Scale B. "Baird J."

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Prepared on 29 October 2026 · Esheria