

CANADA / JUDGMENT

Este v. West Vancouver (District)

2022 BCCA 445

COURT

British Columbia Court of Appeal

DECIDED

18 November 2022

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2022 BCCA 445 Este v. West Vancouver (District)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Este v. West Vancouver (District),

2022 BCCA 445

Date: 20221118

Docket: CA48280

Between:

Rosa Donna Este

Appellant

(Petitioner)

And

District of West Vancouver and Kevin Spooner in his capacity as

Director of Building Approvals

Respondents

(Respondents)

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fisher

The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated April 13, 2022 (Este v. District of West Vancouver, 2022 BCSC 584, Vancouver Docket S218022).

Oral Reasons for Judgment

The Appellant, appearing in person
(via videoconference):

Dr. R.D. Este

Counsel for the Respondents:

E.A. Anderson

Counsel for Mina Esteghamat-Ardakani:

K.E.H. Thompson

S. Sodhi

Counsel for Mehran Taherkhani:

J.R. Shewfelt

Place and Date of Hearing:

Vancouver, British Columbia

November 18, 2022

Place and Date of Judgment:

Vancouver, British Columbia

November 18, 2022

Summary:

The appellant challenges the dismissal of her petition for judicial review of two decisions of the respondent District: the rejection of her application for a building permit and the District's issuance of a demolition order. Her application for a building permit was refused because it was not made by or on behalf of both registered owners of the property. The appellant says the District erred in holding that its Building Bylaw required all owners to consent to the issuance of a building permit. She contends demolition should not have been ordered if a building permit was refused because demolition without reconstruction would pose a danger. Held: Appeal dismissed: The Bylaw bears the interpretation given to it by the District. There was nothing arbitrary in the District's conduct. It took a rational approach to a problem that presented itself when it was made aware that one owner did not consent to the issuance of a building permit. The District did not improperly interfere with the appellant's rights as a tenant in common. No error

was made out in relation to the demolition order.

- [1] WILLCOCK J.A.: This is an appeal from the dismissal of Rosa Donna Este's petition for judicial review of decisions by the District of West Vancouver (the "District") in respect of a property located at 2668 Bellevue Avenue in West Vancouver (the "Property"):
- a) the District's decisions in March, June, and September 2021, refusing to grant a building permit for the Property; and
 - b) the District Council's March 29, 2021 resolution, affirming its December 14, 2020 decision, that the derelict structure on the Property must be demolished.
- [2] Reasons for judgment are indexed at 2022 BCSC 584.
- [3] On judicial review, Dr. Este argued the District and the Director of Building Approvals were wrong to have refused her applications for a permit to rebuild a residence on the Property that had been substantially damaged in a 2015 fire and rendered uninhabitable, on the grounds that the application was not made on behalf of both registered owners of the Property, herself and her mother, Mina Esteghamat-Ardakani. She argued that demolition should not have been ordered until and unless a building permit was issued; that demolition without reconstruction would pose a danger; and that she had not been afforded a fair hearing by the District Council before the demolition order was made.
- [4] Sections of the relevant Building Bylaw provide that the owner of a property must obtain a permit before beginning construction:

8.1 Every Owner of a property or their Agent shall:

8.1.1 Obtain from the Building Inspector prior to commencement of work Permits relating to Construction of Buildings or Structures, or change in classification of occupancy

In order to obtain a building permit, the owner must complete an application pursuant to Part 9 of the Building Bylaw, which provides, in part:

9.1 The Permit application shall include:

9.1.1 A completed application form signed by the Owner or Agent to include location, description, Construction Value, use, Owner name, contractor and designer;

[]

9.1.17 Other information as determined by the Building Inspector which may be required in order to confirm that the work is in accordance with this Bylaw, other Municipal bylaws and Provincial enactments; ...

- [5] The judge held that the decision to refuse to consider an application for a building permit that was not made by or on behalf of all registered owners was reasonable. She found the District's interpretation of the Bylaw, that a building permit will not be issued without every owner's consent, is "reasonable, both in terms of the plain meaning of the provision and the

broader context of the bylaw". She held that because the Bylaw imposes obligations on all owners in relation to the permitted work, it is reasonable to read the application provision (s. 9.1.1) in a manner that requires all owners to consent to the work.

- [6] The reviewing judge found the District's practice in most cases of assuming an application for a building permit is made on behalf of all owners does not tie the District's hands so as to require it to issue a building permit submitted by one owner even in cases where it is aware of a dispute between owners. She rejected the argument that by refusing to issue a building permit in this case, the District was improperly restricting Dr. Este's rights as a tenant in common.
- [7] The judge held that the demolition order was reasonably made. There was evidence before the Council in support of its decision that the structure was "unsafe and therefore in a hazardous condition" (at para. 91), and constituted a fire hazard. She noted:
- [92] Pursuant to s. 74(2) the Council found that the structure was "so dilapidated and unclean as to be offensive to the community". In this respect, the First Staff Report provides statements from various neighbours and citizens, who stated that the structure had attracted squatters, rodents, and other trespassers.

Further:

- [93] The First and Second Staff Reports, the petitioner's First and Second Submissions, and the Council resolution provide insight into the Council's decision-making process. When viewed together, they demonstrate that the Demolition Decision was justified, intelligible, and transparent. In particular, the Staff Reports provide cogent evidence which satisfy the requirements of the Community Charter. The Council reasonably assessed this evidence, applied it to their specific statutory context, and issued the Demolition Decision. Moreover, the Second Staff Report and Second Submissions do not raise any significant points which undermine the underlying reasonableness of the Initial Decision. Indeed, the Council appears to have reviewed the materials before it at the Reconsideration Hearing and determined the Initial Decision appropriately assessed the relevant factors within the statutory context.
- [8] With respect to procedural fairness, the judge held there was no reason to find that the District Council had not considered Dr. Este's evidence. She found the Council met its duty of fairness to Dr. Este. She had been given notice of hearings, made oral and written submissions at the initial hearing, and made written submissions to a reconsideration hearing. Adjournments had been made at her request and while her last request for an adjournment (based on the unavailability of her counsel) was denied, she could have availed herself of the opportunity to appear in person at the reconsideration hearing but had not done so. The judge held it was not open to Dr. Este to seek indeterminate extensions for the reconsideration hearing she requested, fail to attend the reconsideration hearing, and then claim her right to fair process was violated.

- [9] In her factum, Dr. Este describes what are said to be 15 errors of fact and law made by the judge (none of which relate to the procedural unfairness and only one of which, the last, touches upon the grounds for making the demolition order). The judge is said to have erred by:
- a. Interpreting s. 8.1 of the Building Bylaw as requiring all owners of property to sign building permit applications and in particular by failing to consider the way in which the District previously applied this same s. 8.1 of the Building Bylaw, which contradicted the interpretation the District argued for;
 - b. Failing to consider the wording of Demolition Permits under s. 21 of the Building Bylaw dealing with "all owners" being required to apply for and obtain demolition permits and failing to consider the impact of the differences between that section and the sections dealing with Building Permits in s. 9;
 - c. Failing to consider the impact of the decision on the common law principles of co-ownership articulated by the Court of Appeal 2020 BCCA 202 in the previous Este application for mandatory injunction;
 - d. Failing to consider the broader policy implications of the decision, including but not limited to promotion of an absurd result that one co-owner has veto power over building for any reason they want, including spite;
 - e. Failing to consider or find a basis that would allow the District to look into the circumstances between co-owners and determine that all owners must sign a building permit, and further failing to consider under what circumstances the District can or will do this;
 - f. Misinterpreting and incorrectly applying the Yestal case, which is particular to the Strata context and actually stands for the proposition that not all owners are required to sign a building permit as in Yestal, all Strata lot owners were owners of the property at issue but were not required to sign a building permit;
 - g. Determining that it would lead to an absurd result to hold owners liable for building permits that they didn't specifically approve of. This is not an absurd result and is in fact a common occurrence in the situation of co-owners where owners are responsible for decisions made by their co-owners;
 - h. Finding that a co-owner can notify a municipality that they will not consent to a building permit application and that this effectively acts as a veto for any future plans to build that other co-owners have;
 - i. Finding that it was Mina's express words in her September 23, 2020 letter that caused the District to withhold any permit; Rather, permits were refused before that time because the District had, on its own, decided it was going to require Mina's signature;

- j. Failing to consider the broader policy implications that favour building houses rather than leaving vacant lots that become neighbourhood dumping sites;
- k. Misapplied [sic] the legal criteria to be considered in an application for relief under judicial review by failing to consider the Demolition Bylaw requirement of section 9.1.1 for a Building Permit and the Community Charter requirement for the District, inspector and council to follow Geotechnical requirement;
- l. Misapprehended [sic] this Court's prior decision in relation to co-owner's rights to use and enjoy the entire property and evidence of the Inspector and District when in 2009 a Building Permit was issued with only Appellant's signature as an Owner as required by the Building Permit Application and the Legislation through the Building Bylaws which are in accordance with common law and co-ownership rights;
- m. Failed [sic] to interpret the definition of "Owner" consistent with the language of the statute - language that is reflective of and rooted in the common law principles of co-ownership in land and made a fatal error in not finding the District and Inspector decision unlawful, incorrect and unreasonable;
- n. Failed [sic] to consider to apply the common-law ownership rights of the Appellant, the injustice to the Appellant and the evidence in concluding that the District's decision to give Mina veto power over not issuing the Building Permit was lawful or reasonable; and
- o. Misapplied [sic] a fairness and reasonableness standard to the conduct of the District, inspector and council in making the decision to reject the Appellant's fully complying Building Permit Application and denying the Appellant's co-ownership right to rebuild for her use and enjoyment her fire damaged residence when it was required by the Geotechnical Engineer letter dated January 7, 2021 that demolition to be followed promptly with rebuild to prevent unsafe and hazardous outcome.

[10] These grounds of appeal are assembled under the following nine headings in the factum.

- a) The Chambers Judge's Interpretation of Bylaw 8.1.1 is Illogical;
- b) The Chambers Judge Erred by Not Considering the Wording of Section 21 of the Building Bylaw;
- c) The Particular Section Dealing with Building Permit Applications Uses the Wording "the Owner";
- d) The Chambers Judge's Decision Effectively Gives Co-Owners Veto Power that Contradicts Common Law Property Rights;
- e) The Chambers Judge Failed to Consider the Arbitrariness of the District's Position;
- f) The Yestal Case is Particular to the Strata Context and Any Application Outside of that Context Favours the Appellant's Position, not the District's;

- g) The Chambers Judge Failed to Consider the Desire to Build Property (Official Community Plan) Rather than Have Lots Sit Empty;
 - h) It Is Not an Absurd Result that a Co-Owner that Has Not Explicitly Signed Off on a Building Would be Held Responsible; and
 - i) Demolition Order and Building Permit Refusal Constitute One Issue.
- [11] Our task on appeal from a decision on judicial review is to step into the shoes of the reviewing judge: 1193652 B.C. Ltd. v. New Westminster (City), 2021 BCCA 176.
- [12] Doing so requires us to consider the reasonableness of the District's view that the Building Bylaw requires that an application for a building permit must be made by, or on behalf of, all registered owners of the property. As Justice Groberman said very recently, writing for the Court in G.S.R. Capital Group Inc. v. White Rock (City), 2022 BCCA 46, where the question was whether a municipality was entitled to deference in respect of its interpretation of its powers under s. 463 of the Local Government Act, R.S.B.C. 2015, c. 1:
- [25] The Vavilov framework establishes that administrative bodies, including municipal institutions, are normally entitled to deference in the interpretation of the statutes from which they derive their powers, subject only to narrow exceptions necessary to preserve fundamental values of rule of law. A municipality's interpretation of the scope of its powers under provisions of the Local Government Act will normally be subject to review on a standard of reasonableness: 1120732 B.C. Ltd. v. Whistler (Resort Municipality), 2020 BCCA 101.
- [26] Correctness review is confined to exceptional situations. The category of "general questions of law of central importance to the legal system" is a narrow one. The interpretation of s. 463 of the Local Government Act, as important as it is to the parties in this case, does not raise issues falling into that category. The mere fact that the Local Government Act regulates a large number of municipalities does not make the interpretation of its provisions of "central importance to the legal system", nor does it transform the interpretation of specific statutory provisions into "general questions of law".
- [13] Having stepped into the shoes of the reviewing judge, and having considered Dr. Este's submissions, most of which are the same as those made to the reviewing judge by the appellant, acting then, as now, on her own behalf, I am of the view there is no merit to the appeal.
- [14] The positions taken by the District and the Director of Building Approvals in respect of their interpretation of their powers are entitled to deference. In order to succeed, the appellant must establish reviewable error on the part of the District, not error on the part of the reviewing judge. It is not enough, for example, for her to demonstrate that the reviewing judge placed inappropriate emphasis upon s. 8.1.1 of the Building Bylaw (as opposed to s. 9.1.1). The question is whether the District's interpretation of the Bylaw as a whole is reasonable. In my view, it is.

- [15] Dr. Este began her oral submissions by referring to the legal and factual constraints that bear on the decision maker, as identified in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653. In particular, she draws attention to the importance of considering the impact of the decision on the affected individual and the court's caution, in that case, that where the decision severely impacts an individual's rights and interests, the reasons must reflect those high stakes. In such circumstances, as the Court noted in *Vavilov* at paras 133-135, a failure to grapple with such consequences may well be unreasonable.
- [16] There is no doubt that the impact of the District's decisions on Dr. Este is very significant. Dr. Este clearly spent considerable time and money on the efforts to obtain a building permit. The District was aware of those efforts, as she regularly corresponded with the District staff while seeking to perfect her application. The District knew how valuable the Property was, its desirable location, and the long time it has been uninhabitable since the 2015 fire. It knew its decision to refuse to consider a building permit and the decision to demolish the structure would leave the land vacant and deprive Dr. Este, for the time being, of the opportunity to rebuild her home. There is no reason to conclude the District was unaware of, or failed to consider, the high stakes of its decision. Further, the District was aware of the longstanding dispute between the owners of this property. That dispute was what precluded the issuance of the building permit. In my view, the District's decision does not reflect a failure to grapple with the consequences of its interpretation of the Building Bylaw.
- [17] The Building Bylaw bears the interpretation given to it by the District: that all registered owners of a property must consent to the issuance of a building permit. That reading is consistent with the general scheme of the Bylaw. In particular, as the reviewing judge noted, it is a requirement that is consistent with the obligation imposed upon any owner to be responsible for damage to municipal work that results from the work covered by the permit (s. 7.2 of the Building Bylaw).
- [18] The District's interpretation of the Bylaw is consistent with the approach taken by Master Muir when addressing a similar question in *Yestal v. New Westminster (City)*, 2012 BCSC 925. In that case, Master Muir held that control over a strata corporation's limited common property was divided between the unit holder and the other strata owners in accordance with the provisions of the Strata Property Act, S.B.C. 1998, c. 43, and, that being the case:
- [32] I am satisfied that where the bundle of ownership rights is divided as between two parties, the position taken by the applicant and by the City in interpreting the Building Bylaw as requiring the consent of the Strata Corporation for a building permit application is apt.
- [19] That decision is, of course, not binding upon us, but it certainly lends weight to the view that the District's interpretation of its powers in this case was reasonable.
- [20] The District's interpretation of the building permit provisions is not inconsistent with a provision in the Bylaw (s. 21) that requires the written authorization of all owners to apply for and obtain a demolition permit. The existence of more formal requirements where a

demolition permit is sought is not inconsistent with the District's position that a building permit may not be issued where it is on notice (as here) that an owner opposes the issuance of a building permit, even in the absence of the same formal requirement in its Building Bylaw.

[21] The fact s. 9.1.1 of the Building Bylaw refers to "the Owner" of the affected property does not assist the appellant. "Owner" is defined in the Building Bylaw as follows:

"Owner" means owner as defined in the Community Charter

[22] The Community Charter defines "owner", in respect of real property, as, inter alia: "the registered owner of an estate in fee simple".

[23] The expression "registered owner" must be read to include the plural "the registered owners of an estate in fee simple", consistent with the reading of enactments and regulations prescribed by s. 28 of the Interpretation Act, R.S.B.C. 1996, c. 238.

[24] I would not accede to the argument that a consideration of the Community Charter as a whole leads to a different conclusion. I cannot see in the provisions of the Community Charter any contrary intention to the prescribed reading of the singular word "owner" as including the plural "owners".

[25] Significantly, in my view, the Building Bylaw does not contemplate an application by, or the issuance of a building permit to, "an owner".

[26] Further, I am of the view that there is nothing arbitrary in the District's conduct. It took a rational approach to a problem that presented itself when it was made aware that one owner did not consent to the issuance of a building permit in this case.

[27] For essentially the reasons of the reviewing judge, I would not accede to the argument that the District improperly interfered with Dr. Este's rights as a tenant in common.

[28] In my view, Dr. Este asserts rights to affect the common property that are as inconsistent with the rights of a tenant in common as those rights, she claims, her mother should not be allowed to exercise.

[29] Dr. Este does not expressly take issue with the reviewing judge's dismissal of her procedural unfairness argument. Nor does she make out any case to set aside the issuance of the demolition order (other than the argument it should not have been made without approval of a building permit).

[30] In my view, there is no basis upon which we can interfere with the District's orders and I would dismiss the appeal.

[31] FISHER J.A.: I agree.

[32] MARCHAND J.A.: I agree.

[33] WILLCOCK J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Willcock"

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