

CANADA / JUDGMENT

Kamloops (City) v. Plante

2008 BCSC 32

COURT

Supreme Court of British Columbia

DECIDED

9 January 2008

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2008 BCSC 32err1 Kamloops (City) v. Plante IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Kamloops (City) v. Plante, 2008 BCSC 32 Date: 20080109 Docket: 40326 Registry:

Kamloops Between: City of Kamloops Plaintiff And Hubert Joseph Plante and Gloria Jean Plante

Defendants Before: The Honourable Mr. Justice Blair Reasons for Judgment Counsel for the

Plaintiff J.H. Grover Hubert Plante appearing on his own behalf Date and Place of Trial/Hearing:

December 3, 2007 Kamloops, B.C.

[1] The City of Kamloops (the "City") brings this application pursuant to Rule 18A of the Rules of Court seeking declarations and an injunction to preclude the defendants, Hubert Joseph Plante and Gloria Jean Plante, from keeping poultry on their property located on Spurraway Road in the Rayleigh area of Kamloops.

[2] Mr. Plante appeared on his own behalf with respect to the City's application. Neither he nor his wife filed any affidavit material in response to the City's notice of motion and the only evidence is that filed by the City in support of its claim against Mr. and Mrs. Plante. The City alleges that Mr. and Mrs. Plante since 2005 have kept poultry at their Kamloops' residence in contravention of the City's Animal Control By-law No. 34-11 ("By-law 34-11") which at ss. 2.1., 9.1, and 9.2.1 states: 2.1 No person shall keep or harbour any animals, birds or bees except in accordance with the provisions of this by-law. 9.1 No person shall keep more than the number of head of poultry on any parcel of land in the City than as provided in the following table: Parcel of Land (Area)

Maximum Poultry Permitted

over 0.4047 ha (one acre) 30 head 9.2.1. No person shall use any structure, pen or enclosure for the keeping of up to 30 head of poultry unless it is located at least 46 m (150.919 ft.) from any highway and at least 7.5 m (24.606 ft.) from any other property line.

- [3] Counsel for the City submits that the By-law precludes any person from keeping poultry unless they have property of a minimum size of .4047 hectares, the equivalent of one acre, and they are allowed to keep only a maximum of 30 head of poultry. The City's position is that Mr. and Mrs. Plante's property of approximately one-half of an acre is below the minimum property size of .4047 hectares specified by s. 9.1 of By-law 34-11 which is required before a person is permitted to keep poultry.
- [4] The City's actions against Mr. and Mrs. Plante commenced in June 2005 when the Plantes' neighbour, Gerald Lysyk, complained to the City that Mr. and Mrs. Plante were keeping poultry on their property. City by-law enforcement officer Andrew Kaskowski attended the Plantes' residence, advised Mrs. Plante of the complaint and gave them until June 10 to comply with By-law 34-11.
- [5] Mr. Kaskowski on June 23 again attended the Plantes' property where he observed approximately 24 poultry and advised Mr. Plante that he could not keep any chickens on his property as it was less than one acre in size. He served a violation notice on Mr. Plante charging him under s. 9.1 of By-law 34-11. On August 23, 2005 Mr. Kaskowski served Mr. Plante with a second violation notice charging him under s. 9.2.1 of By-law 34-11 with respect to the location of the chicken coop on the Plantes' property.
- [6] Mr. Kaskowski deposed that His Honour Judge Cleaveley of the Provincial Court of B.C. on January 3, 2006 heard the trial of the two charges against Mr. Plante under ss. 9.1 and 9.2.1 of By-law 34-11. Mr. Kaskowski deposed that Mr. Plante argued the charges should be dismissed as his keeping of poultry was a lawful, non-conforming use which preceded the imposition of the City's restrictions on the keeping of poultry. The learned Provincial Court Judge rejected the argument, but dismissed the charge under s. 9.1 finding that the wording of the Information under s. 9.1 required the City to prove that Mr. Plante kept more than 30 head of poultry and that it had failed to prove that element of the charge. Judge Cleaveley convicted Mr. Plante for using a structure as a chicken coop in a location precluded under s. 9.2.1 and imposed a \$100 fine which Mr. Plante paid on January 3, 2006.
- [7] Mr. Kaskowski again attended the Plantes' residence on January 5, 2006 where Mr. Plante confirmed that he still had poultry on the property. Mr. Kaskowski issued Mr. Plante with two violation notices charging him again under ss. 9.1 and 9.2.1 of By-law 34-11. His Honour Judge Cleaveley heard the trial on February 27, 2006 and convicted Mr. Plante on both charges and on March 13, 2006 imposed a \$100 fine on the s. 9.1 conviction and a \$200 fine on the s. 9.2.1 conviction. Mr. Plante paid the two fines and did not appeal the convictions.
- [8] On June 12, 2007 in response to a further complaint from Mr. Lysyk, Mr. Kaskowski again attended the Plantes' residence and observed poultry in the chicken coop. Rather than proceeding with further charges against Mr. Plante the City issued a writ and statement of claim on August 13, 2007 seeking relief pursuant to s. 274 of the Community Charter Act, S.B.C. 2003, c. 26. against Mr. and Mrs. Plante in the following terms:

- (a) a declaration that the defendants are in breach of By-law 34-11 by keeping poultry on property in Kamloops smaller than .4047 hectares or one acre;
 - (b) a declaration that the defendants are in breach of By-law 34-11 by using a structure for keeping poultry which was not located pursuant to the By-Law;
 - (c) an injunction restraining and enjoining the defendants from continuing to breach By-law 34-11 with respect to keeping poultry; and
 - (d) a mandatory injunction requiring the defendants to satisfy the requirements of By-law 34-11.
- [9] Mr. Plante filed a statement of defence stating that he and his wife had located a chicken barn and pen on the southeast corner of their Rayleigh property as soon as they moved into their home in 1973 and before Rayleigh amalgamated with the City in 1973. The defendants further pleaded that they had kept chickens on their property since 1973, that their use of the chicken coop and the keeping of poultry existed prior to the passage of By-law 34-11, and their keeping of poultry and the location of the chicken coop were lawful, non-conforming uses. The statement of defence also stated that there had been no complaints about their keeping poultry other than that expressed by a single neighbour, presumably referring to Mr. Lysyk.
- [10] Mr. Plante also submitted during the hearing that the City's motion for injunctive relief should fail:
- (a) as the City has not established that the defendants' keeping of poultry amounted to a nuisance;
 - (b) as the City has failed to establish that By-law 34-11 was properly enacted; and
 - (c) as s. 9.1 is so vague that its meaning cannot be ascertained.
- [11] The defendants' pleading that they built the chicken coop in 1973 and that they have kept chickens on their property continuously since 1973 lacks an evidentiary basis as it is not supported by affidavit material. Mr Lysyk deposed that there was no poultry on the Plantes' property between 1999 when he and his wife purchased their home and June 2005 when he first saw chickens on the Plantes' property. During submissions, Mr. Plante acknowledged that he kept chickens on his property from 1973 until 1999 when he went to Grande Prairie to work and resumed keeping poultry on his return home in 2002.
- [12] S. 911 of the Local Government Act, R.S.B.C. 1996, c. 323, provides that when a lawful non-conforming use is discontinued for a continuous period of six months the use must subsequently conform to the by-law dictating the then existing use of the property. Mr. Lysyk deposed that there was no poultry on the Plantes' property for approximately six years between 1999 and 2005 and there is no evidence to the contrary, other than Mr. Plante's acknowledgement that he kept no poultry on his property between 1999 and 2002. I conclude that if the defendants were making a lawful, non-conforming use of their property by keeping poultry up to 1999 that it was no longer a lawful, non-conforming use as of 2002.

Although not argued by Mr. Plante, I further conclude that his termination in 1999 of the use of his property to keep poultry was not the result of normal seasonal or agricultural practices as referred to in s. 911(2) of the Local Government Act.

- [13] The defendants' plead that there had been just one complaint about their poultry whereas a number of their neighbours supported their continued keeping of poultry. No weight can be given to this assertion. Merely because some citizens of the City object to certain provisions of By-law 34-11 does not mean the provisions should not be enforced by the Courts. It is open to those who object to such provisions to follow the political process with respect to the amendment of municipal by-laws.
- [14] Mr. Plante's submission that the City must establish that his poultry are a nuisance lacks foundation. There is nothing in By-law 34-11 that states or implies that the City must establish that the keeping of poultry and the location of a chicken coop amounts to a nuisance before the City can take action to enforce ss. 9.1 and 9.2.1 of the By-law.
- [15] Although Mr. Plante submitted that the City had failed to establish the validity of the Animal Control By-law No. 34-11 he took no steps to establish the basis upon which he was attacking the by-law's validity. Jon Wilson, the City's by-law services supervisor, set out in his affidavit sworn October 29, 2007 the history of the zoning designation and the animal control bylaws, including By-law 34-11, applying to the Plantes' property both before and after Rayleigh's 1973 amalgamation with the City. Neither Mr. Wilson's affidavit nor any of the other filed affidavit material provides a basis upon which the validity of By-law 34-11 may be challenged.
- [16] Mr. Plante's final submission is that s. 9.1 of By-law 34-11 dealing with poultry on property in the City is so vague that its meaning cannot be ascertained and hence it is unenforceable. S. 9.1 is found in ¶ 2 of these Reasons along with s. 2.1. The two sections must be read together as s. 2.1 provides for a general prohibition against the keeping of birds except in accordance with the provisions of By-law 34-11. S. 9.1 then provides the basis upon which a person is allowed to keep poultry.
- [17] Although not perhaps the best example of statutory wording, I conclude that s. 9.1 is understandable to a reasonably intelligent person and can only be taken to mean that in order to keep poultry in the City a person must have a parcel of land larger than .4047 hectares, or one acre, and that the person is limited to keeping a maximum of 30 head of poultry: *Dhillon v. Richmond (Municipality)*, (1987) M.P.L.R. 243 at 250 (B.C.S.C.).
- [18] S. 11.1 of By-law 34-11 addresses the keeping of pigeons within the City and it states as follows: 11.1 No person shall keep pigeons unless the person has a minimum parcel of 0.4047 ha (one acre) of land;
- (i) The maximum number of pigeons permitted is 30 head. I find s. 11.1 offers language easier to understand than s. 9.1, but that does not mean s. 9.1 is so vague as to preclude the ascertainment of its meaning.

- [19] I conclude that the City has established that Mr. and Mrs. Plante since 2005 have clearly breached By-law 34-11 in that they have kept poultry on property less than .4047 hectares, or one acre, contrary to s. 9.1 of the by-law, and that in keeping their poultry they have utilized a structure as a chicken coop in a location contrary to s. 9.2.1 of the by-law. The City is entitled to a declaration that Mr. and Mrs. Plante have breached ss. 9.1 and 9.2.1 of By-law 34-11.
- [20] I find that the City is entitled to an injunction restraining and enjoining Mr. and Mrs. Plante from continuing to breach the City's By-law No. 34-11 with respect to the keeping of poultry on the Plantes' Spurraway Road property.
- [21] The City will have its costs at Scale B of Schedule B. "R.M. Blair, J." BLAIR J. January 25, 2008 - Revised Judgment Please be advised that the attached Reasons for Judgment of Mr. Justice R.M.L. Blair dated January 9, 2008 have been edited. · On the front page, the case name and on the subsequent pages, the header information has been changed to Kamloops (City) v. Plante.

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