

CANADA / JUDGMENT

Lepiarczyk v. West Vancouver (District)

2013 BCSC 1474

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2013 BCSC 1474 Lepiarczyk v. West Vancouver (District)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lepiarczyk v. West Vancouver (District),

2013 BCSC 1474

Date: 20130814

Docket: S126157

Registry: Vancouver

Between:

Andrzej Lepiarczyk

Petitioner

And

The Corporation of the District of West Vancouver

and Collingwood School Society

Respondents

Before: The Honourable Madam Justice H. Holmes

Reasons for Judgment

The Petitioner:

Appearing on his own behalf

Counsel for the Respondent,

District of West Vancouver:

Francesca V. Marzari

Melania D. Cannon

Counsel for the Respondent,

Collingwood School Society:

R.J. Randall Hordo, Q.C.

David G. Volk

Place and Date of Hearing:

Vancouver, B.C.

April 18-19, 2013

May 8, 2013

Place and Date of Judgment:

Vancouver, B.C.

August 14, 2013

INTRODUCTION

- [1] The petitioner Andrzej Lepiarczyk is one of many residents in the Glenmore community in West Vancouver, B.C., who over the years have raised concerns about the effects on their neighbourhood of traffic volume, parking, and, at times, construction associated with Collingwood School. Collingwood School is a non-denominational private school which has two campuses, one of which is on Morven Drive in the Glenmore community.
- [2] Mr. Lepiarczyk and evidently others in the neighbourhood understandably associated many of the problems they experienced in the neighbourhood with the number of students enrolled in the school. All parties agree that in 2007 the school had significantly more students than the District of West Vancouver's zoning restrictions allowed. However, views differ about whether the school came into compliance in September 2010 and following, and about whether certain zoning by-law amendments that gave the school greater flexibility concerning the number of students were validly passed.
- [3] Mr. Lepiarczyk's materials and his oral submissions were detailed to an extent that these reasons cannot realistically reflect. However, I believe a fair distillation of his position may be found in the following description of the orders he seeks and the bases on which he seeks them:

- (1) requiring the District to enforce a Land Title Act covenant between the District and the school, on the basis that the school's student population exceeds the number the covenant permits;
 - (2) declaring that, for the purposes of zoning restrictions, a "combined" school on the property means approximately fifty-percent elementary grade students and approximately fifty-percent secondary grade students, because that is the commonly understood meaning of the term;
 - (3) setting aside the District's 2010 zoning by-law for lack of procedural fairness, on the basis that the amendment purported to enact a different definition of a "combined" school, which would allow the school a larger student population, despite public notice that the by-law would involve no more than a "technical rewrite";
 - (4) setting aside any development permit issued for the Morven school, on the basis that the student population exceeds the permissible limit; and
 - (5) limiting the effect of the District's Tax Exemption By-Law No. 4739, 2012 to only those organizations listed in the first public notice of Council's meeting about the by-law, which did not include the school.
- [4] I will discuss in turn these applications and the issues they raise, after first commenting on the procedural context of this petition.

PROCEDURAL CONTEXT

- [5] Many and perhaps all of the orders sought are not available by way of petition. For those which are, Mr. Lepiarczyk has not met certain procedural requirements, such as service on others (in addition to the respondents), limitation periods, and time limits for the holding of the hearing.
- [6] The respondents in fairness suggest that the court treat the challenges to the zoning by-law as though brought under the Judicial Review Procedure Act. They submit that this will allow the court to determine the merits of the challenges without putting Mr. Lepiarczyk to further procedural steps, and without prejudice to the parties or to others potentially affected. The respondents note in this regard that Mr. Lepiarczyk's challenge to the development permit, and his applications to enforce the covenant and for a declaration about the required make up of the student population, while not proper subjects for judicial review, will turn largely on whether or not the zoning by-law is valid, as the judicial review would determine.
- [7] The respondents take a different position in relation to the challenge to the tax exemption by-law because notice of the challenge was not given to the many people who could be seriously affected by it. The District submits that those people should have been notified, but the court has authority to hear the challenge despite the fact that they were not. The school submits that to do so, the court would need to order "otherwise" from the notice

requirement for a petition in Rule 16-1(3), and that the court should not do so because a successful challenge to the tax exemption by-law would have significant financial consequences for the many other schools and organizations that have relied on it.

1. SHOULD THE COURT REQUIRE THE DISTRICT TO ENFORCE THE COVENANT?

- [8] In 2006 and early 2007, many neighbours in the Glenmore community had continuing concerns about the traffic volume and traffic issues associated with the school. Information circulated within the community that the school had as many as 800 students on the Morven campus, greatly in excess of the maximum 600 permitted under the zoning restrictions, and the school was slow to respond to inquiries about the actual number enrolled. After a delay of some months, the school in March 2007 indicated in response to Mr. Lepiarczyk's first formal inquiry, that the school had 718 students at its Morven campus.
- [9] District staff called on the school to comply with the zoning restrictions. However, after negotiations and discussions with the school and the community, the District agreed that the school could delay full compliance until September 2010. The school made changes to its student population, which I will describe later, which the school and the District say brought the school into compliance, but which Mr. Lepiarczyk says did not.
- [10] In this process, the District also required the school to execute a covenant. The covenant, which is registered against the land, sets a maximum student population of 495 for the school's Morven campus, as of the date the school's Wentworth campus is granted an occupancy permit. The school also published a Good Neighbour Pledge, publicly expressing various commitments concerning compliance with the zoning by-laws and consultation with the neighbourhood about any development on school property.
- [11] Mr. Lepiarczyk asks for an order requiring the District to enforce the covenant so as to limit the school's student population to 495.
- [12] However, as I explained during submissions, I agree with the respondents that Mr. Lepiarczyk lacks standing to make this request.
- [13] The covenant was part of the negotiated response in 2007 to long-standing concerns about the size of the school's student population and its effect on the community. It gives the District the necessary tools to enforce commitments the school made to the District and the community in the course of the negotiations and consultations, and it is binding on the school in that sense. However, it is not a contract or agreement with the community, and the community cannot itself seek enforcement of its terms. I do not need to address the additional question of whether Mr. Lepiarczyk has the necessary authority to represent the community.

[14] The covenant is between the school and the District, and benefits the District. Only the District may seek its enforcement. Moreover, even if the school is in breach of the covenant's terms -- a matter I do not decide -- the District has no legal duty to act in response to that breach.

[15] It is therefore unnecessary to decide whether the applicable occupancy permit for the Wentworth campus was in fact granted, so as to engage the covenant's restriction on the size of the Morven student population.

2. WHAT IS A "COMBINED" SCHOOL IN THE SCHOOL'S ZONE?

[16] When the petition was heard, the school had 568 students at the Morven campus.

[17] The respondents say that this number is below the permissible maximum allowed under the applicable zoning by-law because the school is a "combined" school, through the effect of definitions introduced in a zoning by-law amendment in 1998 (By-law 4134, adopted in 1999). There is no dispute that the by-law governing zone CU9 provides for a "combined elementary/secondary school" in zone CU9 with a maximum of 600 students.

[18] Mr. Lepiarczyk submits that the school's Morven campus is not truly a "combined" school, but is, rather, a secondary school, because it has only students in grades 8 through 12. He submits that it is therefore not entitled to have the student population of 600 students which the by-law allows for a "combined" school in zone CU9, or, indeed, to operate at all there, because zone CU9 allows only for combined schools.

[19] Some background is necessary.

[20] When Collingwood School Society was founded in 1984, the by-law that governed land use in the District of West Vancouver was Zoning By-law 2200, 1968 as amended.

[21] With the development of the Morven campus, the District created the site-specific zone CU9, encompassing the Morven property, with greater restrictions on school uses. After a successful challenge to the first rezoning by-law, a new CU9 zone was introduced and passed by the District's council in 1989.

[22] Use of the property in zone CU9 was restricted to private and public schools and their accessory buildings and uses. The student population was restricted as follows:

61-908 Number of Students

The total number of students enrolled in a combined elementary/secondary school within the C.U.9 zone shall not exceed six hundred (600) students at any time.

This is the provision which the respondents say applies because, they say, the school is a "combined" school.

[23] The by-law which introduced zone CU9 did not specifically define "elementary", "secondary", or "combined" schools.

[24] However, a zoning by-law amendment in 1998 (By-law 4134, adopted in 1999) introduced the following definitions:

SCHOOL, COMBINED means a Private or Public School providing for instruction in any combination of grades 1 to 12 only

SCHOOL, ELEMENTARY means a Private or Public School providing for instruction in any combination of grades 1 to 8 only

SCHOOL, SECONDARY means a Private or Public School providing for instruction in any combination of grades 9 to 12 only.

As I will discuss, it is the above definition of "combined" school which the respondents say applies to the Morven school with its current student population.

[25] The respondents say that the school became a "combined" school in September 2012, with phase two of its redevelopment. Phase one took place in September 2010, when the school moved the grade 6 class of its Morven campus to its Wentworth campus, reducing the Morven school population from 718 to 600 students, all of whom were enrolled in grades 7 through 12. In phase two, two years later, the school moved the grade 7 class of its Morven campus to its Wentworth campus, reducing the Morven population to 568 students, all of whom were enrolled in grades 8 through 12. The Morven school is not a "secondary" school, as defined, because it has grade 8 students. With students in grades 8, 9, 10, 11, and 12, it falls squarely within the definition a "combined" school.

[26] Mr. Lepiarczyk submits that the definitions introduced by the 1998 zoning by-law amendment do not assist the school, because they apply only to zone PA1. As I mentioned earlier, the amending by-law, which introduced the definitions quoted above, also created a new zone PA1, which included all of the residential areas containing schools, but with certain exceptions for existing properties already in use as a school. All parties agree that the Wentworth campus fell within the PA1 zone, but the Morven campus did not and remained within its site-specific CU9 zone.

[27] Mr. Lepiarczyk submits that the definitions (including for "combined" school) introduced in the 1998 amending by-law apply only to schools in the new zone PA1, as created by that same amending by-law. He submits that for schools in other zones, including zone CU9, the terms in issue are to be given their ordinary meanings, as they are commonly understood. Thus, he submits, "secondary" refers to grades 8-12, "elementary" to grades 1-7, and "combined" to schools with students from both of those groups. On these interpretations, the school's Morven campus is a secondary school, because since September 2012 its entire student population is enrolled in grades 8 and higher.

[28] The difficulty with Mr. Lepiarczyk's position is that nothing in the amending by-law which introduced the definitions restricted them to schools in zone PA1. Indeed, the amending by-law expressly related the definitions to the underlying 1968 zoning by-law as a whole, which applied to the entire district, by incorporating the definitions into the alphabetically-arranged set of definitions in the 1968 by-law:

ZONING BYLAW NO 2200, 1968

AMENDMENT BYLAW NO. 4134, 1998

1. "Zoning Bylaw No. 2200, 1968" is hereby amended:
 - a) in Part 1, Division 2 by adding the following definitions in the appropriate alphabetical order:

"SCHOOL, COMBINED means a Private or Public School providing for instruction in any combination of grades 1 to 12 only

SCHOOL, ELEMENTARY means a Private or Public School providing for instruction in any combination of grades 1 to 8 only

SCHOOL, SECONDARY means a Private or Public School providing for instruction in any combination of grades 9 to 12 only";

[29] There is no dispute that the school's zone CU9 (now CD27) is subject to the 1968 zoning by-law. That by-law was amended by the 1998 amending by-law, and it therefore now includes the quoted definitions. The definitions apply across the district, including to CU9. They displace any interpretations of the terms based on common usage or ordinary meaning which otherwise might apply.

[30] With phase two, the school has students in grades 8 through 12 and is therefore not a "secondary" school, as defined. It falls within the definition of a "combined" school.

[31] I am therefore unable to accept Mr. Lepiarczyk's submission that the Morven campus is not a "combined" school for the purposes of the zoning by-law.

3. WAS THE 2010 AMENDING BY-LAW MORE THAN A "TECHNICAL REWRITE"?

[32] For the same reasons, Mr. Lepiarczyk's challenge to the 2010 amending by-law cannot succeed.

[33] The challenge is based on the assumption that the 2010 zoning by-law purported to apply the definitions to zone CD9 for the first time, while also renaming that zone as CD27. Mr. Lepiarczyk submits that the 2010 by-law was therefore much more than the "technical rewrite" the District described in its notices inviting community consideration and comments because, he submits, the definitions allowed for a significant increase in the school's population.

- [34] As I have discussed, the definitions applied to zone CD9 from the time they came into effect with the 1998 amending by-law. The 2010 zoning by-law simply repeated them, and the District's description of that amendment as a "technical rewrite" was accurate and fair.
4. SHOULD THE SCHOOL'S DEVELOPMENT PERMIT(S) BE SET ASIDE?
- [35] For the same reasons and others, there is no basis for setting aside any development permits issued to the school.
5. SHOULD THE EFFECT OF THE TAX EXEMPTION BY-LAW BE LIMITED TO THE ORGANIZATIONS NAMED IN THE NOTICE?
- [36] Through Tax Exemption By-Law No. 4739, 2012, the District granted the school's request for an exemption from municipal taxes. The school had not been required to pay municipal taxes before then because the B.C. Assessment Authority regarded private school properties, including both buildings and ancillary lands, as statutorily exempt. However, in June 2012, the B.C. Assessment Authority changed its interpretation, and told the school that ancillary lands would no longer be treated as tax exempt. The school therefore applied to the District for a permissive tax exemption for its ancillary lands.
- [37] Mr. Lepiarczyk submits that the tax exemption by-law is invalid for lack of procedural fairness, because of several deficiencies in the public notice of the meeting at which council considered the by-law, and because the meeting was, he submits, "in practical terms" a closed meeting.
- [38] I find no basis for Mr. Lepiarczyk's submission that the meeting at which the District passed the by-law was in effect a closed meeting because the period for which it was open for consideration of the tax exemption by-law was extremely brief. A meeting is not closed to the public only because it is brief.
- [39] Nor can I accept Mr. Lepiarczyk's position concerning notice of the meeting.
- [40] Mr. Lepiarczyk submits that the notice of public meeting was defective for the following reasons: (a) reference to the school was buried in among the many other organizations to which the notice related, in a situation where the notice appeared to be merely a re-publication of an earlier notice that did not include reference to the school; (b) the notice referred to Collingwood School as an organization, and not to the specific property or properties for which the tax exemption was sought, failing also to differentiate the school's Morven and Wentworth properties; and (c) information in the notice about the value of the property or properties related similarly to the Morven and Wentworth properties in the aggregate, and in any event conflicted significantly with other information about their values. Mr. Lepiarczyk submits that with these defects, the notice failed to comply with the specific requirements of s. 94 of the Community Charter.

[41] Generally a council must notify the public of a proposed permissive tax exemption in accordance with s. 94 of the Community Charter by publishing certain details of the exemption for two consecutive weeks in a local newspaper:

94(1) If this section applies, the applicable notice must be

- (a) posted in the public notice posting places, and
- (b) published in accordance with this section.
- (2) Subject to subsection (4), publication under subsection (1) (b)
 - (a) must be in a newspaper that is distributed at least weekly
 - (i) in the area affected by the subject matter of the notice, and
 - (ii) if the area affected is not in the municipality, also in the municipality, and
 - (b) unless otherwise provided, must be once each week for 2 consecutive weeks.
- (3) The obligation under subsection (2) may be met by publication of the notice in more than one newspaper, if this is in accordance with that subsection when the publications are considered together.
- (4) If publication under subsection (2) is not practicable, the notice may be given in the areas by alternative means as long as the notice
 - (a) is given within the same time period as required for publication,
 - (b) is given with the same frequency as required for publication, and
 - (c) provides notice that the council considers is reasonably equivalent to that which would be provided by newspaper publication if it were practicable.
- (5) As an exception, subsection (4) (b) does not apply in relation to an area if the alternative means is by individual distribution to the persons resident in the area.
- (6) If the same matter is subject to 2 or more requirements for publication in accordance with this section, the notices may be combined so long as the requirements of all applicable provisions are met.
- (7) A council may provide any additional notice respecting a matter that it considers appropriate, including by the Internet or other electronic means.

[42] However, the requirements in s. 94 do not apply to a permissive tax exemption for a private school. The relevant provisions are in s. 224 of the Community Charter:

224(2) Tax exemptions may be provided under this section for the following:

...

(h) in relation to property that is exempt under section 220 (1) ... (l) [private schools], any area of land surrounding the exempt building;

...

(4) Subject to subsection (5), a bylaw under this section

...

(b) may only be adopted after notice of the proposed bylaw has been given in accordance with section 227 [notice of permissive tax exemptions],

...

(5) Subsection (4) ... (b) does not apply in relation to exemptions under subsection (2)(f) and (h).

[43] The Community Charter thus expressly provides that public notice of the school's tax exemption by-law was not necessary.

[44] If some other source required some form of notice - a matter I do not decide - I would in any event decline to grant relief in all the circumstances.

[45] With these conclusions about the merit of the challenge to the tax exemption by-law, it is unnecessary to address the problems with the procedure by which the challenge was brought.

ORDER

[46] The petition is denied, and the applications for various orders declined.

[47] If the respondents wish to pursue their intention to seek costs, they should within thirty days of these reasons arrange a hearing on the earliest date convenient to all parties and the Court. Otherwise, the petition is dismissed with each party bearing their own costs.

"H. Holmes, J."

The Honourable Madam Justice H. Holmes

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