

CANADA / JUDGMENT

Nye-Islam v. West Vancouver (District)

2018 BCSC 868

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 868 Nye-Islam v. West Vancouver (District)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nye-Islam v. West Vancouver (District),

2018 BCSC 868

Date: 20180529

Docket: S159139

Registry: Vancouver

Between:

Marilyn Susanne Nye-Islam

Plaintiff

And

The Corporation of the District of West Vancouver

Defendant

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Plaintiff:

J.D. Fraser

Counsel for the Defendant:

P.A. Hildebrand

R. Phillips

Place and Date of Trial:

Vancouver, B.C.

October 30-31, 2017

November 1-3, 2017

Place and Date of Judgment:

Vancouver, B.C.

May 29, 2018

INTRODUCTION

- [1] On September 2, 2015, the District of West Vancouver expropriated Marilyn Nye-Islam's 73-year-old one and ½ story 2400-ft.² waterfront house at 1454 Argyle Avenue in Ambleside, West Vancouver (the "property") for public use as part of a historic acquisition plan for waterfront homes in the neighborhood.
- [2] The District paid \$5,300,000 to Ms. Nye-Islam for her house and land. This amount was based on appraisals of her property as a single-family dwelling prepared by Mr. Dale Hooker.
- [3] Ms. Nye-Islam has however brought an expropriation compensation claim under the British Columbia Expropriation Act, R.S.B.C. 1996, c. 125.
- [4] Ms. Nye-Islam's appraiser Mr. Geoff Johnston values the property at \$8,000,000. He does so on the basis this is a holding property, for eventual assembly with the properties of two neighbors to the east, and rezoning to permit multi-residential development into a four-story six-unit luxury condominium. This reflects a shortfall in compensation of \$2,700,000.
- [5] The District does not agree and says the property would not likely have been rezoned for multi-residential development. It maintains its valuation of \$5,300,000 as a single-family dwelling.
- [6] As an alternative claim, Ms. Nye-Islam maintains if, in the absence of the District's acquisition scheme, the court does not agree the property would have likely been permitted to be redeveloped to multi-residential use, the proper value of her property, as a single-family dwelling is \$6,600,000. This reflects a shortcoming in compensation already paid of \$1,300,000.

ISSUES

1. What was the fair market value of the property on September 2, 2015, the time of expropriation? In assessing that value, what is the highest and best use of the land? Was the probability more than 50% that the District would have rezoned the property for multi-residential development as at September 2, 2015?
2. If not, what is the value of the property as a single-family residence?

THE LEGAL FRAMEWORK

- [7] As set out in *Chen v. Chilliwack (City)*, 2015 BCSC 382:
- [8] An owner of expropriated property is entitled to be compensated in accordance with the Expropriation Act, R.S.B.C. 1996, c. 125 (the "Act") which includes compensation for the market value of the expropriated land and disturbance damages.
- [9] The basic principles for determining market value are set out in s. 31:

Basic formula

31(1) The court must award as compensation to an owner the market value of the owner's estate or interest in the expropriated land plus reasonable damages for disturbance but, if the market value is based on a use of the land other than its use at the date of expropriation, the compensation payable is the greater of

- (a) the market value of the land based on its use at the date of expropriation plus reasonable damages under section 34, and
- (b) the market value of the land based on its highest and best use at the date of expropriation

[10] Pursuant to s. 31(1) then, compensation is the greater of the market value of the land based on its use at the date of expropriation plus reasonable damages, or the market value of the land based on its highest and best use as at the date of the expropriation.

[11] Market value" is defined in s. 32 as follows:

The market value of an estate or interest in land is the amount that would have been paid for it if it had been sold at the date of expropriation in the open market by a willing seller to a willing buyer.

[12] Section 33 of the Act sets out a list of factors that must not be taken into account in determining market value, including the following:

- (a) the anticipated actual purpose for which the expropriating authority intends to use the land,
- (d) an increase or decrease in the value of the land resulting from the development or prospect of the development in respect of which expropriation is made, and

(e) an increase or decrease in the value of the land resulting from any expropriation or prospect of expropriation.

[14] The courts have determined that expropriation legislation should be read in a broad and purposive manner consistent with its purpose, which is to fully compensate an owner whose property has been taken: *Rockridge Estates Ltd. v. Langley (City)*, 2014 BCSC 77 at para. 64 citing *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32 [Toronto Area Transit].

[15] The Supreme Court of Canada set out the governing principles in *Toronto Area Transit* at paras. 20 - 21 and 23 as follows:

20 The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected. This principle has been stressed by eminent writers and emphasized in decisions of this Court.

21 Further, since the Expropriations Act is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose. Substance, not form, is the governing factor.

23 It follows that the Expropriation Act should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property had been taken.

[8] As per s. 31(1)(b), the court must award as compensation the market value of the land based on its highest and best use at the date of expropriation. In *Shell Canada Ltd. v. British Columbia Transit*, 2007 BCCA 64, the Court noted at para. 13:

if the probability of a change that will affect highest and best use is "clearly established", that change is properly considered in determining value as at the date of expropriation [Emphasis in original.]

[9] The test for assessing highest and best use when rezoning is required to realize a property's development potential, is set out in *Holdom v. British Columbia Transit*, 2006 BCCA 282 at paras. 36-38:

[36] The highest and best use analysis requires an evaluation at the time of taking. The zoning in place then was C6 and the City of Burnaby's responses to Chevron's overtures for C6b zoning had not been encouraging. The Board had to make a judgment as to the likelihood of achieving the desired zoning.

[37] B.C. Transit alleges the Board used the wrong test in making that judgment.

[38] I cannot accept that argument. The Board referred to the leading authorities on the subject:

[97] Where a property requires regulatory approvals in order to realize its full development potential, the decided cases make clear that highest and best use must be based upon something more than the mere possibility of approval. As Howland J.A. (as he then was) said in the context of rezoning in *Farlinger Developments Ltd. v. East York (Borough)* (1975), 8 L.C.R. 112 at pp. 123-4 (Ont. C.A.):

There must be a probability or a reasonable expectation that such rezoning will take place. It is not enough that the lands have the capability of rezoning. In my opinion, probability connotes something higher than a 50% possibility.

See also *Runnymede Development Corporation Ltd. v. City of Oshawa* (1982), 25 L.C.R. 105 at p. 119 (Ont. H.C.J.).

[Emphasis added.]

[10] This point is important in this case. Ms. Nye-Islam must meet this test and establish the highest and best use of the property as "holding property for multiple residential development".

PRELIMINARY MATTER

The admissibility of Mr. Nicholls' evidence as to whether he would have approved the rezoning of the property to multi-family use

[11] A preliminary matter arises concerning the admissibility of part of the evidence of one of the District's witnesses, Mr. Nicholls, the district planner for 40 years. At one point in his testimony, Mr. Nicholls stated that as the district planner, he would not have recommended to Council to approve the development for the property proposed by Mr. Johnston, Ms. Nye-Islam's expert. Ms. Nye-Islam objects to the admissibility of this evidence, arguing that it constitutes late-tendered opinion evidence or speculation.

[12] I conclude it is not necessary to decide whether or not this evidence is admissible. It has little, if any, probative value and makes no material difference to the decision on any of the main issues in this case. Without rezoning being formally considered by the planning department, it is neither possible to know what Mr. Nicholls would have recommended, nor what Council would have done with those recommendations. Mr. Nicholls' testimony prior to that point in time, setting out the considerations that were regularly taken into account, and with which Ms. Nye-Islam takes no issue, is sufficient to determine this matter.

[13] I turn to the issues now.

1. What was the fair market value of the property on September 2, 2015, the time of expropriation? In assessing that value, what is the highest and best use of the land? Was the probability more than 50% that the District would have rezoned the property for multi-residential development as at September 2, 2015?

- [14] The first question that must be dealt with is what is the highest and best use of the property? This is of significant dispute between the parties. The District maintains the alternative use put forward by Ms. Nye-Islam, as a holding property for future development, was not established on the evidence.
- [15] Appraisers must determine the highest and best use of the property they are appraising. This is "the reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value." Appraisers must test the reasonable likelihood or probability of a change such as rezoning or assembly that influences the legality, physical possibility or financial feasibility of an alternative use from the existing use of the property. If such a change is not reasonably likely (i.e. not greater than 50% probability), the use is too speculative to be further considered (Holdom at paras. 36-38).
- [16] The District acknowledges that its acquisition program for waterfront properties in the area of the property at issue must be disregarded. It maintains, however, that despite this, there was ample evidence to show the test set out above, is not met.
- [17] Ms. Nye-Islam maintains the valuation of \$8,000,000 is based on three factors. First, the Expropriation Act requires Mr. Johnston to imagine the likely value of the property if the District had never established a plan to acquire the property and others for a park. Second, Mr. Johnston considers it reasonably likely that, absent that acquisition scheme, the District would have rezoned Ms. Nye-Islam's property from single-family/duplex use to multi-family apartment/condo use. Third, Mr. Johnston considers it reasonably likely that, absent that acquisition, Ms. Nye-Islam would have assembled her property with her neighbors' properties to create a lot large enough to build this development.
- [18] The District does not agree with this valuation. It rejects the notion that Ms. Nye-Islam's property would likely have been rezoned for multi-residential redevelopment. The District maintains its valuation of \$5,300,000 for the property as a single-family dwelling.
- [19] There is no dispute the court must consider the value of the property as if the District's acquisition policy of a waterfront park did not exist. There is, however, a significant difference between the parties about the probability of this property being rezoned for multi-family use. Ms. Nye-Islam points to the large number of waterfront lots located to the west of her property that have been rezoned over the years and argues that, but for the acquisition policy, her property would also have been rezoned. She argues that this use was consistent with the attitudes of the District and the remaining owners. In support, she relies heavily on historical documents referencing comments about the consideration of the acquisition of land required for future park or other purposes.
- [20] Mr. Johnston, whose appraisal forms the basis of Ms. Nye-Islam's case, relies on two historical district planning documents in coming to his conclusion - the 1964 apartment study and the 1983 Ambleside by the sea waterfront program review. Ms. Nye-Islam maintains the 1964 apartment study read in the context of the 1958 draft community plan

and a 1958 revised planning study that preceded it, establishes that in 1958 the district planner considered the property suitable for rezoning the multi-residential apartment use as part of some 94 acres of property including waterfront homes in the 1400 Argyle block.

- [21] The planner, however, included an important caveat to this recommendation. This noted that the District should not rezone any such property to multi-family apartment use if the District wanted the property for public use. Those statements are set out at pages 17 and 24 in the 1958 Ambleside planning study. The 1958 Ambleside community plan draft included a general recommendation that prior to rezoning any property for multi-family use, counsel should give consideration to the acquisition of land required for future Park or other municipal purposes.
- [22] The District ultimately did not rezone the entire 94 acres of Ambleside that included waterfront homes like the property at issue into the multi-residential apartment zone. Rather, it amended the existing bylaw to rezone a smaller area of the properties to the north and west of the property at issue. The new zone was called the Ambleside apartment zone. Numerous apartment towers and condo developments were later built on properties in this zone.
- [23] Ms. Nye-Islam maintains essentially that the property at issue was frozen in the low-density single-family use from this time to when it was expropriated. She argues strongly that the district planner had recommended consideration of including her property in the Ambleside apartment zone in 1958 unless the District intended to use it for public use.
- [24] In contrast, the District maintains this evidence is entirely speculative and the court should consider the evidence of Mr. Nicholls. In particular, the District maintains in 1983 Mr. Nicholls developed and provided optional uses for the property if the District decided not to take it. The District say that Ms. Nye-Islam's characterization of Mr. Nicholls evidence that the property was a "community asset" joining Ambleside and John Lawson parks is inaccurate. Rather, the evidence of Mr. Nicholls demonstrates that the District policies at the time considered different uses and the property was not essentially frozen since 1956.
- [25] The 1958 Official Community Plan for West Vancouver included the property in an area of approximately 92.4 acres designated for the potential apartment development. However, that is the last document that could support the inference sought by Ms. Nye-Islam. The 1964 Report titled "Apartment Buildings in West Vancouver", said on the first page:

The West Vancouver Community Plan, produced by the Planning Department in September, 1958, included a comprehensive section on apartments and put forward certain recommendations. This section, which was adopted by the Council, on May 11, 1959, proposed that an area of 92.4 acres be set aside for apartments in the general vicinity of the Ambleside Business District, see map following page 1. This map entitled Area Proposed for Multi Family District, is hereinafter called the plan map. Subsequently, on August 10, 1959, Council re-zoned an area of 47.3 5 acres to the classification "R.M.2 -- Multiple Family Zone", and on November 9, 1959, 9.90 acres for apartment use as part of the Consolidated Development Area No. 2 in Park

Royal. In addition 4.45 acres were added to the R.M. classification, in the 2200 block Bellevue, on January 23, 1961, to bring the total in R.M. 2 zoning to 51.80 acres.

- [26] The mere fact that rezoning was at one point recommended for the general area in which Ms. Nye-Islam's property is located, does not lead to the conclusion that it was reasonably expected on September 2, 2015. The district planners' recommendation was never completely adopted by Council even for properties in the area about which there was no question of future acquisition by the District. Only 51.80 acres of the recommended 92.4 were rezoned for multi-family development in the 1959 and 1961 rezoning bylaws. What was contemplated at the time of the rezoning was that the apartment zone might be expanded later, to some or all of the "rest" of the 92.4 acres, as and when demand required.
- [27] Mr. Nicholls began working in West Vancouver in 1979. He testified at that time the apartment area was still the same 51.80 acres shown in the 1964 study. It had not increased, and did not increase over the next 30 years.
- [28] Mr. Nicholls said by the late 1970s, the West Vancouver public and the municipal council opposed anything other than slow, controlled, growth. As set out in several parts of the 1980 Community Plan:
- (a) The objectives listed on page 3 include the following:
- "1. Permit only slow, controlled growth.
6. Contain commercial development within present limits.
7. Exclude industrial development."
- (b) At page 28:
- "Residents feel excessive growth will spoil the rural, parklike character of the community. They want West Vancouver to 'remain like it is'".
- (c) At page 28, the Community Plan records that the 50 acres re-zoned in 1964 was still not fully built out. Fifteen possible sites remained within the area already zoned for apartments, five of which were on the waterfront. There was still approximately 7 acres of developable land within the area zoned for apartments, of which 2 acres were assembled for redevelopment immediately.
- (d) Not only was there no talk of increasing the apartment zone - if anything things were going to move in the opposite direction. The 1980 Community Plan described the possibility of downzoning some or all of the existing undeveloped sites, to reduce the area available for apartment development, but stated that council had not made "a final decision" on the downzoning (p. 34).

[29] Mr. Nicholls said one of his first tasks was to draft a bylaw to implement downzoning of the Ambleside apartment zone. This was, however, ultimately not approved. The reality of this task, however, weakens the assertion of Ms. Nye-Islam that her property would have been upzoned.

[30] The evidence establishes resistance to development continued throughout this time in West Vancouver. The 1980 Community Plan, and each Official Community Plan which followed it, provided a specific prohibition against increasing the apartment zone. As noted below:

(a) The 1980 plan stated:

"2. Contain the boundaries of present apartment zones with the possible exception of a Senior Citizens' complex" (Ex 3A, Tab 15, p. 37)

(b) The 1988 plan stated:

"j. No extension of the Ambleside Apartment Area will be considered." (Ex 3A, Tab 32, at p. 12)

(c) The original version of the 2004 plan stated:

"Policy BF-B.5. There will be no expansion of the Ambleside Apartment Area to extend the high density, high rise development area". (Ex 3B, Tab 35, at p. 62)

[31] Furthermore, I agree the 1983 study titled "Ambleside by the Sea" contradicts Mr. Johnston's theory. As noted by the District:

(a) Mr. Nicholls was the author of the document. He testified on some occasions he put forward alternatives to acquisition policy, given the rising costs of continuing it. The 1983 study included specific alternatives for the 1400 block of Argyle.

(b) One of the alternatives Mr. Nicholls put forward was "Low scale multiple residential". Mr. Johnston viewed this as supporting his hypothetical high density development, requiring a Floor Area Ratio ("FAR") of 2.0.

(c) Mr. Nicholls' evidence established however that Mr. Johnston's appraisal misinterpreted the document. Mr. Nicholls testified that by the phrase "Low scale multiple residential" he meant something much different - a development with FAR not substantially different from the existing FAR of 0.5.

(d) Mr. Nicholls also gave reasons why he did not include a reference to any higher density form of development. He referred to several factors which militated against any higher density development in the area: the relatively shallow lots, the difficulties with the water table, the unsuitability of creating a massive structure near areas frequented by the public etc. He also stated that any such development would have been contrary to the public interest.

- [32] Moreover, as pointed out by the District, approximately 15 years later, Mr. Nicholls authored another report in 1998 putting forward possible alternatives to continuing the acquisition program. He discussed land use alternatives. He contemplated low density residential use, but there is no mention of any high density use. Mr. Nicholls said the same reasons applied. He considered any high density residential use of the area inappropriate.
- [33] Thus, even where subsequent Plans presented alternatives to the acquisition program, there is no evidence these plans were anything more than potential options for consideration. Mr. Nicholls turned his mind to that specific issue - what alternative land uses should be considered if the acquisition program were abandoned. In both cases, Mr. Nicholls' reports make it clear that high density residential use was not among the options.
- [34] When examined in its entirety, the historical evidence about the District's plans and attitudes about rezoning the area in which Ms. Nye-Islam's property is located is at best mixed, even if one disregards the existence of the acquisition plan. Thus, despite Ms. Nye-Islam's able argument, there is insufficient evidence to conclude on a balance of probabilities that, but for the acquisition plan, rezoning of Ms. Nye-Islam's property for multi-residential use was ever anything more than a mere possibility.
- [35] The evidence does not support the requirement that the property would "probably" be eligible for development as a high density residential property in the absence of the District's acquisition policy for waterfront properties.
- [36] This case is distinguishable from *Devick v. British Columbia (Minister of Transportation and Highways)* (1998), 156 D.L.R. (4th) 528 (B.C.C.A.), on which Ms. Nye-Islam relies. In *Devick*, the owner of ranch lands sought compensation for the redevelopment value of his expropriated lands, which had not been rezoned for 20 years due to the "shadow" of expropriation. The Court of Appeal found that, but for the expropriation, rezoning for commercial development would have been reasonably expected and ordered that the owner be compensated based on the value of the land had it been rezoned.
- [37] Although *Devick* confirms that it is possible to consider that redevelopment would be reasonably likely even for properties which have been under the shadow of expropriation for many years, at the end of the day, the ultimate analysis depends on the facts of the individual case. While a number of factors indicated that rezoning and commercial development was reasonably likely in *Devick*, an assessment of the evidence in the case at bar leads me to the opposite conclusion. The prospect of rezoning and redevelopment of the property was simply too speculative.
- [38] As I have concluded the rezoning of the property to multi-residential use was not reasonably likely on September 2, 2015, there is no need to consider any link between rezoning to multi-residential use and the increase in the value of the property.
2. What is the value of the property as a single-family residence?

- [39] Relying on the appraisal of Mr. Johnston, Ms. Nye-Islam argues that Mr. Hooker's appraisal under-valued the property even if its highest and best use was as a single-family dwelling, and the real value was \$6,600,000. Broadly speaking, Mr. Johnston's appraisal differs in four respects from Mr. Hooker's:
- a) Mr. Hooker's and Mr. Johnston's direct comparison approaches share six comparable sales in West Vancouver neighbourhoods west of Ms. Nye-Islam's, although Mr. Johnston's location adjustments are different. Mr. Johnston also adds a seventh sale from those neighbourhoods and looks at four sales of waterfront properties in Kitsilano.
 - b) Mr. Johnston considers that Mr. Hooker is mistaken when he uses district-wide rather than neighbourhood-specific home price indices ("HPIs"). Mr. Johnston uses neighbourhood-specific indices.
 - c) Mr. Johnston considers that Ms. Nye-Islam's property is in a superior location to neighbourhoods in the west, from which his and Mr. Hooker's comparable sales are drawn. Mr. Hooker considers it inferior.
 - d) Mr. Hooker and Mr. Johnston differ in their adjustments for the property's physical attributes (slope and waterfront access). While Mr. Hooker considers Ms. Nye-Islam's property to have inferior topography to the comparable properties, Mr. Johnston does not. Moreover, Mr. Johnston considers Ms. Nye-Islam's property to have true waterfront access.
- [40] Mr. Johnston's appraisal was reviewed by Mr. Hooker and Ms. Cawley, a consultant retained by the District to provide a further independent review of the evidence of the property's valuation. Ms. Cawley largely agreed with Mr. Hooker's assessment.
- [41] In my view, the District's evidence of the valuation of the property is more compelling than Ms. Nye-Islam's. Mr. Johnston's approach to valuation was revealed as unreliable by the reports of Mr. Hooker and Ms. Cawley. His evidence was also significantly undermined in cross-examination.
- [42] First, Mr. Johnston's use of comparables in Kitsilano was not helpful. All experts agreed that Kitsilano is a more desirable neighbourhood to Ambleside and yet Mr. Johnston not only used comparables from Kitsilano, but it was revealed in cross-examination that his location adjustments for the two neighbourhoods were effectively symmetrical - plus 35% for West Vancouver neighbourhoods and minus 35% for Vancouver neighbourhoods. In this sense, Mr. Johnston was giving equal weight to the significantly different Vancouver comparables, which cast doubt on the objectivity of his approach.

- [43] Second, Mr. Johnston concluded that the Ambleside neighbourhood is superior to the West Vancouver neighbourhoods that were located to its west and attributed a higher value to the property for being located in Ambleside. Objective evidence from the HPIs undermines this conclusion and is consistent, rather, with Mr. Hooker's appraisal. Mr. Johnston's approach was not based on available empirical evidence, but rather his subjective opinion about the superiority of Ambleside.
- [44] Third, Mr. Johnston admitted that use of district-wide HPIs, as Mr. Hooker had done, is standard to make time adjustments and generally produces accurate results.
- [45] Finally, cross-examination revealed that many of Mr. Johnston's adjustments to the property values based on the property's physical attributes were exaggerated. Mr. Johnston also based his adjustments on sparse or inadequate information. As an example, Mr. Johnston based his assessment on the assumption that the property has direct, level walk-out access to the water. The evidence at trial did not fully support that position. It was not possible to actually walk directly down to the water. Rather, one had to walk to the end of the block to use the public access. While one could conclude that the property has good waterfront access, there is no basis in the evidence for the large deductions Mr. Johnston made.
- [46] Furthermore, both Mr. Hooker and Ms. Cawley raised the fact that the property is located near a rail line, which partially offsets its aesthetic as a waterfront property, and is an important factor in terms of market appeal. Mr. Johnston's location adjustments do not account for the proximity of the property to a rail line.
- [47] Overall, much of Mr. Johnston's appraisal is simply too subjective and speculative. Mr. Hooker's appraisal remains the most reliable valuation of the property before the Court. It is therefore not established that the property was worth more than the \$5,300,000 Ms. Nye-Islam was compensated.

CONCLUSION

- [48] At the end of the day, while Ms. Nye-Islam set out an intriguing case associated with the initial historical documents, the District defended the case well. The cross-examination of Mr. Johnston was very effective and the response with the respect to the historical documents was compelling.
- [49] On the basis of all the evidence before me, I am unable to conclude that Ms. Nye-Islam was inadequately compensated for the expropriation of her property. The value of the property is as a residential property and is \$5.3 million.

The Honourable Madam Justice E. Burke

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