

CANADA / JUDGMENT

Surrey (City) v. Kallu

2024 BCSC 333

COURT

Supreme Court of British Columbia

DECIDED

9 February 2024

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2024 BCSC 333 Surrey (City) v. Kallu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Surrey (City) v. Kallu,

2024 BCSC 333

Date: 20240209

Docket: S250971

Registry: New Westminster

Between:

City of Surrey

Petitioner

And

Amandeep Singh Kallu

Respondent

Before: The Honourable Justice Schultes

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner appearing by video conference:

A. Wu

A. Aujla

Counsel for the Respondent appearing by videoconference:

R. Doran

Place and Date of Hearing:

New Westminster, B.C.

December 1, 2023

Place and Date of Judgment:

New Westminster, B.C.

February 9, 2024

Introduction

- [1] In this petition the City of Surrey seeks a declaration that the respondent Mr. Kallu has contravened the Surrey building bylaw, and an injunction to address those contraventions. These remedies are being sought in relation to an addition to a residence and an enclosed deck on that residence that were constructed by him.
- [2] The City's position is that the construction was carried out without the necessary building permits, contrary to the bylaw. The injunction would require Mr. Kallu obtain a permit to demolish the structures he built.

Evidence

- [3] The property in question is on 130 Street in Surrey. The respondent, who is the property owner, obtained a permit to build a house on it in January 2020. He deposes that he completed it in 2021.
- [4] According to the City, the construction for which he obtained the permit did not include the offending structures. An affidavit of one of the City's investigating bylaw officers explains that under the zoning bylaw there would have been no allowable room for those structures to be built. The approved house had used up all of the permitted square footage, only 32 feet of permitted "lot coverage" of any kind remained, and less than a metre was left to build towards the rear of the house before it encroached on the required amount of setback. In the area where he ultimately enclosed the deck, the respondent had requested and been authorized by the City to build a covered deck, which was exempt from the calculation of the square footage of the house.
- [5] One of the City's bylaw officers deposed that its records indicate that a stop-work order had been made in March 2021. It appears that this was in relation to the initial construction of the house, although that is not clear. An officer attended in April of that year and did not see any construction ongoing. He did not mention in his affidavit whether the stop-work order referred to in the evidence was still posted, or indeed whether the unauthorized

construction was in progress or had concluded. The stop-work order was no longer posted when the officers began visiting again in 2022.

- [6] During that year, the City discovered the offending construction. The addition is a large structure that is connected to the rear of the house at the first-storey level, and which extends towards the back of the property. The enclosure is of the former approved covered deck at the rear of the house, on the second floor. Besides the fact that it is unauthorized, the enclosure of the deck means that it is no longer exempt from the square footage calculation.
- [7] A bylaw officer went to the house and viewed these structures on April 21, 2022.
- [8] Bylaw officers spoke with the respondent at the house on May 12. The City had previously sent him a letter requiring him to comply with the building bylaw. He told them that he had disregarded the letter because he had not been engaged in any construction for the year since the house had been completed. Despite this, they emphasized to him the need to obtain permits for the unauthorized construction.
- [9] Another officer spoke to him by phone on May 22, after she had gone to the house and dropped off a letter to him from the City's legal department. That letter demanded that he seek demolition of the unauthorized structures. In response to his request, which he made during their phone call, to cease the inspections, that officer told him that the inspections would continue until the construction was in compliance with the bylaw.
- [10] Officers returned again in October of that year in an unsuccessful attempt to inspect the inside of the structures, which were still in place.
- [11] In June 2023, they personally served the respondent with a letter advising him that the structures were going to have to be demolished, as they could not be retroactively authorized. The City's material explains that in addition to exceeding the dimensions that are permitted under the zoning bylaw, the structures have been completed, which means that its officials cannot access the areas of them that would need to be inspected and declared safe in order for a permit to be issued. The letter directed the respondent to cease occupying the structures and to obtain the necessary permit for the demolition, failing which an application of the present nature would be begun. As at the date of this hearing, the respondent had not made any such application.
- [12] For his part, the respondent did not dispute the status of the structures under the bylaw regime in his affidavit. He focuses on the hardship that would result to his family (which consists of himself, his spouse, their three children, and his elderly parents, both of whom have health problems) from having to vacate the house during the demolition process, which he says is of unknown duration. (The director of the City's building division deposes that approving a permit to demolish the unauthorized structures, assuming all the necessary materials are attached to the application, should actually take no more than 15 days to process.) In any event, the respondent deposes that his family has no alternative accommodation available during that process.

- [13] The respondent also attached a press release that summarized recent changes that have been made to the Local Government Act by the provincial government. These changes are intended to require municipal bylaws to accommodate greater housing density in what were former single-family neighbourhoods, such as the one where the respondent's house is located. (The director of the building division deposed that this legislation, which had not yet been proclaimed in force at the time he swore his affidavit but has since been proclaimed in part, would not necessarily eliminate the requirements that prevent the respondent's structures from being authorized. Further, the City expects to be granted considerable flexibility by the legislation as to how it goes about increasing the number of residential units in these areas.)

Legal Framework

- [14] The statutory authority for the relief being sought by the City is s. 274(1)(a) of the Community Charter, which permits the municipality to apply to this court to "enforce, prevent, or restrain the contravention of," among other things, a bylaw. The right to make such an application is available regardless of any other penalties that may be available for such contravention - for example, a bylaw prosecution.
- [15] This is a form of statutory injunction. Unlike an equitable injunction, once the underlying violation is proven, there is only a very narrow discretion to refuse to grant it. This discretion has been described as being reserved for "rare cases with exceptional circumstances": *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494, at para. 38. Although the person who is subject to the injunction may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed: *Maple Ridge (District of) v. Thornhill Aggregates Ltd.*, 1998, 54 BCLR (3d) 155, (C.A.), at para. 9.
- [16] Specifically in the building context, efforts by an owner to stave off demolition by obtaining proper permits for the unauthorized construction have been rejected where there was no realistic prospect of retroactive approval, either because of the extent of the violations or because the construction would never have been approved in the first place: *Surrey (City) v. Singh*, 2022 BCSC 1455, at para. 45, and *Surrey (City) v. Sidhu*, 2023 BCSC 1837, at para. 45.
- [17] The court in *Singh* also rejected the argument that the provincial government's housing initiative could excuse the unauthorized construction in that case, refusing to accept the proposition that:
- [37] the Government of British Columbia, as part of its Homes for People Plan, wishes to encourage the unlawful construction of dwellings in the province as part of the solution.

Positions

- [18] The City's position closely tracks the authorities that its counsel provided, which I have just summarized.

- [19] Its counsel submits that this is a clear case of a long-standing, direct contravention of the building bylaw, and there is no reasonable prospect of it being remedied by a subsequent approval. This is both because it exceeds what is permitted under the applicable zoning, and because its compliance with the building requirements, particularly in respect to safety, cannot now be verified.
- [20] The respondent's primary position is that the petition should be dismissed because of a lack of probative evidence. His counsel argues that the assertions in the City's affidavits that the construction is unauthorized are either based on hearsay (which, as we know, is inadmissible in a petition that seeks a final order - see Rule 22-2(13) of the Supreme Court Civil Rules) or are based on general statements that are unsupported by actual documentation of what was authorized, in contrast to what was actually built. Crucially in relation to the latter, his counsel points out that the plans that were authorized pursuant to the building permit are, for the most part, not part of the record.
- [21] These concerns include that:
- The officer who attended in April of 2022 deposes that he reviewed the City's records to see what had been authorized, and then determined during his visit that the construction in question exceeded it. Counsel's position is that the records showing that it did so are not before the court, and there was no ongoing construction at the time from which it could be inferred.
 - Similarly, although the officer who attended on May 12 attached the building permit to his affidavit, the overall plans for the house were not attached (although, as I previously indicated, a rear-view drawing showing the authorized covered deck was attached as a separate exhibit). The point is that the main plans, which would demonstrate how what was observed differed from what was approved, were not provided. The photos that the officer took during that visit also did not differentiate between the approved and built stages. Further, the officer's general assertions that the construction violates the square footage, lot coverage, and setback requirements, and that the City would not approve those unauthorized structures, in addition to being an unqualified expert opinion, lack the degree of detailed support that is needed to justify an injunction that requires demolition.
 - The same is true, counsel submits, of the building director's assertion that he is aware of the violations on the property, specifically what has been constructed contrary to the zoning limitations.
 - Finally, the letter delivered to the petitioner on May 22 is not substantive evidence of the violations that it refers to.

- [22] On the necessity of demolition as the remedy, the respondent's counsel points out that the Surrey building bylaw allows after-the-fact permit approvals, as well as the issuance of occupancy permits before completion of construction (in the latter case, as long as no risk to health, safety, or property is posed). He submits that this runs counter to the general assertions in the affidavits of the City staff that there is no prospect that these non-compliances can be remedied.
- [23] As to the legislative changes increasing residential units in family neighbourhoods, counsel's point is not so much that the respondent's structures would themselves be utilized for that purpose, but rather that as part of the legislative changes, the permitted square footage, lot coverage, and setbacks could end up being modified in a way that brings the structures into compliance. In other words it is possible that certain non-compliant structures will be retroactively authorized.
- [24] If I am not persuaded to dismiss the petition, the respondent's counsel submits that this is an appropriate case in which to grant a temporary stay of proceedings, or to delay the issuance of the injunction, to address the significant hardship that will be created by a requirement to demolish the structures.
- [25] Alternatively, the Court of Appeal in the North Pender Island case did not specifically define those rare and exceptional circumstances in which the court should decline to approve a statutory injunction. In this case, the impact to the respondent and his family from the demolition that is being sought may well fall within such circumstances.
- [26] On the evidentiary issue, the City's counsel responded that City officials within the building department should be able to give evidence of what has or has not been authorized within that department. He also resourcefully contrasted the rear-view building drawing that was attached to one of the affidavits with the photos of the enclosure and the addition, which are not present on that drawing, to support the inference that they were not authorized in the permit process. Further, he submits that not only has the respondent not adduced any evidence suggesting that the construction was authorized, the respondent's own affidavit implicitly acknowledges that they were not, by referring to them as "the renovation," as distinct from the main construction. If the evidence is still considered to fall short on this basis, he submits the appropriate remedy is for the City to be granted an adjournment so that it can adduce the complete approved plans.

Discussion

- [27] In order to resolve the evidentiary concerns raised by the respondent, it is necessary to begin with basic principles.
- [28] A document that is relied on for the truth of its contents is potential hearsay, just as much as testimony about a statement by an out-of-court witness. Unless it is being relied on to prove some other issue other than its truth, which is known as original evidence or non-hearsay, or it falls within an exception, including the principled exception based on necessity and

reliability, a document that is to be relied on in this manner must be proven to be one that is kept in the usual and ordinary course of business, pursuant to s. 42 of the British Columbia Evidence Act, or the common law business records exception, if its author is someone other than the witness through whom it is sought to be introduced.

- [29] There is no exception for employees of the same department all resorting to a common body of records, of which any one of them may not be the author (although one of those employees certainly could, either pursuant to the Evidence Act or the common law business records exception, provide the necessary evidence for the document to be received as a business record).
- [30] The difficulty in this case is that the key witnesses on behalf of the City all derive their knowledge of the extent to which the building on the respondent's property deviates from what has been authorized from reviewing records by someone else, including the building permit itself (which in any event, does not set out the limitations on what has been authorized) and the one drawing of the rear of the property, which contains a hand-drawn indication of the enclosure and a City of Surrey stamp whose author and origins are unknown. (The officer who appended the drawing to his exhibit also did not authenticate it as something that was submitted by or on the respondent's behalf, which might have made it admissible as a form of admission against interest by him.)
- [31] What this means is that the resourceful efforts of the City's counsel to contrast the drawing to the offending construction fall short of providing the required proof, because the provenance of the drawing is unknown and has not been properly proven.
- [32] Even the fact of the stop-work order, which might provide some evidence supporting an inference of the respondent having proceeded in an unauthorized manner at the initial construction stage, was based on a review of records that have not been substantively proven.
- [33] Indeed, quite apart from these hearsay concerns, exactly what conduct the stop-work order applied to is left completely unexplained in the material.
- [34] Further, as the respondent's counsel has pointed out, the allegations of unauthorized construction in the City's letter to the respondent are not substantive proof of those facts in this proceeding.
- [35] As a result, to the extent that the evidence of the City's witnesses is based on their resort to its records, it is inadmissible in this proceeding as hearsay.
- [36] What remains to prove the violations are the general assertions of the City officials that the construction in question violates the zoning bylaw in the manner described. I must consider whether those assertions in themselves are sufficient to prove a violation on a balance of probabilities.

- [37] Bylaw Officer Grewal, who visited in April of 2022, deposed that he reviewed the City's records "to confirm what construction had been authorized by a building permit" and that when he attended, he "observed the construction had been completed that had not been authorized by a building permit".
- [38] Bylaw Officer Bolton, who attended on May 12 deposed that he was "able to confirm" failure of the construction to comply with the square footage, ground coverage, and setback requirements that I had previously referred to. Once again, the difficulty is that other than estimating the square footage by eye, which he does not say he did, there is no admissible evidence of either the authorized square footage, or that the structures fully utilized the permitted floor area. The cryptic notation "maximum FAR achieved" on the permit, which was not explained, was entered by the author of that permit, who is described only as "IP4." The same is true of the amount of setback authorized under the permit, which deprives the officers' observations and photos of the structure of the necessary context.
- [39] The building division manager, Mr. Dubé, simply deposes that he is familiar with the violations at the respondent's address, without claiming the personal observations that were engaged in by Officer Bolton. That evidence is certainly incapable of establishing a violation.
- [40] While the respondent's reference to the renovation might in some circumstances serve as an acknowledgement of a second construction process, which could be inferred to have been the unauthorized one. Without admissible evidence before the court defining the extent of what was authorized, the context within such an inference might properly be drawn is absent.
- [41] Finally, I do not think I can make anything of the respondent's own failure to assert that the construction was authorized. The absence of such a denial only acquires significance when the party bearing the burden of proof in an application has adduced evidence that is otherwise sufficient to meet its burden. In that situation, the absence of any contrary assertion by the opposing party means that there is nothing opposing the weight of the evidence that has been adduced. That has no significance if the applicant has not themselves proven their case.
- [42] I also do not think this is an appropriate case to grant the City an adjournment to remedy these deficiencies in its evidence. Parties in an adversarial process must generally put their best foot forward in presenting the evidence on which they seek to rely. In absence of a compelling reason for an initial deficiency, they will not be given an opportunity to resubmit the evidence in admissible form.
- [43] As a result, I conclude that the City has failed to provide admissible evidence proving the violations alleged, specifically admissible business records and/or direct testimony substantively proving the difference between what was authorized and what was built by the respondent. This makes it unnecessary to consider the further issues of whether the shortcomings of the offending structures are truly irremediable, as the City contends, the potential effect of the recently proclaimed housing legislation, or the procedural

alternatives to granting an immediate injunction.

[44] Therefore, the petition must be dismissed, with costs to the respondent.

"Schultes J."

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