
CANADA / JUDGMENT

Yu v. City of Richmond

2020 BCSC 454

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 454 Yu v. City of Richmond

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yu v. City of Richmond,

2020 BCSC 454

Date: 20200330

Docket: S-196425

Registry: Vancouver

Between:

Fu Li Yu and Jing Yang

Petitioners

And

City of Richmond

Respondent

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

Counsel for Petitioners:

Robin Bennett

Counsel for Respondent:

Reece Harding

Nick Falzon

Place and Date of Hearing:

Vancouver, B.C.

September 25-26, 2019

November 6, 2019

Supplemental Written Reasons:

Place and Date of Judgment:

January 27, 2020

Vancouver, B.C.

March 30, 2020

I. introduction

- [1] This is a judicial review of the November 14, 2018 joint decision of the Director of Building Approvals and the Manager of Inspections of the City of Richmond (the "Decision"; the "Building Director"; the "Inspections Manager"; the "City") that the building permits issued to the petitioners had expired by operation of the City's Building Regulation Bylaw No. 7320, 2002 (the "Permits", the "Building Bylaw").
- [2] The Permits authorized a one-family dwelling at 8551 No. 5 Road: a property located in the Agricultural Land Reserve (the "Property"; the "ALR").
- [3] This matter was heard with *Minster Enterprises Ltd. v. City of Richmond*, 2020 BCSC 455, which raises identical issues on a slightly different yet contemporaneous factual record.

II. facts

A. The proposed house

- [4] In 2016 the petitioners purchased the Property for the purpose of building a single family residence.
- [5] The proposed house was a two-storey single-family residence with total floor area of 13,482.77 ft.² and one detached six-car garage. There would be two driveways.

B. The geotechnical report

- [6] In a geotechnical report dated March 14, 2017 the petitioners' geotechnical engineer made recommendations to prepare the site for building, and to address the risk that the soil would sink under the new house's weight. These measures included digging out the topsoil beneath the house footprint; filling the resulting excavation with permanent compacted structural fill, and temporarily covering the structural fill with preload surcharge material (that is,

sand) to further compress the underlying ground. The preload material would then be removed immediately before laying the foundations of the house.

- [7] Specifically, the geotechnical report, under the heading of "Site Preparation and Preload," recommended structural fill of a granular material backfilled 1.5 metres wider than the building footprint. The permanent structural fill would be deposited to rise approximately 10 centimetres above the proposed final grade to allow for settlement. A temporary preload would be deposited to rise two metres above the proposed ground floor slab level for building areas and one metre above the detached garage and pavement areas. The top of the preload mound would rise approximately 4.90 metres off the ground, and 1 metre above building lines. The preload footprint would extend 1 metre beyond the building footprint. Following construction of the building, the area would be re-graded. The report also recommended that paving be delayed for an additional six months to allow further settlement to occur.
- [8] Appendix B of the geotechnical report sets out the house plans and dimensions. Appendix C of the geotechnical report provides details of the test pit logs and findings with respect to the solidity of the underlying soil, with measurements delineating organic soil/silt, sandy silt, and clay silt. Appendix E sets out the location of the gauges designed to periodically measure the progress of the settlement and compaction of the earth.
- [9] The geotechnical report was submitted by the petitioners with the application for the building permits. The Permits refer to "soils report, septic filing & grading plan on file."

C. The Permits

- [10] On August 30, 2017, the City issued two building permits and a site service permit to Timothy Tse, contractor for the petitioners.
- [11] Each Permit states at the top:
- Expires: February 26, 2018 (if no construction activity)[1]

D. The soil densification process

- [12] On August 11, 2017 excavation began, followed by placement and mechanical compaction of the structural fill. These processes completed on September 17, 2017.
- [13] Placement of the sand preload on the building footprint began immediately. This process was completed on October 1, 2017.
- [14] The sand mound was then left in place and surveyed from time to time to measure its settlement. It was surveyed at least once a month from October 2017 to March 2018.

E. Drainage issues

- [15] A neighbour complained of water running off the preload sand mound.

- [16] On January 18, 2018, Mr Lannard, a City building inspector, inspected the Property. He observed the preload sand mound. He directed the excavation of a drainage ditch and the installation of a French drain along the Property boundary, to mitigate runoff from the preload mound.
- [17] The parties agree that the ditch and drain did not move the construction of the house forward, but were merely interim measures to deal with the run-off. But for the complaints, the ditch would never have been built.

F. The removal of the preload sand mound

- [18] The petitioners say that after the final settlement gauge reading on March 7, the preload sand was removed. The removal process started on March 10, 2018, and finished on May 10, 2018.
- [19] That said, the evidence indicates that on October 2, 2018, at least two sizable mounds of preload sand, rising several meters in the air, remained on site. Extensive concrete forming, running some 10 metres, was also visible on that date.

G. May - October 2018 construction steps

- [20] In May and June 2018 the petitioners' contractor installed survey pins to mark the dimensions of the retaining wall's concrete forms.
- [21] Starting on June 29, 2018, concrete forming was installed for the garage footing in retaining wall foundations.
- [22] On July 27, 2018, it was discovered that the framing contractor had installed the forming for the retaining wall footings higher than set out in the design drawings. From August 14-21, 2018, the concrete forming was broken down so that it could be reassembled in the correct position.
- [23] From October 26 to September 29, 2018, the retaining wall forming was reconstructed and completed.
- [24] On September 26, 2018, the petitioners' son, Perry Yu, applied for the City's approval to change the driveway layout. He paid a fee of \$133 for the application. The City accepted the application and payment.

H. November 2018: the Decision that the permits had expired

- [25] An inspection of the forming for the retaining wall and garage footings was scheduled for October 5, 2018.
- [26] Mr Lennard arrived, but refused to perform an inspection. Instead, he stated that the Permits had expired and that the petitioners should contact Mr Tewfik, the City Inspections Manager.

- [27] On October 10, 2018, Mr Tewfik emailed Perry Yu to request documentation detailing any construction activity that may have occurred on the Property before the stated expiration date of February 26, 2018.
- [28] On October 10, 2018, Mr Yu emailed City staff a timeline of the construction. He explained that construction of the house itself had not commenced due to preloading between October 2017 and March 7, 2018. He attached invoices related to excavation, survey, rebar, and building materials. He also attached some photographs relating to the excavation in May and June 2018. These photographs showed a wide mound of sand several meters high, as well as an excavator digging a sizable pit on the Property.
- [29] In emails dated October 16, 23, and 25, Mr Tewfik advised Mr Yu that he continued to "liaise" with colleagues as well as the City law department with respect to the status of the Permits.
- [30] On October 23, 2018 Mr Yu wrote to Mr Tewfik:

We do not agree with the interpretation of the bylaw that preload does not count as construction activity for a project in agricultural land. The building permit was valid for the duration of 6 months, which is the same amount of time that it can take up to for preload settlements on agricultural land (depending on the quality of the soil). The 6 months needed for preload is a both mandatory and necessary part of the construction process. Obtaining an approved building permit and site plan are necessary prior to the geengineer confirming the preload required area; this is crucial because we do not want to spend \$210,000 for preload before we are 100% certain of the location.

The permit provided did not offer enough time for the preload settlement process, if preload does not count as construction activity. The permit's expiry date was on February 26, 2018, with the condition if no construction activities. Therefore we believed that our permit would stay valid since we were continuously working on this construction project, including our preload activities .

- [31] On November 14, 2018, Mr Yu met with Mr Tewfik, as well as James Cooper, the City Building Director. Mr Tewfik and Mr Cooper reiterated the City's decision that the Permits had expired because construction activity had not started before the expiration date stated on the Permits.

I. May 2018 City Bulletin

- [32] On May 30, 2018, nine months after the issuance of the Permits, and three months after the date the City says the Permits expired, but before the City's communication of its Decision that the Permits had expired, the City Approvals Office issued Bulletin Building-31: "Permits -- Expiry and Extension". The Bulletin has been posted on the City's website since approximately that date.
- [33] The two-page Bulletin states in part:

Background:

Part 5 of the Building Regulation Bylaw 7230 outlines the terms, conditions and requirements pertaining to Permits. Permits are valid for a limited and defined duration. Sections 5.10 and 5.11 specifically deal with the expiration of, and extension of permit validity periods. A permit is initially valid for a period of 180 days, commencing the date of issuance, and expires when:

- No construction, gas work or plumbing pursuant to the issued permit has begun within the period starting on the date of issuance and ending 180 days thereafter; or,
- Construction, gas work or plumbing is discontinued or suspended for a period of more than 180 days.

A permit holder who has not yet started construction, gas work, or plumbing and is approaching the end of the initial 180 days may request an extension. The extension is granted at the discretion of the Director, Building Approvals. Such requests for extension must be made within 30 days of expiry, and associated permit extension fees paid.

A permit holder who has discontinued or suspended work for a period of more than 180 days from the date of the last inspection may not apply for an extension.

The activities of construction, gas work and plumbing are defined in the Building Regulations Bylaw 7230.

Issue:

Limitations to permit validity periods are incorporated into the Bylaw as a means to ensure permit holder commitment to the completion of approved projects, within a reasonable and justifiable time period. The varying nature of permit types, project complexities, schedules and phasing conditions, require flexibility in assessment and application of the requirements for each project, while ensuring a fair and transparent evaluation process to deal with expired permits, and requests for extension.

The Evaluation section below offers clarification to the most commonly observed issues arising when considering building permit expiration and requests for extension.

Evaluation - Criteria and Procedures:

- Construction activity, as defined in the Bylaw, is not deemed to include site preparation works, mobilization of construction equipment and materials, or soil densification work (such as pre-loading).

[emphasis added]

J. Controversy over construction on ALR lands

- [34] The petitioners attach as exhibits to its affidavits several news stories concerning the public controversy in 2017 and 2018 over the construction of "monster houses" on ALR lands. The subject was a key issue in the 2018 municipal elections.
- [35] The petitioners also attach two sets of City Council minutes of City motions related to this controversy:
- a) On March 27, 2017 City Council passed a moratorium and review of building permits in ALR lands pending the city's preparation of a bylaw to limit house size on ALR lands.
 - b) On November 6, 2018 City Council passed a motion that city staff be directed to prepare a bylaw that limits the size of residences on ALR lands. The motion notes that section 463 of the Local Government Act allows the withholding of building permits that conflict with bylaws in preparation. It directs City staff to bring to counsel all applicable building permit applications submitted seven days after the resolution or later to determine whether they conflict with the proposed bylaws. On December 17, 2018, that motion was eventually passed, to amend the City's Zoning Bylaw, to restrict house size to 400m².
- [36] The petitioners put forward this material to the effect that the Decision under review was not based upon an analysis and interpretation of the existing Building Bylaw, but rather the external political controversy and influence of City Council. It also seeks to provide the political context for the Decision: not only the public political controversy, but also the elected body with oversight over the Building Department that made the Decision.

III. DISCUSSION AND decision

- [37] The Bylaw provisions, and principles of judicial review and statutory interpretation discussed in *Minster* apply equally to the present set of facts. For the reasons set out in *Minster*, even applying the deferential standard, the Decision was unreasonable and must be set aside. The extensive work conducted on the Property, specifically the soil densification process necessary for the erection of the building on the specific area where that process was carried out, constituted "construction" under the very wide definition in the Building Bylaw.
- [38] I similarly conclude that as the unreasonable Decision concerns a specific and discrete matter of statutory interpretation, on which the Court's pronouncement is determinative of the eventual outcome, the present is one of the rare instances discussed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para.142 where it would not be in the interests of justice or efficiency to remit the matter back to the Building Director and Inspections Manager for reconsideration.

IV. conclusion and costs

- [39] The Court accordingly makes the following orders:

- a) the City's Decision to cancel Building Permits 2017-765229, 2017-765230, and Site Service Permit 2017-765473 is quashed;
- b) the Permits have not expired, and they remain valid and in full force and effect.

[40] The petitioners have been successful. They are entitled to their costs on the ordinary scale.

"Crerar J"

- [1] In contrast to the facts in the companion case of *Minster*, the present petitioners never sought to renew the building permits. In *Minster*, the City argued that the petitioner's renewal of the building permits was a tacit acknowledgment that it understood that the excavation, fill, and pre-loading activities did not constitute "construction" in the Building Bylaw.

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