STEWART McDANNOLD STUART
Barristers & Solicitors

Local Governments May Owe a Duty of Care to Process Development Applications in a Timely Way

Peter Johnson, Jeff Locke, Andie Britton-Foster

December 13, 2017 Local Government Law, Uncategorized

In ***Wu v. Vancouver (City)*** 2017 BCSC 2072, Madam Justice Murray of the BC Supreme Court held that the City of Vancouver owed a duty of care to the plaintiffs, the purchasers of a home in the Shaughnessy area, who had applied for a development permit for the demolition of an existing house and construction of a new house. According to the decision, the City owed the plaintiffs a duty to make a final decision on their permit application, in accordance with the applicable statutory framework, within a reasonable time. Madam Justice Murray concluded that the City was negligent in this case since it acted in bad faith and failed to conduct itself in accordance with the standard of a reasonably competent municipality when dealing with the plaintiffs' application.

The plaintiffs were interested in building a home in the Shaughnessy area of Vancouver. They found a property with the assistance of a realtor. The existing house was not suitable for their needs, and with the assistance of an architect they made inquiries of the City to determine whether the existing house could be demolished and a new house constructed. Through those inquiries, they learned that the house was not on the City's heritage register, but was included in an inventory of buildings that might have heritage value. The plaintiffs were satisfied that although the City might regard the house as having heritage value, and might encourage them to retain the house, in order to prevent the demolition of the house the City would have to designate the house as a heritage structure by bylaw, and would have to compensate the plaintiffs for any resulting loss

in market value. With that knowledge, the plaintiffs decided to purchase the house.

A development permit was required in order for the plaintiffs to demolish and rebuild the house. Before a development permit was submitted, the plaintiffs (through their architect) engaged in discussions with City staff about the heritage merit of the property. The City had developed a "pre-application" process for older homes in the Shaughnessy area, through which the Director of Planning would make a decision about whether the house had sufficient heritage value to warrant protection. The plaintiffs became frustrated with that process, as no decision was forthcoming, and in early 2013 they submitted a development permit application. It became apparent that the City considered the house to have heritage value, and the City repeatedly suggested that the plaintiffs consider retaining the structure, and also required the plaintiffs to submit a "Statement of Significance" report as to the heritage value of the house. The plaintiffs' expectation was that the City would either issue the development permit or move forward with a heritage designation bylaw. The City did neither. Instead, following a lengthy and protracted process through which the City, in the view of the court, inordinately delayed making a decision on the development permit application, Vancouver City Council made an order for temporary protection of the house. That order eventually lapsed, with no steps being taken to adopt a heritage designation bylaw. Following the lapse of the temporary protection order, and after the plaintiffs commenced their action, the City designated the area in which the house was located as a protected heritage area. The effect of the new bylaw, adopted under section 590 of the *Vancouver Charter,* was to prevent demolition of any house in the area unless the Director of Planning was of the opinion that the house no longer had sufficient heritage character or value. The adoption of the new bylaw also deprived the plaintiffs of any entitlement to compensation that would have been triggered by the adoption of a heritage designation bylaw.

The court rejected the City's position that the plaintiffs' development permit application was incomplete, and found that the plaintiffs' claim in negligence was made out. In coming to that conclusion, the court made a number of key findings. Firstly, the court found that the City's process of assessing development permit applications was an operational and not a policy decision, and therefore was not immune from judicial scrutiny. Secondly, applying the *Anns/Cooper*[1] analysis, the court found that there was a sufficient relational proximity between the City and the plaintiffs for a *prima facie* duty of care to arise. The court was satisfied that it was foreseeable that excessive delay in making a final decision would allow the City to avoid paying compensation that it would otherwise have had to make – in fact the court ultimately found that avoiding the requirement to pay compensation (through the adoption of the bylaw designating the area as a heritage protection area) was the reason the City delayed in processing the plaintiffs' application.

Additionally, the court held that the City had acted in *bad faith* in its consideration of the plaintiffs' application, and that this was convincing evidence of the City's failure to adhere to the requisite standard of care for processing permit applications, being that of a *reasonably competent municipality*.

The court also rejected the City's argument that there were residual policy concerns that weighed against the imposition of a duty of care. Among the City's concerns was that imposing legal guidelines would take the place of the policy adopted by Council, and would result in a *de facto* rewriting of the City's Zoning and Development Bylaw. In relation to this argument, the court stated:

The relevant municipal legislation includes provisions that attempt to provide structure to the permit application process. It cannot be argued that the existing legislation intends for the City to let permit applications languish indefinitely, therefore I fail to see how requiring finality would modify the legislative framework or create inconsistency.

The court dismissed the plaintiffs' request for a mandamus order compelling the issuance of a development permit, on the grounds that it would have been open to the City to refuse the permit in favour of protecting the house (through the adoption of a heritage designation bylaw).

While not making any findings as to the extent of the damages the plaintiffs were entitled to, the court held that the plaintiffs were entitled to damages for economic loss.

Should local governments be concerned? What are the lessons to be learned from this case?

The case involved an application for a development permit under the provisions of the *Vancouver Charter*. The *Vancouver Charter* allows Vancouver City Council to adopt bylaws prohibiting a person from undertaking any development unless a development permit is obtained, and in this case the authority to issue the permit had been delegated to the Director of Planning. This is not the same system of development permits that is established under the *Local Government Act*. According to the British Columbia Court of Appeal, the issuance of a development permit under the *Local Government Act* is a legislative decision that does not attract a duty of care in negligence law: *Birch Builders Ltd. v. Esquimalt (Township)* (1992) 46 M.P.L.R. (2d) 104. It is far from certain that the *Wu v. Vancouver (City)* analysis would apply to a local government's consideration of a statutory development permit under the *Local Government Act*.

The *Wu v. Vancouver (City)* analysis *could* apply to a local government's consideration of building permit and business licence applications. One factor that influenced the court's findings was that the City had published a bulletin which set out the City's practices and pre-application procedures for development in the Shaughnessy area, as well as for the City's heritage evaluation process. The City's own policy suggested a typical 10 – 14 week process leading to a decision of the Director of

Planning. The City's consideration of the plaintiffs' application extended over a far greater time period, and a decision was never made.

The finding of bad faith was obviously significant to the court's findings, and evidence that a local government has established reasonable policies and procedures and has followed those procedures should be a complete answer to a similar claim of bad faith.

One concern is whether the court's decision that development applications must be processed in a "reasonable time", and in accordance with the standard of a "reasonably competent municipality", could limit a local government's ability to establish policies, processes and timelines for development applications. Financial and budgetary limitations are obvious factors that can influence true "policy decisions", which under current case law are supposed to be immune from review under ordinary principles of negligence law. The time lines within which applications can be processed will vary according to the size of the local government, the resources available to it, and the relative complexity of the application. It is not clear whether in judging the actions of a local government against the standards established in *Wu v. Vancouver (City)*, a court would be free to substitute its own view of what constitutes a "reasonable time" for processing an application, for that of the local government. There is some indication in the judgment that this may not be an issue – Madam Justice Murray does state that the local government's duty is to make a final decision within a reasonable time, and accordance with the "applicable statutory framework". That statement should leave it open to local governments to establish their own policies and procedures, as long as they do so within the statutory framework of the *Local Government Act* and *Community Charter*.

In light of *Wu v. Vancouver (City)*, we recommend that local governments consider the following risk-management measures:

- A review of internal procedures for processing development applications – ensure that any stated or estimated processing times

are practically achievable.

- Consider building additional time into internal application and approval processes to allow for contingencies.
- Review how application procedures are communicated to the public, and ensure that the possibility of delays in the processing of an application is clearly communicated.
- Consider the inclusion of disclaimer language on application forms so that the applicant understands the local government does not guarantee a final decision will be made within any specific time period.
- Ensure that a policy or departmental culture commits to timely communication with the applicant, including communication of delays in the application process, and follow through on that commitment.
- Ensure that applications can be processed well within any time limits set by bylaw, so that applications do not expire prior to the local government being able to complete its consideration of the application.
- If the local government is considering changes to bylaws that might affect an in-stream application, seek legal advice.
- Consider whether policies and procedures for processing development applications are in line with "best practices" followed by other local governments of a similar size.
- Consider having the council or board endorse application review procedures and timelines in the form of a "policy decision" that might provide grounds for distinguishing *Wu v. Vancouver (City)* in a future case.

[1] See *Cooper v. Hobart*, 2001 SCC 79 (S.C.C.)

Previous Post »