Date: 19981113
Docket: S627
Registry: Powell River

# IN THE SUPREME COURT OF BRITISH COLUMBIA



BETWEEN:

**BRIAN MULHOLLAND and JEAN MULHOLLAND**

PLAINTIFFS

AND:

**JACK VAN ZWIETERING**
**doing business as**
**JACK VAN ZWIETERING CONSTRUCTION**
**and**
**CORPORATION OF THE DISTRICT OF POWELL RIVER**

DEFENDANTS

## REASONS FOR JUDGMENT

## OF THE

## HONOURABLE MR. JUSTICE BURNYEAT

## (IN CHAMBERS)

| | |
|---|---|
| Counsel for the Plaintiffs: | M.R. Giroday |
| Counsel for the Defendant District of Powell River: | D.J. Smith |
| Place and Date of Hearing: | Powell River, B.C. October 26, 1998 |

[1] The defendant, Corporation of the District of Powell River, applies pursuant to Rule 18A of the Rules of Court to dismiss the claim of the plaintiffs against it. The amended statement of claim alleges that the municipality had a duty to inspect the lands and buildings of the plaintiffs to ensure that the construction project being undertaken by the defendant, Jack Van Zwietering Construction, conformed with the National Building Code, the British Columbia Building Code and the Municipal Bylaws and Regulations. The plaintiffs say the municipality was negligent in the performance of the inspection of the construction project in failing to require Van Zwietering to place and construct their new home in a manner which would ensure the safe, comfortable and proper access to the house and its garage. The plaintiffs say that they are entitled to damages as they will incur a loss on sale of the property because of "restricted use and occupancy of the residential property including interrupted access and egress by way of the driveway under certain weather conditions, restricted access so that elderly and disabled people are unable to attend the residential dwelling, inability to have elderly relatives residing in the residential dwelling and loss of use of the garage premises from time to time."

[2] In their amended statement of defence, the municipality denies that the driveway access to the plaintiffs' residence does not comply with its applicable bylaws and that, in any event, it had no duty to inspect the driveway access of the

plaintiffs' residence prior to issuing an occupancy permit and undertook no such inspection. The municipality also says that it was not given written notice of the time, place and manner in which the said damage was sustained in accordance with the provisions of ss.754 and 755 and of the ***Municipal Act*** so the claim of the plaintiffs is statute barred.



**SEQUENCE OF EVENTS**

[3] The plaintiffs own a home in a subdivision created in 1975. The subdivision consists of 68 building lots. At the time of the approval of the subdivision, Bylaw number 357 adopted in 1963 was in effect. There is nothing in that bylaw which regulates the grades of driveways on residential property. While minimum widths of roads, lanes and walkways are set out in the bylaw, there are no provisions relating to the grades of those roads, lanes or walkways.

[4] The plaintiffs entered into a construction contract with Jack Van Zwietering Construction in 1993. Their lot is on Leslie Crescent and the adjacent homes were relatively level with Leslie Crescent as fill was added to the adjacent lots before those homes were built. The plaintiffs say that they made it clear to Mr. Van Zwietering that their residence: "... was to be constructed in a similar manner to the residences to the south of our property." No fill was placed on their lot so that their home lies well below the residences to the south of

them and well below Leslie Crescent. As a result, the driveway to their garage is very steep.

[5] A building permit for this property was issued on April 13, 1993. According to the records of the Building Department, inspections were carried out by a building inspector at the property on the following dates:

(a) May 3, 1993 - excavation and footing inspection;

(b) May 25, 1993 - drain tile inspection;

(c) June 22, 1993 - framing, rough plumbing, water test inspection;

(d) August 23, 1993 - final inspection.

A final occupancy permit was issued to the plaintiffs on September 1, 1993.

[6] On May 10, 1995, the solicitor for the plaintiffs advised the municipality about the "serious access and egress problem" relating to the property and requested that the municipality allow access to its records of inspection "... of this recently completed construction and in particular the Certificate of Occupancy." There was also a request for a conference with the building inspector who was responsible for the project.

[7] On May 23, 1995, a letter was forwarded from the solicitor for the plaintiffs serving notice on the municipality pursuant to "Section 55 [sic] of the Municipal Act" and advising that the plaintiffs had "learned that the driveway to their new

residence does not conform with municipal bylaws." The letter concluded: "This Certificate [of occupancy] should not have been issued and the construction of the residence should have been held up pending resolution of access to the double garage at the front of the residence."



**STATUS OF THE DRIVEWAY OF THE PLAINTIFFS**

[8] The plaintiffs retained a land surveyor who reviewed the gradient levels of the driveway. Using a survey dated February 9, 1995, the land surveyor ascertained that the grade of part of the driveway which was on the plaintiffs' property varied between 16.9% and 25.8%. Regarding that portion of the driveway which was on city property, the land surveyor measured the grade at 28%. The plaintiffs therefore describe the part of the driveway on municipal property as being: "... the steepest and therefore the worst area of the driveway ... ."

[9] Vittorio Birtig, an "engineering technologist" for the municipality, went to the property to determine the grade of the part of the driveway which was on municipal property (from the property line of the plaintiffs' property to Leslie Crescent, a distance of 3.1 metres). He calculated the grade at that point to be 11.8% along the centre line. However, his diagram also indicates that the grade at the northern edge of the portion of city property is 2.8% and at the southern edge is 19%.

**MUNICIPAL ACT PROVISIONS**

[10] The provisions in the ***Municipal Act*** which were in effect for the periods in question were as follows:

> 754. All actions against a municipality for the unlawful doing of anything purporting to have been done by the municipality under the powers conferred by an Act of the Legislature, and which might have been lawfully done by the municipality if acting in the manner prescribed by law, shall be commenced within 6 months after the cause of action shall have first arisen, or within a further period designated by the council in a particular case, but not afterwards.
>
> 755. The municipality is in no case liable for damages unless notice in writing, setting forth the time, place and manner in which the damage has been sustained, is delivered to the clerk within 2 months from the date on which the damage was sustained. In case of the death of a person injured the failure to give notice required by this section is not a bar to the maintenance of the action. Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes there was reasonable excuse and that the defendant has not been prejudiced by it in its defence.

On October 31, 1997, ss.754 and 755 became ss.285 and 286 of the ***Municipal Act***.

**IS THE CLAIM OF THE PLAINTIFFS STATUTE BARRED?**

[11] In ***Middlemiss*** the ***Muller and Regional District of Central Okanagan, 33229*** (Kelowna Registry) (oral reasons for judgment July 23, 1998), Brenner J. dealt with the six month limitation period provided by s.285 of the ***Municipal Act***. The plaintiffs owned a home which they purchased on April 30, 1993 and which had received a final inspection on April 27, 1993. In July of 1993, there was a heavy rainfall and surface water entered the

house because the level of the ground around the house was graded towards instead of away from the house. As well, there were inadequate roof drainage facilities and the south foundation wall had imperfections which allowed water to enter the home. The owners wrote to the contractor during August, 1993 requesting a rectification of the deficiencies. Further problems were experienced early in 1994. Contact was made with the Deputy Chief Building Inspector who visited the plaintiff's home on February 2, 1994. A lawyer was consulted in the fall of 1994 and, on November 1, 1994, the lawyer wrote the Regional District providing notice under the ***Municipal Act***. Further notice was given on May 24, 1996 and the action was commenced in October, 1996.

[12] At para.24, Brenner J. summarized the law as follows:

> It is clear, in my view, that for the time to commence to run a plaintiff must not only have suffered damages, but must also, under s.286, be in a position to "give particulars of the time, place, and manner of the damages", and "be in a position to know that the municipality has committed some act or has omitted to do something which may make it liable in whole or in part for the damage sustained by the complainant." See *Grewal v. District of Saanich*, (1989) 45 M.P.L.R. 312 at 319.

[13] The plaintiffs took the position that it was not until an extensive report was received that they appreciated the full nature and extent of the construction deficiencies and structural defects with the home. Brenner J. noted that the plaintiffs were clearly aware of the defects in 1993 when they wrote a letter to the contractor requesting rectification and

that they were aware of a subsistence problem with respect to the house by February, 1994. In the circumstances, he held that the limitation period commence to run in February, 1994 and that, accordingly, the action against the municipality was out of time.

[14] In speaking on behalf of the majority in ***Kamloops v. Nielsen***, [1984] 4 W.W.R. 1 (S.C.C.), Wilson J. described the appellant (city) as accepting the proposition advanced at the Court of Appeal of British Columbia that the limitation period starts to run: "... from the date on which the plaintiff actually discovers the damage or should with reasonable diligence have discovered it." (At p.46.)

After discussing the state of the law in England, Wilson J. concluded that, in England, the defendant's negligence:

> ... has to have manifested itself in the shape of physical damage to the property, e.g., cracks or subsistence, before time starts to run for limitation periods.
>
> Once the damage has manifested itself it is ... immaterial when the plaintiff discovered or ought reasonably to have discovered it.

However, Wilson J. rejects the English authorities and concludes that the test in Canada remains:

> ... by postponing the running of time until the acquisition of knowledge or means of knowledge of the facts giving rise to the cause of action. (at p.50)

[15] The discussion in these decisions is pertinent to the question of when the time periods set out in ss.754 and 755 of the ***Municipal Act*** start to run. While the purpose of section 755 is to provide notice to a municipality so that it may correct the alleged complaint and so that it may investigate the cause of the damages, it is also important to balance those requirements against the possibility that a municipality will escape liability on "technical grounds." This was not the intent of this provision: ***West v. Montreal*** (1912), 9 D.L.R. 9 (Que. S.C.), and ***Killeleagh v. Brantford*** (1916), 38 O.L.R. 35 (Ont. C.A.). However, the purposes of both sections are to provide the municipality with some certainty as to what claims may be brought against it. While the limitations set out in these sections are more stringent than are set out in many other statutes, there is a long history of Canadian courts upholding these deadlines if the facts support the proposition that the plaintiffs had actually discovered the damage or could have, with reasonable diligence, discovered the damage.

[16] In this case, the problem with the driveway was immediately visible to the plaintiffs. Fill had not been added to the lot in accordance with their request. Accordingly, their house was well below where they thought it would be and well below the houses on adjacent lots. As a result, their driveway came down off Leslie Crescent at a steep grade in

order that it could meet up with the entrance to their garage. While the exact grade of the driveway may not have been known to the plaintiffs in 1993, the steepness could not have been missed by them when they took occupancy of their new home. Knowing of the damage when they took possession in September, 1993, they waited some 20 months before their solicitor wrote on May 10, 1995 and on May 23, 1995 to provide the notice required under s.755. Under the test that is set out in the ***Kamloops v. Nielsen*** decision or even under the more stringent test set out in ***England***, it is clear that the plaintiffs did not take the steps required of them even though they were fully aware of the damage complained of. Knowing what they did, they did not commence an action within the six month time period stipulated under s.754 of the ***Municipal Act***. Having not provided notice and having not commenced an action within the time periods set out in ss.754 and 755 of the ***Municipal Act***, the plaintiffs are not able to maintain their action against the municipality.

[17] While I cannot find that Powell River has been prejudiced in its defence by virtue of the delay, I am satisfied that the plaintiffs have not advanced a "reasonable excuse" for their delay in providing notice and, accordingly, this is not an appropriate case to relieve the plaintiffs from their failure to provide the notice required under s.755 of the ***Municipal***

***Act***. There was no suggestion that municipal council had designated a time beyond six months and, accordingly, the six month limitation period provided by s.754 applies. As well, it is clear that the plaintiffs are not in a position to rely upon s.21.1 of the ***Law and Equity Act*** for relief: see ***Lloyd v. Richards*** (1985) 67 B.C.L.R. 22 (B.C.S.C.). Accordingly, the claim of the plaintiffs against the defendant, Corporation of the District of Powell River, is dismissed.



[18] Even if I am incorrect in this finding, I am satisfied that there was no duty imposed upon Powell River to inspect the grade of the portion of the driveway which was on the property owned by the plaintiffs or to warn the plaintiffs of the steep grade of their driveway.

**DUTIES OWED BY A MUNICIPALITY TO AN OWNER**

[19] In ***Kamloops***, supra, Wilson J. described the obligations on a municipality as follows:

> The by-law prohibited construction without a building permit, provided for a scheme of inspections at various stages of construction, prohibited occupancy without an occupancy permit and, perhaps most important, imposed on the Building Inspector the duty to enforce its provisions.
>
> It seems to me that, applying the principle in *Anns*, [*Anns v. Merton London Borough Council* [1978] A.C. 728] it is fair to say that the city of Kamloops had a statutory power to regulate construction by by-law. It did not have to do so. It was in its discretion whether to do so or not. It was, in other words, a "policy" decision. However, not only did it make the

> policy decision in favour of regulating construction by by-law, it also imposed on the city's Building Inspector a duty to enforce the provisions of the by-law. This would be Lord Wilberforce's "operational" duty. Is the city not then in the position where in discharging its operational duty it must take care not to injure persons such as the plaintiff whose relationship to the city was sufficiently close that the city ought reasonably to have had him in contemplation? (at p.27)
>
> The city's responsibility as set out in the by-law was to vet the work of the building and protect the plaintiff against the consequences of any negligence in the performance of it. In those circumstances it cannot, in my view, be argued that the city's breach of duty was not causative. The builder's negligence, it is true, was primary. He laid the defective foundations. But the city, whose duty it was to see that they were remedied, permitted the building to be constructed on top of them. The city's negligence in this case was its breach of duty in failing to protect the plaintiff against the builder's negligence. (at p.29)

In accordance with the test set out in ***Kamloops***, it is therefore necessary to ascertain, firstly, whether this municipality used the statutory power available to it to regulate construction and, if so, what construction and secondly, whether it made a policy decision to impose on the municipality's building inspector a duty to enforce the provisions of the bylaw so as to create an "operational duty" owed to the plaintiffs as owners of the property being inspected.

**BYLAW 989 (PASSED 1980)**

[20] At the time the plaintiffs' house was constructed, bylaw 989 dealing with the administration and enforcement of the Building Code was in effect. The recital to that bylaw noted:

> WHEREAS Section 740 of the Municipal Act, R.S.B.C. 1979, c.290 and Regulations made pursuant to that section provides that the National Building Code of Canada 1977 as amended and as adopted by the Province and the British Columbia Building Code 1972 as amended apply to The Corporation of the District of Powell River.

Under the bylaw, "Building" was defined as meaning any structure or portion of a structure which is used or intended for supporting or sheltering any use or occupancy.

[21] Under s.2.1 of the bylaw, the provisions of the bylaw were to apply to:

> (a) the erection, construction, maintenance, moving, demolition and safety of any building; ....
> (c) the design and construction of any building constructed on site or assembled as a factory-built unit or component;

[22] Under ss.4.3 and 4.4 of the bylaw, the duties of the building inspector were described as follows:

> The Building Inspector shall receive applications, and approve any drawings and specifications and shall issue Building Permits for the construction, alteration, removal or demolition of any building.
>
> The Building Inspector shall
> (a) inspect all buildings or structures during the course of construction, alteration or repair;

. . .

(d) hear and determine any question which relates to whether any method of construction or any materials used in the erection, alteration, or repair of any building conform to the requirements and provisions of this by-law.



[23] There was nothing in this bylaw which dealt with the grades of driveways or the grades of roads within a subdivision. In the absence of such provisions, there was no duty imposed on municipal employees to check the grades of roads or driveways or the access between the two. As well, it is clear that the bylaw relates only to "buildings." There is nothing in the bylaw which would suggest that the bylaw in any way dealt with what might surround a building on a lot, including such things as sidewalks, driveways, etc.

[24] The 1992 British Columbia Fire Code and British Columbia Building Code were in evidence. The National Building Code at the time was not. Counsel for the plaintiffs submitted that the recital in bylaw 989 had the effect of incorporating the National Building Code and the British Columbia Building Code into the duties of inspection imposed under ss.4.3 and 4.4 of the bylaw. Firstly, it should be noted that there is nothing in the recital that incorporates the provision of the British Columbia Fire Code. Secondly, there is nothing in the British Columbia Building Code which incorporates by reference the provisions of the British Columbia Fire Code. Thirdly, there

is nothing in either the British Columbia Fire Code or the British Columbia Building Code which establishes or deals with the grade of that portion of a driveway which is on private property or that portion of a driveway which is on city property.

[25] The British Columbia Fire Code (1992) defines the "means of egress" as:

> ... a continuous path of travel provided for the escape of persons from any point in a *building* or contained open space to a separate *building*, an open public thoroughfare, or an exterior open space protected from fire exposure from the *building* and having access to an open public thoroughfare. *Means of egress* includes *exits* and *access to exits*.

Section 2.7.1.1 of the Fire Code provides that the means of egress: "... shall be provided in buildings in conformance with the B.C. Building Code."

[26] The British Columbia Building Code sets various requirements regarding gradients. Section 3.4.6.6 deals with the maximum gradient of "ramps" within buildings. Section 3.4.6.6.(1)(d) also sets the maximum gradient for "every exterior ramp" at 10%.

[27] While the definition of "egress" contained in the British Columbia Fire Code may well include a driveway, it is clear

that the "means of egress" referred to in that Code and the requirement that the means of egress be in conformance with the British Columbia Building Code only refers to means of egress within buildings. There is nothing in the British Columbia Fire Code which deals with the grade of continuous paths of travel once a person is outside a building.

[28] Even assuming that the reference in s.2.7.1.1 of the British Columbia Fire Code is to means of egress inside of and outside of buildings, there is nothing in the British Columbia Building Code dealing with driveways or sidewalks. The Building Code only deals with "ramps" within buildings and the maximum gradient for "every exterior ramp." The use of the word "ramp" cannot be extended to mean a driveway, sidewalk, lawn or any other surface over which people might travel in order to move from a building to an "open public thoroughfare." Accordingly, the recital making the National Building Code of Canada and the British Columbia Building Code applicable to this municipality does not affect the question of the duty imposed on a building inspector to inspect the grades of streets, driveways on private property or that part of the driveway which is in between.

[29] Bylaw 989 also must be restricted to buildings: their erection, construction, maintenance, moving, demolition and

safety. The common law right to build a building on a lot and to develop that lot cannot be taken away or affected by a statute or a bylaw unless the bylaw is expressed in clear language: see, for instance, ***Re Bridgman and Toronto*** [1951] O.R. 489; ***Orpen v. Roberts*** (1924) 26 O.W.N. 367 aff'd at [1925] S.C.R. 364; and ***Glover v. Sam Kee*** (1914) 20 B.C.R. 219. The provisions of Bylaw 989 would not have allowed the building inspector to refuse an occupancy permit on the basis that the driveway was too steep or not steep enough, was composed of inappropriate material or was other than in accordance with the desires of the municipality as expressed by the building inspector. In the absence of a provision which would regulate the grades of driveway on private property or the grades of that part of a driveway which is between the driveway on private property and a street, the municipality could not regulate the driveway of the plaintiffs.

[30] At the same time, in the absence of a provision requiring the building inspector to inspect anything other than "the building" - its "erection, construction, maintenance, moving, demolition and safety" - the plaintiffs could not look to the municipality because the building inspector failed to inspect and draw to their attention of the plaintiffs the grade of their driveway. There was no obligation imposed by bylaw 989 requiring the building inspector to check to see whether this

driveway was in accordance with the desires of the plaintiffs. Accordingly, the municipality is correct in submitting that there was no duty to inspect any part of the driveway leading to the plaintiffs' residence prior to issuing an occupancy permit. Accordingly, in the absence of a duty to inspect and in the absence of a duty to warn, the municipality cannot be found liable to the plaintiffs. The question that then arises is to the extent to which a bylaw passed in 1989 affects this subdivision created in 1975.

**BYLAW 1331 (1989)**

[31] This bylaw was passed in 1989 and remains in effect. It is entitled a "Subdivision Servicing Bylaw" and deals with topics such as lot standards, dedication of park land, highways, servicing requirements, and service levels. As part of Schedule "A" (design criteria, specifications, and standard drawings), there are provisions dealing with the design criteria of roads and of sidewalks. The bylaw sets out the "maximum longitudinal grades" relating to local residential streets, limited local streets, collectors, industrial and commercial streets, and arterials. For instance, the maximum grade for a "local residential street" is set at 12% (s.2.5.3). Under s.2.5.1.5 ("Driveways"), there is a provision that:

> Each lot created by development must have sufficient road frontage to accommodate the construction of a standard driveway access to the following specifications, and the applicable standard drawing: ...

No "maximum longitudinal grades" are set out for driveways.



[32] However, "driveways" are mentioned in the design criteria for roads and sidewalks. For instance, there is a provision that driveways in urban developments with "barrier style curbs" will require curb and sidewalk "let downs" to "Municipal Standards." There is also a provision that all urban residential driveways will have a minimum width of 4.0 metres and that driveways located on corner lots should be no closer than 15.0 metres from the corner of the lot nearest the intersection. There is further provision that: "All driveway accesses shall be designed to permit the appropriate vehicular access for the zone, without "bottoming-out" or "hanging-up."

[33] Included within the design criteria for sidewalks, curbs, etc. are the following provisions:

> 2.6.3 The grade of the sidewalk(s) shall be consistent with the grade of the road.
>
> Residential driveway accesses shall be restricted to a minimum 10.0m from the property line adjacent to the intersection with an arterial road, and no closer than 6.0m from any intersection as measured from the property line.

[34] Dealing further with "sidewalks, s.3.6.2.1(p) provides:

> The property edge of sidewalk crossings shall be depressed, if necessary, a maximum of 100mm to meet existing driveway levels. The length of private crossings shall be not less than 4m; ...

> All crossing lengths specified shall be measured at the property edge of the sidewalk.



[35] Counsel for the plaintiffs relies on s.2.5.1.5 of the bylaw in support of the proposition that there is a duty on the building inspector to inspect the grade of both parts of the driveway. Section 2.5.1.5 provides that:

> The maximum grade on a driveway access to a local road shall be 15%. The maximum grade for a driveway access to collector and arterial roads, and in all commercial and industrial zones, shall be 10%.

[36] The submission of the municipality regarding the effect of bylaw 1331 is that, firstly, the effect of the bylaw is not retroactive and, secondly, in any event, s.2.5.1.5 of the bylaw does not deal with residential driveways but deals only with that portion of a driveway which is found on municipal property. Accordingly, any references to "driveway access" do not include the portion of the driveway which is on private property.

[37] The submission of the plaintiffs is twofold: bylaw 1331 was in effect when their lot was developed and therefore applies and s.2.5.1.5 of the bylaw deals not only with that portion of the driveway which is on municipal property but also that portion of the driveway which is on their property. The plaintiffs submit that, because s.2.5.1.5 applies to their

property, the building inspector was obligated to assure himself that the maximum grade on all of the driveway was no more than 10%, that he had a duty to warn them about the excess grade of their driveway and that the occupancy permit should not have been issued in view of the maximum grades on the driveway being exceeded.

[38] The Municipality relies on s.993 of the ***Municipal Act*** to say that bylaw 1331 does not have a retroactive affect. Section 993 deals with applications for subdivision and provides that any new bylaws will not be retroactive if an application for subdivision has been received and the subdivision process has been completed within 12 months. Counsel for the municipality cites the decisions in ***Cenam Constructions Ltd. v. British Columbia (Ministry of Transportation and Highways)*** (1995), 5 B.C.L.R. (3d) 214 (B.C.S.C.) and ***Fernco Development Ltd. v. Nanaimo (City)*** [1990] B.C.J. (Q.L.) No. 2906 (B.C.C.A.) in support of its submission. That section and those decisions deal with applications for subdivision.

[39] Section 993 is not applicable to the question of the status of buildings being constructed on lots within a subdivision when new building bylaws are enacted. Section 970 of the ***Municipal Act*** provides protection for existing buildings

or buildings which are being constructed in accordance with building permits issued prior to the adoption of a further building bylaw. A review of that section and the decisions dealing with that section allow me to conclude that bylaw 1331 would apply to any applications for building permits made after the enactment of the bylaw in 1989.

[40] In this case, bylaw 1331 did not have a retroactive effect on the subdivision requirements for this 1975 subdivision. However, while bylaw 1331 could not retroactively affect the maximum longitudinal grades of the streets, curbs, sidewalks and the space between the local roads and the lot lines of existing lots already created in the subdivision, it would have been possible for bylaw 1331 to affect the grades of driveways on lots not already developed and not already subject to building permit applications. Accordingly, it is necessary to review bylaw 1331 to ascertain whether the maximum grades of that portion of the driveway on the lot of the plaintiffs was regulated and affected by the provisions of bylaw 1331.

[41] There are several affidavits filed on behalf of the municipality relating to this question. In his affidavit, Jim Greenwood, Director of Engineering Services, indicates that the following is in effect at the present time:

(a) "Generally, bylaw 1331 regulates the construction of such services up to the property line of individual lots, but does not regulate the construction on private property of services such as sewer lines or storm drains which connect to municipal services."

(b) "Powell River has no bylaw in place which regulates the construction of driveways on residential property, or the gradient at which such driveways can or should be constructed."

[42] Gino Francescutti, Chief Building Inspector for the Municipality, deposes as follows:

> At the time the plaintiffs' was constructed, the Powell River Building Department did not conduct inspections to check driveway gradients on private property at any time prior to the issuance of an occupancy permit. The gradient of driveways on residential property is not regulated under the provisions of the British Columbia Building Code, and the Building By-law did not require the building inspector to inspect the gradient of driveways being constructed on residential property.
>
> ... At the time of the construction of the plaintiffs' residence the Powell River Building Department did not review or inspect the elevation of the main floor of a house or garage, and its relationship to the elevation of the surrounding property, or its relationship to the elevation of the street, either at the building permit approval stage or during inspections. Powell River's Zoning By-law contains regulations for the minimum setback of buildings from property lines and for the maximum height of buildings. Those provisions are enforced by the District's Building Department and the District's Planning Coordinator, and the plaintiffs' residence complies with those regulations. However, as of 1993 the elevation of the main floor of a house or garage in relation to the surrounding property was considered by the Building

> Department to be a matter for the owner and builder to decide upon.



[43] The position taken by the plaintiffs is that the municipality has interpreted its own bylaw to regulate the maximum grade for that part of the driveway which is not on municipal property. In support of that submission, they cite a portion of council minutes dated March 11, 1996 where variance of the provisions of bylaw 1331 was allowed: "... by waiving the 15% maximum grade requirement for a private driveway." There is not sufficient information before me which would allow me to conclude that the municipality is interpreting and enforcing bylaw 1331 in this way. In any event, if it is interpreting it in this way, it is interpreting it wrongly. Any such interpretation and enforcement would be subject to a successful challenge.

[44] While there are provisions dealing with the width of and the location of "driveway accesses", it is clear that these references all relate to that portion of the driveway which is between the lot line and the local road. This part of the driveway is on municipal property. If it had been the intention of the municipality to deal with all portions of the driveway, then the words "access" or "accesses" would be superfluous. As well, all references to "driveway accesses" relate to that part of the driveway which is on municipal

property. The references are to frontages necessary to accommodate driveways, to sidewalks, to let-downs, and to the relation of driveways to municipal roads and to intersections. There is nothing in bylaw 1331 which would allow me to conclude that this bylaw was intended to deal with that part of the driveway which is on private property even though bylaw 1331 governed the building which was constructed on behalf of the plaintiffs in 1993.

[45] However, the provisions of bylaw 1331 apply to the "driveway access", being that portion of the driveway which is on municipal property. Accordingly, the municipality must comply with all sections of the bylaw dealing with "driveway access."

[46] The evidence before the Court was that the land surveyor retained by the plaintiffs measured the grade of the driveway access at 28% and the employee of the municipality measured the grade at the centre line of the driveway access at 11.8% (at the same time noting that the gradient ranged from 2.8% at the northern edge of the driveway access to 19% at the southern edge of the driveway access). Section 2.5.1.5 provides that the "maximum grade on a driveway access to a local road" must be no more than 15%. There is nothing in that section which would lead me to conclude that it is the "centre line" of the

driveway access which is to be measured. Rather it is the maximum grade on a driveway. This can only be interpreted as referring to the maximum grade on any part of a driveway access and not only to the grade at the centre line of the driveway access.

[47] Because it was contained within bylaw 1331, there was a duty imposed upon the building inspector to assure himself that the maximum grade on the driveway access was no greater than 15%. The plaintiffs can require the municipality to bring the maximum grade on the driveway access adjacent to their property in accordance with the provisions of section 2.5.1.5 of bylaw 1331. However, that is not the matter which is before the court in this action. Rather, the plaintiffs' claim for damages that will occur in the future on the sale of their property. There is no part of their claim which relates to damages already suffered as a result of the "driveway access" being other than in accordance with bylaw 1331. Nor is there anything to suggest that the plaintiffs have already suffered damages as a result of their driveway access being other than in accordance with the provisions of s.2.5.1.5 of bylaw 1331. There is also nothing to suggest that the property is about to be sold. The municipality must rectify any grade problem which may exist on the driveway access prior to sale.

[48] There is also nothing to suggest that the failure of the building inspector to draw to their attention any deficiencies regarding the driveway access in any way led to the plaintiffs to assume that the grade of the portion of the driveway on their property was appropriate and in accordance with their wishes. It would be speculation to assume that and nothing is said by the plaintiffs in that regard. Any deficiencies in the driveway access have not in any way affected or exacerbated the damages which may or may not be available to the plaintiffs as against the defendant, Mr. Van Zwietering. Any deficiencies in the driveway access have not caused damage to the plaintiffs. Any damages they have flow from the actions of Mr. Van Zwietering. There was no duty imposed upon the municipality to monitor the arrangement reached between the plaintiffs and Mr. Van Zwietering as it related to whether fill was added to the lot or whether, as a result of the failure of Mr. Van Zwietering to add fill, the portion of the driveway on property of the plaintiffs had a grade which was in excess in the opinion of the plaintiffs or in excess of the grade of 15% which was in effect for the driveway access adjacent to their property.

[49] In the circumstances, the claim of the plaintiffs as against the defendant, the Corporation of the District of Powell River, is dismissed. That defendant will be entitled to

its their costs on a party and party (scale 3) basis. The trial of the action of the plaintiffs against the defendant, Jack Van Zwietering is scheduled to proceed this month. Accordingly, I will leave to the discretion of the trial judge whether it is appropriate in these circumstances that an order be made pursuant to the provisions of Rule 57(18) of the *Rules of Court*.

"G.D. Burnyeat, J."

Mr. Justice Burnyeat