File No: C37299
Registry: Penticton

In the Provincial Court of British Columbia

Civil Division

BETWEEN:

MARIANNE ARPAGAUS

CLAIMANT

AND:

REGIONAL DISTRICT OKANAGAN SIMILKAMEEN

DEFENDANT

REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE KOTURBASH

COPY

Appearing on her own behalf by teleconference:	M. Arpagaus
Counsel for the Defendant by teleconference:	L. Afonso
Place of Hearing:	Penticton, B.C.
Date of Judgment:	May 5, 2014

160408

[1] THE COURT: In 2007, the claimant, Ms. Arpagaus, purchased a residential lot in the Regal Ridge development subdivision located within the boundaries of the Regional District of the Okanagan and Similkameen. At the time of her purchase, Regional District bylaws provided that every proposed subdivision in the District required written confirmation that arrangements had been made to supply power to each parcel or lot created within the subdivision.

[2] The bylaws also required developers to post security for all works and services to be installed by the developer before the subdivision could be approved by the [final approving] local authority who is the Ministry of Transportation. The amount of the deposit was to be 120 percent of the estimated construction costs of the services.

[3] On the strength of a letter from FortisBC stating they were prepared to supply service to the subdivision, Mr. Juch Yuk [phonetic], on behalf of the Regional District, concluded the developer had complied with the bylaw to arrange for the supply of power. Mr. Yuk did not seek a security deposit to ensure completion of the electrical installation. Electrical power was installed to the subdivision with an electrical line travelling underground through the claimant's lot. Unfortunately, before the installation of the transformer box

which would have enabled the claimant to link up to the underground line, the developer went bankrupt.

[4] The claimant argues that the Regional District bylaws required each individual lot to be supplied with power which meant the installation of a transformer box and that the District should have obtained a security deposit to ensure compliance.

[5] Ms. Arpagaus is claiming $9,024.68, the cost she was quoted by Fortis to install a transformer to provide electrical services to Lot 19, which is hers, and 20 in the subdivision. She is also claiming $3,075 for surveyor fees to create a right-of-way from the transformer junction box on Lot 17 that connects up to the electrical transmission line running through the right-of-way, and her filing fees for a total of $12,255.68.

[6] The Regional District argues that the bylaws were a nullity because they exceeded the lawful jurisdiction of the District.[; there] There was no duty on the District to enforce the bylaw and,[;] even if there was a duty, the bylaw was complied with by the developer.

[7] On January 31, 2006, the Ministry of Transportation, the final approving agency for the subdivisions, provided the Regional District with a preliminary subdivision application

known as the Regal Ridge Development. The proposed development was for a subdivision of acreages.

[8] On July 5, 2006, Mr. Yuk, the subdivision supervisor for the District, sent a letter to the development approval clerk for the Ministry of Transportation outlining some of the District's requirements for the subdivision. Under the heading, "Electrical Street Lighting Requirements," he writes:

> The applicant must provide written confirmation from the local electrical provider when the proposed lots can be serviced with electrical power as specified in Bylaw Section 6.8, see attachment. Any requirements for street lighting shall be in accordance with the Bylaw Section 6.7, see attachment.

[9] At the time of the application, the District Subdivision Servicing Bylaw 2000 was in force. Section 6.7 and 6.8(a) of the bylaw provide that where street lighting, underground or overhead wiring are to be provided, they shall be located, constructed, and otherwise meet the standards found in Schedules A and/or B of the bylaw.

[10] [Schedule] Section A to s. 7.3 of the bylaw provides that where underground or overhead power services are provided that their installation must conform to the requirements of the utility owner, in this case, FortisBC. Schedule B of the bylaw sets out whether the electrical power provided can be overhead or underground based on the parcel size. Section 6.8

of the bylaw reads:

> Every proposed subdivision shall have written confirmation that arrangements have been made to supply electrical power to each parcel being created by the subdivision. This confirmation shall be provided to the Regional District with the proposed plan of subdivision.

[11] Section 7 of the bylaw also provides for the deposit of security by the developer with the District. The section reads:

> Where:
> a) all works and services excluding roadworks under the jurisdiction of the Ministry of Transportation and Highways required to be constructed or installed at the expense of the subdivider are not constructed or installed, before the Local Authority approves the subdivision, security in the form of a cash deposit, or an irrevocable letter of credit from a financial institution acceptable to the Regional District, in the amount of 120% of the estimated construction cost as estimated by the Local Authority, shall be deposited with the Regional District . . .

[12] On June 26, 2006, Fortis provided written confirmation with respect to the Regal Ridge Subdivision to the District stating:

> At this time, we would like to confirm that we are prepared to supply service in accordance with our extension policy to the above-mentioned proposed subdivision utilizing existing plant in the area.

[13] According to Mr. Yuk from Fortis -- according to Mr. Yuk, the District has always accepted similar type letters from Fortis as confirmation that arrangements have been made to

supply power in accordance with s. 6.8 of the bylaw. Although s. 7 of the bylaw provides for a security deposit for all services and works to be installed by the developer, the District did not obtain security deposits for the installation of power.

[14] Section 6.8 of the bylaw sets out what the District requires with respect to electrical power. Prior to 2000, the bylaw only required that any underground wiring be located, constructed, and otherwise meet the standards set out in Schedules A and B. The bylaw did not require, as it does now, a further requirement of confirmation that arrangements have been made to supply electrical power.

[15] According to Mr. Yuk, the District has never interpreted the bylaw as requiring the installation of such services. He further explained that the District only obtains a security deposit under s. 7 of the bylaw for services that it supplies and would be directly involved in the remediation of if the installation were incomplete or deficient. The purpose, he said, is to ensure that any services or any service that is hooked up to its own service infrastructure is properly installed to the right specifications and that money is available to fix any deficiencies.

[16] He also pointed out that since the District has no

authority over Fortis or any experience in the installation of electrical systems, it had no reason to obtain a security deposit in relation to the installation of power. Mr. Yuk also said that he has worked for four different local governments and a security deposit has never been obtained in relation to power or any other utility that the local government has no authority over. It only obtained security deposits for its own infrastructure.

[17] On August 22, 2006, Mr. Yuk sent a letter to the development approvals clerk at the Ministry of Transportation confirming that the applicant, Regal Ridge Developer, had provided proof of water and power for all the proposed lots in the subdivision and that the District was satisfied that the applicable subdivision servicing requirements had been met. Regal Ridge Development was given approval to proceed by the final approval authority for subdivisions by the Ministry of Transportation. The developer proceeded with the project. Underground electrical transmission lines were installed.

[18] On August 20, 2007, Ms. Arpagaus bought Lot 19 in the subdivision. The developer provided her with the developer's August 31, 2006, disclosure statement prior to the purchase. Section 3.1 of the statements reads:

> Electricity: The subdivision will be serviced with electricity by Fortis Canada and electrical services

> will be provided to each lot in the development. Electricity will be supplied to any lot in the subdivision on application for and payment of the usual application and hook-up charges by the purchaser.

[19] Although the developer installed underground electrical transmission lines, transformer boxes for all of the lots were not installed.

[20] On February 19, 2011, after learning that some of the property owners were applying for building permits, but did not yet receive an electrical connection, Mr. Yuk contacted the developer to find out if there were issues with Fortis completing the installation. The developer responded that almost all of the electrical servicing was underground and, unlike most developers who only bring their electrical services to the lot line, his company brought the services adjacent to the building site. He also described other policy changes at Fortis that slowed some of the progress.

[21] On October 14, 2011, the developer sent a letter to Regal Ridge property owners including Ms. Arpagaus that the records showed that their lots had not yet been electrified. The developer explained that because of recent policy changes at Fortis, Fortis was no longer paying for the installation of transformers and the developer was not in a position to absorb the cost of their installation.

[22] On January 9, 2012, John Nett, Ms. Arpagaus' partner, wrote to the Ministry of Transportation stating that the electrical and telephone services for the Regal Ridge Development had not been installed as stated in the disclosure statement provided by the developer and questioned how the subdivision could be approved without ensuring the installation of the utilities. He also asked whether the Ministry collected a security deposit to ensure their installation.

[23] The Ministry of Transportation replied by stating that the requirements associated with the degree of development might be specified by local government and that he should consult the District about any power servicing bylaws and remedies available. On March 10, 2012, Mr. Nett contacted Mr. Yuk and was told by Mr. Yuk that the District did and does not obtain security deposits for other service providers like Fortis.

[24] On May 12, 2013, Mr. Nett and Ms. Arpagaus sent a letter to the District asking for compensation and, on May 17, 2013, the District responded by stating it denied any responsibility for the costs of the electrical servicing to the lot. June 2013, the developer declared bankruptcy.

[25] Ms. Arpagaus, as I indicated earlier, is claiming

$9,044.68, the cost of the transformer that she was quoted by Fortis to provide electrical services to Lots 19 and 20 in the subdivision. She is also claiming $3,075 for surveyor fees to create a right-of-way from the transformer junction box in Lot 17 that connects up to the electrical transmission line running through the right-of-way, and her filing fees, for a total of $12,255.68.

[26] The issues before me are:

1. Is the bylaw *ultra vires*?

2. If the bylaw was legally enforceable, was the District duty bound to enforce it?

3. If the bylaw was legally enforceable and the District had a duty to enforce it, do any damages flow from the District's failure to obtain confirmation that arrangements were made to supply power and/or obtain a security deposit from the developer to ensure the installation of the service?

[27] Ms. Arpagaus argues that pursuant to s. 6.8, Schedule A, s. 7.3, and Schedule B, the District's bylaw, electrical power was required to be provided to each individual lot in the Regal Ridge subdivision by the subdivision's developer and further argues that s. 7 of the bylaw required the District to obtain a security deposit to ensure the proper installation of

electrical power to each lot.

[28] I agree with Ms. Arpagaus' interpretation that the bylaw does require the installation of power. If the purpose of the bylaw was not to require the installation of electrical power, there would be no identifiable purpose requiring confirmation of arrangements for the supply of the same.

[29] Furthermore, s. 6.8(c) of the bylaw states that the installation of natural gas services is optional, but does not use the same wording when it states [refers to] about the installation of electrical power. Schedule B also specifically provides that gas, cable, and telephone services are not a requirement of the subdivision. However, noticeably absent from that list is electrical power.

1. Is the bylaw *ultra vires*?

[30] The defendant argues that although the bylaw required the installation of electrical services, the District did not have the authority to require such services, except to the extent that the services were necessary for street lighting and, if an electrical distribution were provided, to require it to be underground.

[31] Local governments like Districts are creatures of statute and have no powers beyond those that are provided to them by the *Local Government Act*. A District cannot exercise any

powers which are not explicitly conferred on it by the Act or any other provincial statute. The District's authority for enacting Bylaw Number 2000 arises from s. 938 of the *Local Government Act* which reads:

> A local government may, by bylaw, regulate and require the provision of works and services in respect of the subdivision of land, and for that purpose may, by bylaw, do one or more of the following:
>
> (a) regulate and prescribe minimum standards for the dimensions, locations, alignment and gradient of highways in connection with subdivisions of land;
>
> (b) require that, within a subdivision, highways, sidewalks, boulevards, boulevard crossings, transit bays, street lighting or underground wiring be provided, and be located and constructed in accordance with the standards established by the bylaw;
>
> (c) require that, within a subdivision, a water distribution system, a fire hydrant system, a sewage collection system, a sewage disposal system, a drainage collection system ... be provided, located and constructed in accordance with the standards established in the bylaw.

[32] I agree with the District's position that the *Local Government Act* cannot be considered as authorizing the District to make bylaws requiring the provision of electrical services beyond what is provided for in s. 1(b) of the *Local Government Act*.

[33] In *Sundher v. City of Surrey*, 1995 CanLII 1235 (B.C.S.C.), Romilly J. considered the effect and

enforceability of a bylaw that exceeded the scope of a local government's authority. Mr. Justice Romilly concluded that where a legislative body passes a law that even slightly exceeds its jurisdiction, the law will be declared *ultra vires*. He went on to explain that a law that is *ultra vires* is a nullity and void *ab initio*. In other words, it is of no force and effect and neither rights nor liabilities can arise under [its] the purported authority.

[34] In *Welbridge Holdings Limited v. Winnipeg*, 1970 CanLII, (S.C.C.), the Supreme Court of Canada held that the enactment of bylaws that are *ultra vires* or beyond the scope of the governing body's legislative powers do not give rise to damages for a duty of care as long as the governing body exercises its powers in good faith.

[35] In *Dusevic v. Columbia Shuswap*, [1989] B.C.J. No. 668 (B.C.S.C.), the court points out that in cases like this where there is no evidence to suggest bad faith on the part of the District, good faith is to be assumed.

[36] I agree that the bylaw, to the extent that it requires the installation of electrical power to each lot, is *ultra vires*, void *ab initio*, and the District had no legal obligation to enforce it. It necessarily follows that if the District could not require the installation of electrical

services to each lot, it could not in turn require the developer to deposit security for the installation of the same.

2. Even if the bylaw was legally enforceable, was the District duty bound to enforce it?

[37] If I am wrong about the lawfulness of the bylaw, I must then determine whether the District was legally bound either by statute or the bylaw to enforce it. If it was duty bound to enforce it, damages can flow from its failure to do so. In *Froese v. Hik*, [1993] B.C.J. No. 731 (B.C.S.C.), Madam Justice Huddart explains that governing bodies like municipalities or Districts, unless they are acting in bad faith, do not have a duty to enforce a bylaw unless the bylaw or another statute states that such a duty exists.

[38] In the case at hand, the bylaw does not state that the District must enforce it. Again, as noted earlier, where there is an absence of evidence of bad faith, good faith will be assumed. There is no evidence that Mr. Yuk's decision to enforce the bylaw by accepting the letter from Fortis or his decision not to enforce the collection of a deposit for the installation of power was in any way motivated by bad faith.

3. If the bylaw was legally enforceable and the District had a duty to enforce it, do any damages flow from the District's

failure to obtain confirmation that arrangements were made to supply power and/or to obtain a security deposit from the developer to ensure the installation of the services?

[39] Finally, even if I were wrong about the lawfulness and the enforceability of the bylaw requiring the provision of electrical power to each lot, I am satisfied that, in fact, arrangements were made for the supply of power to each lot and, by installing power right through Ms. Arpagaus' lot, the developer complied with the requirements of the bylaw.

[40] The bylaw does not define what is meant by the supply of power to each lot. I am satisfied that the installation of electrical power to the lot line would have been sufficient. In this case, the installation went beyond what was required by the bylaw.

[41] If Mr. Yuk had insisted on 120 percent deposit for the provision of electrical services, I agree with the defendant that he would have been duty bound or the District would have been duty bound to return it upon confirmation that the electrical transmission line had been installed through Ms. Arpagaus' property.

[42] Therefore, it cannot be said that any damages flow from either the failure on the District's part to obtain a more definitive confirmation that arrangements had been made or

from its failure to insist on a deposit and I, therefore, dismiss the claim against the District.

[REASONS FOR JUDGMENT CONCLUDED]