



Date: 20080529  
Dockets: 28805  
Penticton Registry

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA**

**SMALL CLAIMS DIVISION**

Between:

James Barry SMITH and Eileen Patricia SMITH

Claimants

And:

THE TOWN OF OSOYOOS

Defendant

**REASONS FOR JUDGMENT  
OF  
HONOURABLE JUDGE G. G. SINCLAIR**

Date and Place of Hearing:

April 28, 2008  
Penticton, BC

Appearances:

Mr. and Mrs. Smith appeared on own behalf  
Emma Michielsen, Counsel for the Defendant

[1] Section 2 of the Small Claims Act dictates that the purpose of the Act is to have disputes resolved in a just, speedy, inexpensive and simple manner. I do that here to the best of my ability.

[2] Mr. and Mrs. Smith sue the Town of Osoyoos for damages for negligence and, although the pleadings do not specifically say so, for selective enforcement of the town's Zoning Bylaw.

[3] The issue is whether the town was negligent and whether fairness dictates that Mr. and Mrs. Smith should be successful in whole or in part.

[4] In 2005, Mr. and Mrs. Smith bought a lot in Desert Rose Estates, a 37 lot bare land strata development situate in Osoyoos. Desert Rose Estates is zoned R5-Manufactured Home Strata Development. Uses permitted in the R5-Zone are the following:

1. One manufactured home.
2. Home occupation.
3. Accessory buildings.
4. Recreational vehicles storage lot.

[5] The Osoyoos Zoning Bylaw also has a zone titled R4-Manufactured Home Park.

The permitted uses in R4 are:

1. Mobile Home
2. Manufactured Home
3. Home occupation.
4. Accessory buildings.
5. Recreational vehicle storage lot.

[6] The Zoning Bylaw defines manufactured home as follows:

Means any CSA approved single family dwelling built in a factory environment in one or more sections, intended to be moved to, and placed on a perimeter foundation, for occupation in a place other than of its manufacture.

[7] The Zoning Bylaw defines mobile home as follows:

Means a CSA approved structure excluding recreational vehicles, designed and manufactured as a Habitable Area that is designed and constructed to be moved from one place to another by being towed or carried.

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[8] CSA approved manufactured homes are designated A277. CSA approved mobile homes are designated Z240.

[9] Prior to April 15, 2006, Dennis Tomlin was the building inspector for the Town of Osoyoos. After that date, Neil Pagett became the building inspector.

[10] Mr. Tomlin testified that there were 18 surface mounted homes in Desert Rose Estates before Mr. and Mrs. Smith bought their lot. His evidence was that they were under his jurisdiction and that they accorded with the bylaw. In his interpretation, all mobile homes and modular homes are manufactured homes and the BC Building Code and the Canadian Standards Association allow for them to be surface mounted. Tomlin and his immediate superior, the then town planner, interpreted the Zoning Bylaw to mean that a perimeter foundation would only be required for manufactured homes when they were to be placed in R1-Single Family Residential Zones. In parks, Tomlin testified, manufactured homes would be allowed to conform with the Code, i.e., be surface mounted. The planner at the time agreed that the bylaw did not apply to manufactured homes in parks. If he still were the building inspector, Tomlin testified, he would not require a perimeter foundation.

[11] Interpretation of the bylaw, and of the Building Code and CSA standards, changed dramatically in May, 2006. Mr. Pagett wrote a memorandum to Alain Cunningham, the new town planner. It reads, in part, as follows:

It has come to my attention that the Town of Osoyoos has been issuing permits for manufactured homes in contradiction of our Zoning Bylaw and requirements of the 1998 BC Building Code.

The subdivision in question is located within a R5 Zone that permits one manufactured home. It does not permit a mobile home. The Bylaw defines a manufactured home as a single family dwelling, built in a factory, intended to be moved to and placed on a perimeter foundation. A mobile home is defined as habitable area designed to be moved from one place to another by being towed or carried.

The Building Code specifically exempts factory built housing that is constructed to CSA A277 M1990 and CAN/CSA Z280 MH Series but this exemption does not extend to onsite preparations such as the requirements for foundations, basements and connection to services.

Historically we have issued a substantial number of permits for this subdivision that permit the manufactured homes to bear on wood blocking or concrete blocks placed on a 24" x 24" x 4" deep paver placed on the ground. Technically, this installation complies with the Z240 series of CSA standards but does not comply with the Building Code or our Bylaw.

Mr. Pagett concluded his memorandum by asking for direction on how to proceed as there were several permit applications coming in regarding manufactured homes in Desert Rose Estates.

[12] On May 26, 2006, Mr. Pagett wrote a letter to the Strata Council of Desert Rose Estates. In summary, he told the Council that it had come to his attention that the Town had been issuing building permits for manufactured homes contrary to the Town's Zoning Bylaws. He reiterated what was allowed in the R5 zone, how the bylaw defined a manufactured home and concluded by saying that he had been instructed to apply the requirements of the Zoning Bylaw, effective immediately.

[13] There is no evidence before me as to what, if anything, the Strata Council did with that letter.

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[14] By letter dated July 27, 2006, Mr. Cunningham, the town planner, wrote a letter addressed to the strata owners, including Mr. and Mrs. Smith. That Mr. Tomlin considered both mobile homes and modular homes to be manufactured homes, and that they could be surface mounted, is clear from the first two paragraphs of Mr. Cunningham's letter, which read as follows:

As you may know, questions have been raised recently about what constitutes allowable development in Desert Park Estates. The property is zoned for manufactured home strata development (R5) under the Town of Osoyoos Zoning Bylaw 1085, 1998. Permitted uses in this zone are limited to manufactured homes, home occupations, accessory buildings, and a recreational vehicle storage lot. By definition, any "manufactured home" in Osoyoos has to be "placed on a perimeter foundation".

Most strata owners in Desert Park Estates do not meet the above bylaw requirements by virtue of having placed a mobile home (CSA Z240 requirement) on their lot, rather than the mandatory manufactured home (CSA A277 requirement), and/or by not placing their unit on a perimeter foundation.

[15] Mr. Cunningham went on to state that the Town recognized that strata owners with residences already on site would suffer undue hardship if they had to conform retroactively to the Zoning Bylaw. Thus, subject to certain conditions, strata owners in Desert Park Estates who had a residential unit in place at the date of the letter would have their units considered legally non-conforming by the town.

[16] Mr. Cunningham went on to say:

You are also advised that in future after the date of this letter, all persons wishing to place units in Desert Park Estates will have to abide fully by all our bylaw requirements. The only exception to this will be Mr. Dan Ferguson, who is well advanced in acquiring his unit and consequently will be treated in the same manner as an existing resident.

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[17] Shortly after purchasing their lot in 2005, Mr. and Mrs. Smith consulted with Mr. Tomlin regarding the town's requirements for placing a modular/manufactured home in Desert Estates. Mr. Tomlin gave them a copy of the R5 Zoning Bylaw, which sets out the permitted uses and the regulations regarding lot size, lot width and setbacks. Tomlin told Mr. and Mrs. Smith that the Strata Corporation might have other requirements and that they should check the Strata Corporation's bylaw and/or regulations. Mr. and Mrs. Smith were told that when they were ready to place their home on their lot, they need simply attend at the town office, pay the requisite fee, and obtain a building permit. There was no discussion regarding perimeter foundations. One would not expect there to have been, given Mr. Tomlin's belief that they weren't required.

[18] Relying on the information they received, Mr. and Mrs. Smith ordered a manufactured home in late April 2006. They did not receive Mr. Cunningham's letter dated July 27, 2006 until on or about August 8, 2006. They immediately telephoned Mr. Cunningham and followed up with a letter dated August 10, 2006. It read, in part, as follows:

Further to our telephone conversation re Development at Desert Park Estates (Desert Rose Estates), my wife Eileen and I purchased Lot #23 in May 2005. At that time we spoke with the town building inspector and were advised of the town setback rules and that all other stipulations would have to be approved by the Strata Board for Desert Rose Estates.

In May of 2006 we presented a plan of our lot with the building location to Mr. Neil Pagett, the new inspector. He said that it met all setback rules and he advised us that the Strata Board would also have to approve of our plan.

It was at this point we arranged financing, put down the deposit and ordered Moduline homes to build the unit and

locate it on the property in late September. As a result of your letter we would have to add about another \$15,000.00 to our cost which was not planned on and at this stage would be a substantial financial burden.

In view of the fact all previous units are not required to meet these new standards and that Mr. Dan Ferguson has been allowed to proceed as the existing residents, we would ask that we be given the same consideration.

[19] Mr. Smith testified that by the time he and his wife received Mr. Cunningham's letter dated July 27, 2006, their home was in production and that they were advised by the manufacturer that it was too late to cancel their order or to modify it such that the final cost would be less.

[20] Mr. and Mrs. Smith wrote to the Town Council on September 26, 2006. In that letter, they stated that no one had told them that a perimeter foundation was required, that to put in a perimeter foundation would be very expensive to them, and:

At this time we are asking to be treated in the same manner as over half of the total residents of Desert Rose Estates whose homes are surface mounted and with legal building permits.

[21] Town Council met on October 2, 2006 and passed a motion that Mr. and Mrs. Smith be required to meet the requirements of the perimeter foundation.

[22] Council's decision was confirmed in a letter to Mr. and Mrs. Smith from Mr. Cunningham dated October 13, 2006. He wrote, in part, as follows:

Since the Council meeting, you applied for and were issued a building permit (No. 8606, October 11, 2006) on the basis of placing an approved manufactured home on a perimeter foundation. Your new home will therefore be in complete compliance with the zoning of Desert Rose Estates for Manufactured Home Strata Development (R5).

Staff also resolved to look into the special cases of future residents of Desert Rose Estates who had already started the process of purchasing from Moduline. Our greatest concern was that they maybe purchasing a mobile home unit rather than a manufactured home. Thus, it was with considerable relief that we learned that yourselves as well as Mr. Dan Ferguson and Mr. John Rowlands had all purchased manufactured homes. Also, like your selves, Mr. Ferguson and Mr. Rowlands are mounting their units on perimeter foundations to be in complete conformity with the Zoning Bylaw.

The town recognizes that you will have to make a larger financial investment than anticipated to both construct a perimeter foundation and to lower your unit unto it by crane .... You should be advised that your proposed alternative of not building a perimeter foundation would not have been without its own costs, because of having to pay for anchoring your unit and retaining the services of a structural engineer.

[23] Mr. and Mrs. Smith then went ahead and had a foundation constructed at a cost of \$18,246.70. The cost of the crane to set the house on the foundation was \$3,906.11. From that they subtracted the cost of skirting and blocking in the sum of \$2,802.00 and the cost of concrete anchors in the sum of \$2,000.00 leaving a claim of \$17,330.81. They later added a claim for financial hardship and extensive emotional stress and strain in the sum of \$7,679.19, such that their total claim was \$25,000.00, the monetary limit of this Court.

[24] As I remarked at trial, the later claim for financial hardship and emotional stress is not supported by the evidence and I told the parties that nothing would come of it.

[25] It is apparent that as late as May 23, 2006, the town and its employees were unsure as to how to proceed. A building permit was issued on May 23, 2006 to Mr. and Mrs. Beattie for placement of a manufactured home and an accessory building on a lot



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in Desert Rose Estates. The bottom of the building permit contains the words "perimeter foundation recommended".

[26] I am satisfied that negligent misrepresentation on part of the town and its employees has been established. There was a duty of care. There was a representation by Mr. Tomlin, implied or by omission, that the town only required proper siting of the home on the lot. The town and its employees acted negligently in not providing Mr. and Mrs. Smith with the whole Bylaw, including the definition section. Mr. and Mrs. Smith obviously relied on Mr. Tomlin's advice and on Mr. Pagett's advice or direction to simply apply for a building permit when they were ready to place their home on the lot. Mr. and Mrs. Smith incurred damages as a result of their reliance on the omissions of the town. Moreover, what Mr. and Mrs. Smith were told by town employees accorded with what they saw at Desert Rose Estates. The show home and approximately 18 others were not on foundations, but were surface mounted. In all the circumstances, Mr. and Mrs. Smith were reasonable in their expectation that their home could be surface mounted. They went ahead and ordered their home, only to be told, after the home was in production, that the rules had changed.

[27] Further, and perhaps in the alternative, I am concerned about the definition of "manufactured home" as it appears in the Bylaw. In so doing so, I do not purport to comment on the validity of the Bylaw. As I remarked at trial the words "intended to be moved to and placed on a perimeter foundation" are curious. Intended by whom? It was certainly not intended by Mr. and Mrs. Smith that they would place the home on a perimeter foundation given that 18 other homes in the park were not so mounted. If it was the intention of the Town to require manufactured homes to be placed on a

perimeter foundation, that should have been made clear to all, including Mr. and Mrs. Smith.

[28] Had Mr. and Mrs. Smith been made aware of Town policy under the Cunningham/Pagett regime before they ordered their home and it went into production, they could not now be heard to complain. However, having it sprung on them when it was too late for them to change their course of action, and not to be given any consideration by the town, as others apparently were, was unfair and could be seen as amounting to selective enforcement of the Bylaw. As was stated in *Forst v. Toronto (City)* [1923] 54 O.L.R. 256, paragraph 74:

When the municipality is given the right to regulate, I think that all it can do is to pass general regulations affecting all who come within the ambit of the municipal legislation. It cannot itself discriminate, and give permission to one and refuse it to another and, *a fortiori*, it cannot give municipal officers the right, which it does not possess, to exercise a discretion and ascertain whether as a matter of policy permission should be granted in one and refused in a another.

[29] What is the appropriate measure of damages? Various factors militate against Mr. and Mrs. Smith being awarded the full amount of their claim. They are as follows:

1. There are less expensive methods of constructing a perimeter foundation than that chosen by Mr. and Mrs. Smith and their contractor.
2. Mr. and Mrs. Smith would have had to pay some engineering fees had they been allowed to surface mount their home.

3. If awarded full damages they will have a home on a foundation for the cost of a home with no foundation.
4. Presumably, the resale value of their home will be enhanced by reason of it being on a foundation rather than surface mounted.

[30] In taking the above factors into account, I assess damages in the sum of \$7,500.00. In addition, Mr. and Mrs. Smith are entitled to recover a court filing fee of \$156.00. Those amounts are payable to Mr. and Mrs. Smith forthwith.

Dated at the City of Penticton, in the Province of British Columbia, this 29<sup>th</sup> day of May, 2008.



G. G. Sinclair  
Judge, Provincial Court of British Columbia