Citation: Woestenburg v City of Kamloops 2001 BCSC 523

Date: 20010405
Docket: 29210
Registry: Kamloops

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JOHANNES J. WOESTENBURG and LAURA WOESTENBURG

PLAINTIFFS

AND:

THE CORPORATION OF THE CITY OF KAMLOOPS

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE POWERS

Counsel for the Plaintiffs	R. Burke
Counsel for the Defendant	L. S. Marchand
Date and Place of Trial:	February 14, 15, 16, 20, 21, & 23, 2001 Kamloops, BC

OPENING

[1] The plaintiffs own a home in the City of Kamloops (“the City”) in an area referred to as Bachelor Hills. Their property is adjacent to undeveloped property. The City passed a bylaw enacting an official community plan on December 9, 1997. The plan designated the plaintiff’s property as a future roadway to service the undeveloped property adjacent to them. The plaintiffs says that the bylaw was improperly passed and as a result of the actions of the City and its employees they have suffered damages. The trial proceeded on the issue of liability only with the parties asking me to assume that damages had been suffered by the plaintiffs. If the City is found to be liable, the parties would proceed to deal with the issue of damages by way of a separate trial.

THE ISSUES

[2] The plaintiffs say that the bylaw was faulty because the City did not ensure that their capital expenditure plan included monies to acquire the plaintiff’s property. In separate proceedings, the City has consented to an order setting aside that portion of the official community plan designating the plaintiff’s property as road. The plaintiffs say that the City or its employees abused their public office

or acted negligently in passing the bylaw in the manner they did. The City denies abuse of public office and negligence.

[3] The City also says that the plaintiffs' action must fail because they failed to give notice of the damage within two months from the date the damage was sustained as required by s.286 of the ***Local Government Act,*** R.S.B.C. 1996, as amended (formerly the ***Municipal Act***), and as well that they failed to commence the action within the time limits prescribed by s. 285 of the ***Local Government Act*** requiring that the action be commenced within six months after the cause of action first arose. The plaintiffs argue that sufficient notice was given pursuant to s. 286 and that s. 285 does not apply to the circumstances of this case.

BACKGROUND

[4] The plaintiffs are owners of Lot 14, a residential lot and home, in the City of Kamloops. The area immediately behind their home is undeveloped. The owner of the undeveloped land, Westsyde Estates Ltd. ("Westsyde"), applied for approval of a subdivision of that property in 1993. The City and Westsyde did not agree as to the form of access to the proposed subdivision. Westsyde presented engineering studies to the City indicating that the most appropriate or feasible place for road access was a road through Lot 14.

Originally the City did not support such a proposal but after receipt of the information from Westsyde, gave preliminary layout approval to a subdivision of Westsyde's property on the condition that Westsyde acquire Lot 14 and construct a connector road through Lot 14. Westsyde did not proceed with its subdivision application.

[5] The City began a study with regard to a community plan in the Bachelor Hills area in 1996. Potential roadways were an important part of that plan and the draft land use study obtained by the City proposed construction of a road through Lot 14. This road would service a subdivision of Westsyde's property, if it occurred. In the summer of 1997 the plaintiffs heard rumours or received some knowledge that their property might be designated as a road and communicated with the City indicating a willingness to discuss the sale of their property.

[6] On October 23, 1997, the City held a public open house to discuss the draft Bachelor Hills land use study. A public hearing on the Bachelor Hills land use plan was held December 9, 1997. At approximately the same time the City officials were preparing the City's proposed five-year capital expenditure plan. The five-year capital plan did not include a specific item for the acquisition of Lot 14. The position

of the City was that creation of a road through Lot 14 would depend on the subdivision of the adjacent vacant land. It was the City's intention to require Westsyde to provide access to the subdivided land by purchasing Lot 14 directly. The City did not intend to acquire Lot 14. The City officers believed that the approving officer dealing with the proposed subdivision had the authority to require Westsyde to purchase Lot 14 to provide access, and that therefore means were in place to ensure that Lot 14 could be acquired for the public purpose for which it had been designated. City officials recommended to the city council that they pass a resolution stating that the official community plan was consistent with the five-year capital expenditure plan and to pass the official community plan which included designation of Lot 14 as future road. The City did so at the public hearing on December 9, 1997.

[7] The plaintiffs had expressed their concern to the City that the designation of their lot as future road in the community plan would adversely affect the value of their property and make it difficult for them to sell.

[8] The City, through its officers, invited the plaintiffs to submit a proposal to the City if they wished to sell their property. The plaintiffs proposed that the City purchase

their property, originally for $165,000 and subsequently for $172,000. These prices were based on the assessed value of the property and some costs relating to the sale and the plaintiffs' move. Employees and officers of the City reviewed the proposal and concluded that because the property would not be required for road until the subdivision of the adjacent vacant property, which date was uncertain, and because of their intention to require Westsyde to purchase Lot 14, it was not in the City's interest to purchase Lot 14 from the plaintiffs. The City resolved not to purchase the property on March 3, 1998, and advised the plaintiffs on March 12, 1998, of that decision.

[9] A realtor, on behalf of the plaintiffs, communicated with the City on April 28, 1998, by letter and indicated that the designation of Lot 14 as future road placed the plaintiffs' life in limbo with regard to their plans to improve or sell their property. It was suggested that the City enter into negotiations with regard to the purchase of this property. The City Council held an in-camera meeting and considered their position again and concluded, after some discussion and dissent, that the City would not purchase Lot 14 at that time because it may not be required for approximately ten years. The City was aware that if the City required Lot 14 at some

time in the future, they would have to pay fair market value. The City responded to the realtor's letter on May 15, 1998, and confirmed that the property was not likely to be required for many years and that the City was not in a position to consider purchasing the plaintiffs' property at this time.

[10] By letter dated February 4, 1999, the plaintiffs' lawyer wrote to the City of Kamloops, attention City Clerk, on behalf of the plaintiffs regarding the City's decision of March 3, 1998, not to purchase the plaintiffs' property. The letter referred to the official community plan, referred to as KAMPLAN 1997 and the Bachelor Hills Land Use Plan which was adopted December 1997. The letter stated that:

> We hereby place you on notice pursuant to s.286 of the ***Municipal Act*** that our clients propose to claim damages from you. The designation of our clients' land for future public purpose has resulted in a diminution in market value of our clients' lands in the approximate amount of $150,000. We have also been instructed to have your bylaws as they affect our clients' land declared invalid.

[11] In separate proceedings on September 9, 1999, the plaintiffs petitioned for an order that those portions of the official community plan designating their property as roadway be set aside. The basis of the petition was the failure of the City to set aside or to commit funds for the purposes of

acquiring the land which had been designated for a public purpose. The City consented to an order November 3, 1999, setting aside those portions of the community plan related to Lot 14 and agreed to the plaintiffs receiving their costs in that proceeding.

[12] The plaintiffs, again through their counsel on December 21, 1999, by letter to the City of Kamloops, attention the City Clerk, indicated that they proposed to claim damages from the City for reduction in the market value of their property as a result of the designation of their property as road under the community plans. The letter alleges that the market value of their property when the official community plan was adopted was $180,000 and that it has been reduced to a value of no more than $50,000.

[13] This action was commenced March 21, 2000, and amended December 14, 2000, and again on February 14, 2001, the first day of the trial. The statement of claim refers to the actions of the Director of Development Services, Engineering Manager, Administrator, and Manager of Community Development and Real Estate, as officers and employees of the City. It is alleged that these individuals acted negligently or abused their public office and that the City is vicariously responsible for their actions. It is alleged that they knew

or ought to have known that it is unlawful to designate private land for public use without providing appropriate funding in the capital expenditure plan, and that such designation would cause damage. It is alleged that they failed to advise city council that this procedure was unlawful, further that it was intended that the developer of the undeveloped property adjacent to the plaintiffs' land purchase their land, and therefore advised council not to purchase the plaintiffs' land. It was alleged that the officers and employees of the City owed a duty of care to the plaintiffs and breached that duty. It was also alleged that the City failed to rescind the bylaw when they became aware that it was unlawful.

[14] The statement of claim further states that council's actions were oppressive, arbitrary and arrogant. Further it was alleged that either council, a forum of council, or one or more councillors knew or were recklessly indifferent or willfully blind that the council's conduct was without authority or that harm would result.

[15] It was also alleged in para. 6 that council's motive in designating the plaintiffs' land as a connector road was to reduce its value to facilitate the acquisition of the property by the developer. There was never any evidence to support

this allegation and it is clear that was not the City's motive. It was argued at trial that the City's motive in designating the property was to compel Westsyde to acquire Lot 14 so that it could be used for public purpose and that this was beyond the authority of council and amounted to an improper purpose.

THE ISSUES OR QUESTIONS PRESENTED BY THE PARTIES

[16] The plaintiffs base their claim on abuse of public office or alternatively on negligence on the part of the City's employees. The parties outlined the questions for decision in their submissions. The plaintiff at page 8 stated the following questions for the court:

1. On December 9, 1997 or March 3, 1998 was the council recklessly indifferent or willfully blind to its lack of statutory authority when it adopted the OCP Bylaw and passed the resolution that the bylaw was consistent with its 5 Year Capital Plan?

2. On December 9, 1997 was Randy Diehl recklessly indifferent or willfully blind to the City's lack of statutory authority when he recommended to council that it adopt the OCP Bylaw and pass the consistency resolution?

3. On December 9, 1997 could the City lawfully compel an adjacent landowner to acquire Lot 14 as a condition of subdivision approval?

4. If the answer to question 3 is no, was the OCP Bylaw adopted on December 9, 1997 for the improper purpose of identifying the lands, which it proposed to compel the adjacent developer to acquire?

[17] This is essentially an allegation of abuse of public office by the City through its council or its officers and employees. The defendants acknowledge that this is an issue on page 14 of their closing argument where they state in para. 62 and 63 the questions as follows:

62. Did the City abuse its powers in adopting the BHLUP?

63. With respect to the question of whether the City abused its powers, the City understands the Plaintiffs do not allege any “targeted malice” towards them, that the City actually knew it was acting beyond its statutory authority, or that the City actually knew it was causing harm to the Plaintiffs. That being the case, to determine if the City abused its powers, the Court must consider whether, in adopting the BHLUP, the City:

(a) was willfully blind or recklessly indifferent to its lack of statutory authority; and

(b) was willfully blind or recklessly indifferent that the adoption of the BHLUP would probably cause damage to the Plaintiffs.

[18] The plaintiff raised the issue of negligence at p. 8 of its outline of submissions in paras. 5 and 6 as follows:

5. Was Diehl negligent in advising council incorrectly on December 9, 1997 that the OCP Bylaw was consistent with the City's 5-Year Capital Plan?

6. Were City officers and employees negligent in failing to advise council on December 9, 1997 and March 3, 1998 that the City had no authority to designate the plaintiffs' land for public use without either buying the land or providing for the acquisition in its 5 Year Capital Plan?

[19] The defendants respond at p. 14 of their argument in paras. 60 and 61 as follows:

60. Did the City owe the Plaintiffs a duty of care with respect to the adoption of the BHLUP?

61. If so, did the City breach that duty of care?

[20] Both parties addressed the issue of potential limitations, the plaintiffs at p. 8, para. 7 where they state the question to the court:

> 7. Does the City's limitation defense have merit?

[21] The defendants present that issue at p. 14 of their argument as follows:

> 64. In any event, is the Plaintiffs' action barred by any or all of ss. 285, 286 or 914 of the ***Local Government Act***, RSBC, 1996?

ABUSE OF PUBLIC OFFICE

[22] The tort of abuse of public office has been dealt with in British Columbia in the decision ***First National Properties Ltd. v. District of Highlands et al*** (1999), 178 D.L.R. (4th) 505 (B.C.S.C.). Quijano J. noted that our Court of Appeal declined to decide whether something other than malice could constitute abuse of public office (***Stenner v. British Columbia (Securities Commission)*** (1996), 141 D.L.R. (4th) 122 (B.C.C.A.) at 128), but went on to consider other recent decisions from other jurisdictions, including Alberta. In the decision ***Alberta (Minister of Public Works, Supply and Services) v. Nilsson***, [1999] A.J. No. 645 (QL)(A.C.Q.B.)[now reported 67

L.C.R. 1] the test for abuse of public office was stated at para. 108 as follows:

> Has there been deliberate misconduct on the part of a public official? Deliberate misconduct is established by proving:
>
> 1. an intentional illegal act, which is either:
>
> (i) an intentional use of statutory authority for an improper purpose; or
>
> (ii) actual knowledge that the act (or omission) is beyond statutory authority; or
>
> (iii) reckless indifference, or willful blindness to the lack of statutory authority for the act;
>
> 2. intent to harm an individual or a class of individuals, which is satisfied by either:
>
> (i) an actual intention to harm; or
>
> (ii) actual knowledge that harm will result; or
>
> (iii) reckless indifference or willful blindness to the harm that can be foreseen to result.

[23] Both of these elements were required. In ***Nilsson*** the Alberta Government used environmental legislation to freeze the development of land which the province wanted to acquire at some time in the future for roadways. This was done despite concerns raised by some of their own employees that this may be improper. This was found to be an abuse of public office, reckless indifference or willful blindness was proven.

[24] In the ***First National*** case one of the defendants was found to have acted for an improper purpose but the court also found that this individual knew what he was doing was wrong. It was a scheme to assist in the acquisition of land for public parks and some of the defendants participated in a scheme to disadvantage the plaintiff owner by providing information to the province who was attempting to acquire the property. The information was acquired through the individual's public office and was designed to assist the province in acquiring the property for less money than the owner of the property wished to sell it for.

[25] In the ***Nilsson*** case the Alberta court quoted extensively from the trial judge's decision in the case ***Three Rivers District Council and others v. Bank of England (No. 3)***, [1996] 3 All E.R. 558 (QB), upheld [1998] T.N.L.R. No. 856, E.W.J. 4042 (C.A.). Dealing with the mental state required for the tort of abuse of public office, the Alberta court quotes from ***Three Rivers*** beginning at para. 103 of the Alberta decision in ***Nilsson***:

> 103. At trial, Clarke J. held that the plaintiffs had not established that the Bank of England had acted intentionally, and dismissed the suit. His decision was upheld on appeal. Both the trial judge and the Court of Appeal took the opportunity to analyze and comment on the mental states required to establish abuse of public office. At trial, Clark

J. summarized the post-***Bourgoin*** state of the law as follows (pp. 569, 578):

> The tort could be established in two alternative ways: (a) where a public officer performed or omitted to perform an act with the object of injuring the plaintiff (i.e. where there was targeted malice); and (b) where he performed an act which he knew he had no power to perform and which he knew would injure the plaintiff.
>
> [...] I have reached the clear conclusion that foreseeability of damage is not enough to satisfy the second limb. For the reasons which I have already given, once Mann J's decision is properly understood, there is no support in ***Bourgoin*** for the suggestion that reasonable foresight is sufficient at the second stage. There is no other support for it in the recent cases and in my opinion it is not supported by either principle or policy.

104. After an extensive reviews of the history of the tort of misfeasance and of the difference between knowledge, recklessness and turning a blind eye, Clark J. distilled his conclusions into the following six points (pp. 632, 633):

> (1) The tort of misfeasance in public office is concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer. It is not to be equated with torts based on an intention to injure, although, as suggested by the majority in ***Northern Territory v. Mengel*** (1995) 69 ALJR 527, it has some similarities to them.
>
> (2) Malice, in the sense of an intention to injure the plaintiff or a person in a class of which the plaintiff is a member, and knowledge by the officer both that he has no power to do the act complained of and that the act will probably injure the plaintiff or a person in a class of which the plaintiff is a member are alternative, not cumulative, ingredients of the tort.

To act with such knowledge is to act in a sufficient sense maliciously: see ***Mengel*** 69 ALJR 527 at 554 per Deane J.

(3) For the purposes of the requirement that the officer knows that he has no power to do the act complained of, it is sufficient that the officer has actual knowledge that the act was unlawful, or, in circumstances in which he believes or suspects that the act is beyond his powers, that he does not ascertain whether or not that is so or fails to ascertain the true position.

(4) For the purposes of the requirement that the officer knows that his act will probably injure the plaintiff or a person in a class of which the plaintiff is a member it is sufficient if the officer has actual knowledge that his act will probably damage the plaintiff or such a person, or, in circumstances in which he believes or suspects that his act will probably damage the plaintiff or such a person, if he does not ascertain whether that is so or not or if he fails to make such inquiries as an honest and reasonable man would make as to the probability of such damage.

(5) If the states of mind in (3) and (4) do not amount to actual knowledge, they amount to recklessness which is sufficient to support liability under the second limb of the tort.

(6) Where a plaintiff establishes (i) that the defendant intended to injure the plaintiff or a person in a class of which the plaintiff is a member (limb one) or that the defendant knew that he had no power to do what he did and that the plaintiff or a person in a class of which the plaintiff is a member would probably suffer loss or damage (limb two) and (ii) that the plaintiff has suffered loss as a result, the plaintiff has a sufficient right or interest to maintain an action for

> misfeasance in public office at common law. The plaintiff must of course also show that the defendant was a public officer or entity and that his loss was caused by the wrongful act.

Clarke J. was clear in stating that abuse of power involves some element of deliberate abuse or dishonesty, and that although mere negligence would not satisfy the mental elements of the test, recklessness or willful blindness would, opining that the distinction between these mental states and actual knowledge are very narrow.

105. The majority of the Court of Appeal agreed with Clarke J.'s interpretation of ***Bourgoin*** that actual foresight of harm was required to satisfy the element of knowledge. The majority clearly rejected the submission that any knowing departure from statutory obligations is sufficient to constitute dishonesty, and emphasized the need for careful factual analysis in each case to determine whether the requisite mental states have been established. Auld LJ. took a different view of the law on this point, holding that abuse of public office is established without regard to the public officer's awareness of the consequences of his or her actions.

106. In the end result, the Court in ***Three Rivers*** accepts the two alternative routes for grounding liability as set out in ***Bourgoin***, supra, and establishes that actual knowledge, reckless indifference and willful blindness regarding both the legality of the act and its harmful consequences are the appropriate mental standards of knowledge under the second branch of the tort. Through these standards, the Court carefully limits the expansion of liability, maintaining a high standard of proof and preserving intentional misconduct as the foundation of liability for misfeasance in public office.

[26] The tort of abuse of office requires the intentional illegal act and the intent to harm as laid out by the Alberta court.

[27] One of the basis on which an act can be intentionally illegal is where it involves the use of statutory authority for improper purpose. The plaintiffs allege that the City had no authority to compel Westsyde to acquire Lot 14. If that is the case, the plaintiffs then state that the question the court should answer is whether the official community plan adopted on December 9, 1997, was for the improper purpose of identifying the lands which it proposed to compel the adjacent developer to acquire. This is the way the question is stated in the plaintiffs' submissions at p. 8. Accepting that the City could not compel Westsyde to acquire Lot 14, because it lacked authority to do so under the ***Municipal Act,*** I am not satisfied that the plaintiffs have proven on the balance of probabilities that the purpose of the official community plan or any part of it involved identifying the lands in order to compel Westsyde to acquire that property. Identifying the lands themselves as potential road was not an improper purpose, but simply part of the normal planning process. Compelling Westsyde to acquire the property as a condition to approving its subdivision may have been outside the authority

of the municipality, but the official community plan and the designation of Lot 14 as potential road was not made for that purpose. Therefore the plaintiffs have not shown that the City has intentionally used its statutory authority for "improper purpose".

[28] The plaintiffs also stated questions as to whether or not on December 9, 1997, or March 3, 1998, the council was recklessly indifferent or willfully blind to its lack of statutory authority when it adopted the official community plan bylaw and passed a resolution that the bylaw was consistent with its five-year capital plan. Second, whether the City's director of development services at the time, Randy Diehl, was recklessly indifferent or willfully blind to the City's lack of statutory authority when he recommended to council that it adopt the OCP bylaw and pass the consistency resolution.

[29] Mr. Diehl was one of a number of City employees who dealt with development and planning. Another was Mr. Greg Tomma, the community development manager from 1997 to 1998. (Plaintiffs' documents, Tab 2, Division 17) Mr. Tomma is a registered planner with the Canadian and British Columbia Institute of Planning and was a community planning manager in the 1990s. He reported to Mr. Diehl and was accountable for

the City community development program. Mr. Diehl, as director of development services, reported to the City administrator and was responsible for the operation of the planning and building inspection departments. He was responsible for the provision of professional advice on the adoption and maintenance of the community sector and neighbourhood plans and the application of portions of the ***Municipal Act, Land Title Act***, and City bylaws relevant to the processing of subdivision proposals, development projects and zoning applications. (Plaintiffs' document, Tab 2, Division 5.)

[30] Mr. Tomma, while employed by the City of Kamloops, was involved in a number of official community plans including the plan which led to this lawsuit. He was the person at the City who received and reviewed legal cases that affected municipalities. The City subscribed to Westlaw Reports and received a number of case digests. Mr. Tomma's recollection of the receipt of individual cases, for instance in 1992 and 1994, is understandably limited, but he was referred to a digest of a case ***Century Holdings Ltd. v. Corporation of Delta***, [1992] B.C.D. Civ. 2932-01, which he agrees he would have received in 1992. He also acknowledges that he would have received the digest of the decision ***Hall v. Corporation***

of the District of Maple Ridge, [1994] B.C.D. Civ. 2932-01. His recollection is that he believed that the ***Hall*** case was simply an extension of the principles laid down in the ***Century Holdings*** case. He understood the need for consistency between official community plans and the capital expenditure plans, particularly where private lands were designated for public use. However his evidence is that he believed it was not necessary to include monies in the capital expenditure plan for the acquisition of property that the City did not intend to acquire. For instance, in this case it was his belief that the property would be acquired by Westsyde if it proceeded with its subdivision. His evidence was that his reading of the ***Hall*** decision which dealt with a municipality designating a highway transportation corridor for a provincial highway only indicated that was improper where neither the municipality nor the province had committed to the acquisition of the property. He believed that he was correct in his understanding that the need for consistency was met as long as there was some realistic plan in place for the acquisition of property and that it did not require the City to actually have funds in place. He believed that his understanding was consistent with that of other planners in other communities. His evidence was that if that issue had been put to him or his belief had been challenged, he would have simply sought legal

advice through the City's solicitors. He believed the important thing was that a plan of action be in place for the acquisition of property so that it matched the intention in the official community plan. He also noted that the capital expenditure plan was over a period of five years and the official community plan was over a period of perhaps 20 or 25 years. He believed the commitment necessary for the acquisition of the land could be met through the subdivision approval process which he understood included the City requiring Westsyde to acquire the property, if and when it proceeded with that subdivision. He acknowledged that he would have distributed the ***Century*** and ***Hall*** digests to other members of the City staff, including Mr. Diehl. He indicated that a large number of City staff were involved in the development of official community plans, and particularly this plan, including the engineering department which would identify the needs of the City for infrastructure. He said they were familiar with the plan and the capital plans and that the people he was dealing with and himself considered the official community plan and the capital plan to be consistent in the sense that he understood that requirement. He believed the plan was consistent in the sense that the City had made arrangements through the subdivision process for Westsyde to acquire Lot 14 if it became necessary. He also believed the

need for Lot 14 as roadway was beyond the range of the five-year time horizon of the capital expenditure plan. He acknowledged that Lot 14 would not be required by the City for its own need and would only be affected if Westsyde proceeded with its subdivision. His evidence was that he believed the City was entitled to require Westsyde to acquire Lot 14 as a term of approval of its subdivision in the manner in which it had submitted its subdivision.

[31] It was clear from the evidence of Diehl and Tomma that neither they nor anyone else acting on behalf of the City was motivated out of any malice towards the plaintiffs, nor any desire to assist Westsyde with its subdivision. In developing the official community plan, they were concerned with the needs of the community, including transportation needs. They were aware that Westsyde had in the past proposed a subdivision of its property and that the most feasible subdivision plan included an access road through Lot 14.

[32] The plaintiffs called Mr. Keith Funk, a planner from Kelowna. He is the owner of New Town Planning Services, a company established in 1997, and had worked for the City of Kelowna prior to that. His understanding was that in 1997 the ***Municipal Act*** and the ***Century*** and the ***Hall*** cases required a municipality to ensure that funding was in place for the

acquisition of any property designated for a public purpose in an official community plan. He and other members of the staff in Kelowna were aware of these requirements in 1997. He acknowledged that there were a number of ways of funding the acquisition of such property, including development cost credits, exchange of offsite services for other works, development cost charge bylaws, dedication of land from within a subdivision in excess of those required by the Acts, the city financial plan, bylaws and capital plan strategies and other private funding. He did not believe the requirements for consistency could be met by simply having a different landowner acquire a private piece of property for road access through the subdivision process.

[33] He did say that although the capital expenditure plan was only for five years and the official community plan for 25, one way to ensure consistency was to include an item for acquisition of property in the five-year plan and simply roll that over from capital expenditure plan to capital expenditure plan, even though it was not foreseeable when the property might be required.

[34] Mr. Diehl’s position is that it is important for the City to designate any potential roads in the future for the benefit of everybody, including property owners, that might be

directly affected. He also took the position that it would be improper for the City to include items in its capital expenditure plan which it had no intention of spending, simply for the purpose of rolling it over from year to year to ensure "consistency" with the official community plan.

[35] The City called as a witness Mr. David Shipclark. Mr. Shipclark is the clerk and assistant land agent for the City of Kelowna. He has worked for the City of Kelowna since 1984. One of his duties is to advise the council for the City of Kelowna of the legalities of municipal bylaws and procedures, including the official community plans and the requirements of the ***Municipal Act***. He was aware of s. 882 of the ***Municipal Act*** in 1997 and of the ***Century*** case and the ***Hall*** case. He understood that council could not adopt an official community plan until it reviewed the five-year capital plan and any other plans and practices that addressed the capital needs in the plan. The plan had to address how properties designated for public use, such as roads, would be required when needed. He stated the "whole package had to address it". He acknowledged that in the City of Kelowna's official community plan, some roads had been designated on private land but were not provided for in the capital plan. The reason for this was that the lands might be acquired through the subdivision

process and it also reflected the different time periods for the five-year capital plan and the official community plan. He pointed to instances where proposed roads would cover private lands but would not be required without development of other lands owned by somebody else. In those instances no money was in the official community plan for the acquisition of that land. Roads would not be built without the development occurring. He gave evidence of instances in the City of Kelowna where a developer wishing to develop his own land was required to acquire additional property in order to link his subdivision with existing roads. In those instances, the City did not include money in its five-year capital plan for the acquisition of those private properties. This is consistent with the practice in Kamloops at the time.

[36] Mr. Tomma's and Mr. Diehl's understanding of the requirements of the ***Municipal Act*** for consistency between the official community plan and the capital expenditure plan were in error. (***Greatbanks v. Sunshine Coast (Regional Distrist)*** (1998) 44 M.P.L.R. (2d) 180 (B.C.S.C.)) However, the evidence does not satisfy me on the balance of probabilities that they were recklessly indifferent with regard to their interpretation of the Act or willfully blind with regard to their interpretation of the Act. They believe that their

practice was consistent with other municipalities in the Province of British Columbia. The plaintiffs complain that the designation of their property as potential road would cause them harm, but at no time was any issue taken with the authority of the City to designate the road or the manner in which they proceeded until after the bylaws had been passed. When the plaintiffs commenced its petition to set aside the bylaw, the City consented to an order once it had legal advice indicating that an error had been made in the process of passing the bylaws. There is no evidence to support the allegation in the statement of claim that the council's actions were oppressive, arbitrary and arrogant.

[37] One of the issues raised by the plaintiff was the fact that the city council did not itself compare the official community plan with the capital expenditure plan. The process followed by the City of Kamloops was that council relied on recommendations made to it by its own staff as to whether or not the plans were consistent. Staff were responsible for ensuring that the plans were consistent as they understood them. Mr. Diehl indicated that it would take two weeks for the city council to go through the entire process of comparing each element of the official community plan and each element of the financial plan. He believed that the council had met

its obligation under the ***Municipal Act*** by relying on its staff to confirm that the plans were consistent.

[38] The practice in the City of Kelowna is more in depth and in my opinion more in keeping with the ***Municipal Act***. Members of various departments of the city actually report to city council in a summary fashion and council has the opportunity then to judge for itself whether the plans are consistent. However, I am not satisfied that Mr. Diehl or council were acting with reckless indifference or willful blindness with regard to whether its actions met the requirements of the ***Municipal Act*** in proceeding as they did.

[39] I find that the plaintiffs have failed to establish that either council, the City, or the city employees or officers have abused their offices as it relates to their actions in passing the official community plan on December 9, 1997.

[40] There is no evidence that the City or its officers or employees set out to cause harm to the plaintiffs. I am satisfied that they were aware that the plaintiffs could be adversely affected by the designation of their property as a road, although Mr. Diehl was of the opinion that if their property was required for road, that the City would be required to purchase it for fair market value or Westsyde would be required to purchase it for fair market value, and in

that sense the plaintiffs would not suffer harm. However, he did acknowledge that he had not considered the immediate impact on the plaintiffs if they had attempted or wished to sell their property before it was required for roadway. Mr. Tomma acknowledged that the publication of an official community plan may benefit some people and harm others, but the planning process was a necessary exercise for the benefit of the community as a whole.

[41] I also find the plaintiff has failed to establish that the City or its officers have abused their office in considering the request by the plaintiff to purchase the plaintiffs' property. The City and its officers believed that they had properly passed the official community plan and designated the plaintiffs' property for road and were under no obligation to acquire the plaintiffs' lands.

[42] It should be noted that there is nothing in the ***Municipal Act*** that actually requires the City to purchase lands designated for public use at any particular time. The City was merely required to make sure that its capital expenditure plan was consistent with the official community plan. The development envisioned by the plan may never occur and the plan itself may be changed.

[43] I also note that if the City had included an item in its capital expenditure plan for the acquisition of the plaintiffs' property if and when it was required, no objection could have been taken to the designation of the plaintiffs' land in the official community plan. The bylaw would not have been set aside.

[44] It is true that the City could not simply designate the lands for roadway for an improper purpose such as cause harm to the plaintiffs or to assist Westsyde or to compel Westsyde to acquire Lot 14, but the evidence does not support the plaintiffs' argument that either of those things occurred.

NEGLIGENCE

[45] The plaintiffs state the questions for decision as follows:

> Was Diehl negligent in advising council incorrectly on December 8, 1997, that the OCP bylaw was consistent with the City's five-year capital plan?
>
> Were City officers and employees negligent in failing to advise council on December 9, 1997, and March 3, 1998, that the City had no authority to designate the plaintiffs' land for public use

without either buying the land or providing for the acquisition in its five-year capital plan?

[46] Mr. Diehl's advice to council was wrong. He relied on other members of City staff, including Mr. Tomma, to keep him advised as to any new developments in the law that he should be aware of. Mr. Tomma had read digests of ***Hall*** and ***Century***, but failed to understand the importance of those cases. His understanding, however, does not appear to have been inconsistent with that of some, but not all other community officials in British Columbia, who also dealt with planning, including those in the City of Kelowna. This issue had never been raised and Mr. Diehl and other members of his staff had no reason to doubt their understanding of the requirements of the ***Municipal Act***. Mr. Diehl's methods of keeping up to date on the change in law affecting municipalities was not as thorough as that described by Mr. Shipclark from the City of Kelowna and Mr. Diehl did not attend as many seminars that were available to deal with similar issues. However he is entitled to rely on members of his staff who do attend such seminars or receive and review case authorities. The procedures which the City had in place were informal and could certainly be improved in many ways, but I am not prepared to find that they were negligent. Nor on the evidence have I

been satisfied that Mr. Diehl's interpretation of the requirements of the ***Municipality Act*** was negligent, although it was wrong.

[47] I also find that at the time the advice was given to counsel on December 9, 1997, and March 3, 1998, by the City officers and employees regarding the City's authority to designate the plaintiffs' land for public use, those officers and employees were not negligent. Their understanding and appreciation of the ***Municipal Act*** was not inconsistent with that of other people in similar positions in the province at the relevant time. The systems that the City had in place were certainly far from perfect, but I am not prepared to find that they were so inadequate as to amount to negligence. With regard to March 3, 1998, there was no issue about whether the City had any authority to designate the plaintiffs' land for public use and there is no indication that any advice was given on that topic on March 3, 1998. The only issue was whether the City should or should not purchase the plaintiffs' property at that time. The City could not be compelled to acquire the plaintiffs' property simply because it had been designated for public use. The only thing the City was required to do, which they failed to do, was to include an item in the capital expenditure plan for the acquisition of

the property. The inclusion of an item in the Capital Expenditure Plan is not an irrevocable commitment by the City to acquire the property.

[48] Assuming that Diehl and the other City officers were negligent, I am satisfied they and the City are protected from liability because in proceeding to pass the bylaws enacting the official community plan, they were acting in a legislative capacity. They were acting in the good faith exercise of their legislative powers. In dealing with the failure of a municipality to carry out proper procedures in enacting bylaws, the Supreme Court of Canada in the decision ***Welbridge Holdings Ltd. v. Winnipeg (Greater),*** [1971] S.C.R. 957, the Court stated at p. 5:

> Accepting that Hedley Byrne has expanded that concept of duty of care, whether in amplification or extension of ***Donoghue v. Stevenson,*** [[1932] A.C. 562.], it does not, nor, in my view, would any underlying principle which animates it, reach the case of a legislative body, or other statutory tribunal with quasi-judicial functions, which in the good faith exercise of its powers promulgates an enactment or makes a decision which turns out to be invalid because of anterior procedural defects. ***McGillivray v. Kimber*** [(1915), 52 S.C.R. 146.], so far as it has a majority rationale, rests either on a complete want of jurisdiction or on intentional wrongdoing which might, in any event, be said to be reflected in the want of jurisdiction. It was not concerned with negligence. I refer also to what Rand J. said about that case in

> ***Roncarelli v. Duplessis*** [[1959] S.C.R. 121.], at p. 141.

[49] I am satisfied that in exercising its authority to create official community plans, the municipality is acting in its legislative capacity. ***Welbridge*** was applied by the British Columbia Court of Appeal in the decision ***Birch Builders Ltd. v. Township of Esquimalt***, [1992] 90 D.L.R. (4th) 665, where a development permit was found to be improperly issued because council had not passed resolutions specifically authorizing its issue. The Court found that the council was acting within its legislative function and in good faith and therefore owed no duty of care to the plaintiff in that case. I reach this conclusion even though I do note that in the ***Birch Builders*** case the plaintiff did not plead the negligence of the city clerk and claim that the municipality was vicariously liable for that negligence.

[50] The plaintiff referred to an Alberta decision ***Becze v. Edmonton (City)***, [1996] A.J. No. 754. In the ***Becze*** case the City was held liable. The City was held liable for the negligence of one of its employees for failing to compare plans submitted for signature with plans which had been approved by the planning board. The employee had been simply careless about what plans were signed and this had nothing to

do with the process of determining whether the plans should be approved or not.

[51] This case is distinguishable from ours for that reason. (***Ryan v. Victoria (City)*** (1999), 59 B.C.L.R. (3d) 81 (S.C.C.)) I am not satisfied that the decision ***McAlpine v. T.H. (B.C.C.A.),*** [1991] B.C.J. No. 2185 (Q.L.) (B.C.C.A.) is not helpful to the plaintiff, nor is ***M.B. British Columbia***, [2000] B.C.J. No. 909 (Q.L.) (B.C.S.C.), which is a case with a claim by a former foster child for damages as a result of her abuse at the hands of foster parents acting for the province. They are not of assistance to the plaintiff in establishing the lack of good faith.

LIMITATION DEFENCE

[52] The defendant outlines its defense under s. 285 in its closing arguments commencing at para. 113:

> 113. Section 285 of the ***Local Government Act***, R.S.B.C. 1996, c. 323 provides as follows:
>
> > All actions against a municipality for the unlawful doing of anything that
> >
> > (a) is purported to have been done by the municipality under the powers conferred by an Act, and
> >
> > (b) might have been lawfully done by the municipality if acting in the manner established by law,

> must be commenced within 6 months after the cause of action first arose, or within a further period designated by the council in a particular case, but not afterwards.

114. In the case of ***Saanich v. Grewal***, the Court of Appeal found that:

> Section [285] is intended to apply to actions of the municipality that purport to be done pursuant to an enactment but fail to comply with the requirements of the enactment.
>
> ***Saanich v. Grewal*** (1989), 28 B.C.L.R. (2d) 250 (B.C.C.A.) at p. 254 – Tab 10

115. In ***Pallisade Properties (1985) Ltd. v. Surrey***, Hogarth J. adopted the explanation given by Aikins J. in ***Bergloff v. Terrace*** (1963), 41 D.L.R. (2d) 285 (B.C.S.C.) that:

> [T]he words “which might have been lawfully done by the Municipality if acting in the manner prescribed by law” meant that if the municipality had properly availed itself of the processes of the existing statute, it could without question have lawfully done that which it did lawfully.

116. Furthermore, in explaining the decision of the Court of Appeal in ***Grewal***, Hogarth J. found the decision to mean that “If legislative authority was available to make the act complained of lawful, [section 285] is applicable.”

Palisade Properties (1985) Ltd. v. Surrey (1991), 5 M.P.L.R. (2d) 206 (B.C.S.C.) at paras 17 and 18 – Tab 15

117. In applying the interpretation of the section as set out in ***Grewal***, Bauman J. in ***Pausche v. BC Hydro & Power Authority***, 2000 BCSC 1556, set out an example of an appropriate application of s. 285:

> I would illustrate the proper application of the section by suggesting a case where the municipality purports to enact a bylaw under

> the ***Local Government Act*** expropriating land for a municipal purpose.
>
> The municipality purports to comply with the various statutory requirements and then enters the land and destroys the home on it in preparation for the municipal project.
>
> It transpires that the municipality has not properly complied with the statutory prerequisites to a valid expropriation. (There are a number under the Act, the details are not important.)
>
> The expropriation bylaw is successfully attacked by the landowner and it is declared void.
>
> Setting aside considerations of colour of right, the municipality has in law trespassed and converted the landowner's property.
>
> The limitation period of six months, however, properly applies to that cause of action, because if the municipality had acted in the "manner prescribed by law" in adopting the expropriation bylaw, what would otherwise have been an unlawful act – trespass and conversion – might have been lawfully done. [This indeed was exactly the case in ***Cameron Investment & Securities Co. and Bailey v. City of Victoria***, [1920] 3 W.W.R. 1043 (B.C.S.C.). See also ***Timpany v. Revelstoke (City)*** (1986), 35 D.L.R. (4th) 729 (C.A.).]

Pausche v. BC Hydro & Power Authority, (24 October 2000) Vancouver Reg. No. C976377 (B.C.S.C.) at paras 64 to 70 – Tab 16

[53] I am satisfied that in passing or creating the official community plan the City was purporting to exercise authority it had under the Act. The City erred in not ensuring that the capital expenditure plan included provision for acquisition of

Lot 14 if necessary or when required. However, had that been done, no objection could have been taken to the bylaw. I disagree with the plaintiffs' characterization of the City's actions as being for an unlawful purpose, i.e. assisting or compelling Westsyde to acquire Lot 14. The purpose was to create an official community plan and the designation of Lot 14 as roadway was simply a part of that official community plan. I am satisfied therefore that s. 285 does apply. Even if the limitation did not begin to run against these plaintiffs until February 4, 1999, when their counsel communicated with the City about their intention to sue for damages, this action was not started until March 21, 2000, and is clearly out of time.

[54] Section 286 of the ***Local Government Act***, R.S.B.C. 1996, as amended, provides as follows:

> 286(1) A municipality is in no case liable for damages unless notice in writing, setting out the time, place and manner in which the damage has been sustained, is delivered to the municipality within 2 months from the date on which the damage was sustained.
>
> (2) 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.
>
> (3) 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

(a) there was reasonable excuse, and

(b) The defendant has not been prejudiced in its defence by the failure or insufficiency.

[55] The plaintiffs acknowledge that they were aware or believed that the value of their property had been detrimentally affected on December 9, 1997. Even if the letter from the realtor on April 28, 1998, to the City asking the City to consider purchasing the plaintiffs' property can be considered notice under s. 286, it is still out of time. Counsel agree that s. 914 of the ***Local Government Act*** does not apply.

[56] I find that the plaintiffs have failed to prove abuse of public office on the part of the City or its officials or employees and have failed to prove negligence. I also find that the limitations defence raised by the City in response to the claims of negligence apply and therefore must dismiss the plaintiffs' claims, even though I have some sympathy for them as a result of the position they found themselves in.

[57] Counsel have not had the opportunity to address the issue of costs and if they are unable to agree, on the matter of costs they have liberty to apply.

"R.E. Powers, J."
The Honourable Mr. Justice R.E. Powers

STATUTES AND AUTHORITIES REFERRED TO BY THE PARTIES

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Welbridge Holdings Ltd. v. Winnipeg (Greater), [1971] S.C.R. 957

Bavelas v. Copley, [1999] B.C.J. No. 955 (Q.L.) (S.C.)

Bergloff et al v. District of Terrace (1963), 41 D.L.R. (2d) 285

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