Date: 19971020
Docket: S1042/862020
Registry: COURTENAY

IN THE SUPREME COURT OF BRITISH COLUMBIA

NO. S 1042

BETWEEN:

DEL'S TRAILERLAND LIMITED and HELENA DEL PUPPO McKAY

PLAINTIFFS

AND:

REGIONAL DISTRICT OF COMOX-STRATHCONA

DEFENDANT

NO. 862020

BETWEEN:

VICTOR DEL PUPPO and HELENA DEL PUPPO McKAY

PLAINTIFFS

AND:

REGIONAL DISTRICT OF COMOX-STRATHCONA

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE E.R.A. EDWARDS

Counsel for the Plaintiffs:	WILLIAM M. TROTTER, Q.C.
Counsel for the Defendant:	JAMES S. CARFRA, Q.C. MARY ANN MacKENZIE
Place and Date of Hearing:	COURTENAY, B.C. SEPTEMBER 29 & 30, OCTOBER 1, 2, 3, 6-9, 1997

[1] These two actions were tried together by agreement of the parties and direction of the court. At the outset of the trial, counsel for the plaintiffs asked that a third related action, Courtenay Registry No. 842199, be dismissed without costs. The defendant did not object and that action was dismissed.

[2] The two remaining actions arise from a series of problems between Mrs. McKay, Mr. Del Puppo and the corporate plaintiff on the one hand and the defendant on the other, relating to the plaintiffs' development and operation of a mobile home park during the period 1973-1991.

[3] Counsel agreed all three plaintiffs should be treated as one, making no distinction between the corporate and personal plaintiffs. Mr. Del Puppo died in 1988. Mrs. McKay, his widow, is executrix of his estate. I hereafter refer to all three plaintiffs collectively as "the plaintiffs".

[4] An agreed statement of facts comprehending some 171 paragraphs sets out the history of relations between the parties concerning the mobile home park. It was augmented by several hundred documents which were before the court as exhibits. The agreed facts and exhibits deal primarily with two main problems between the parties which counsel have characterized as "water issues" and "development issues".

[5] The water issues gave rise to action No 862020, which was started in the County Court of Vancouver Island on February 14, 1986 claiming $3,285.35 plus interest. Part of this claim was resolved before the trial and abandoned. The balance is for $1,950 damages allegedly caused by "improperly handling" and "failing to flush" pipes when the defendant installed meters to the plaintiffs' water system in 1984.

[6] Apart from this relatively small monetary claim, the water issues, which generated a good deal of controversy between the parties from 1977 to 1984 and consumed a considerable amount of time at the trial, have long since been resolved. Plaintiffs' counsel relied on the history of the water issues as evidence of antipathy between the plaintiffs and officials of the defendant, which he argued in opening caused the defendant through those officials to deliberately attempt to frustrate the plaintiffs' completion of their mobile home park.

[7] That assertion is the basis of action No. S1042. The Further Amended Statement of Claim alleges that certain specified actions of the defendant after 28 July 1981 were "undertaken maliciously and unlawfully" and amount to an "unlawful interference with the plaintiffs' economic interests" which resulted in "loss or damage" to them. It further alleges these actions were undertaken with "malice and intent to harm" the plaintiffs and their business and amount to "misfeasance by a public officer in the discharge of public duties and an abuse

of public office". The plaintiffs claim aggravated, punitive and exemplary damages as well as general damages as a result of this alleged misconduct.

[8] In final submissions counsel for the plaintiffs properly acknowledged that the evidence did not support a finding that the defendant or any individual official or director had acted vindictively towards the plaintiffs. He submitted the evidence established the defendant had acted illegally and that was sufficient to support the plea of abuse of public office and the claim for general and punitive damages.

[9] As I understood the submission, it was that the defendant had acted illegally in specified instances relating to zoning decisions and building permit requirements and did so either through the action or inaction of its officials or board of directors. This, plaintiffs' counsel argued, was done knowing it would cause harm to the plaintiffs and amounted to abuse of public office. Alternatively counsel argued the action or inaction was negligent.

THE WATER ISSUES

[10] The history of the water issues was developed in the plaintiffs' evidence to support the claim the defendant acted deliberately or vindictively to frustrate the plaintiffs' development. The specific plea that ". . . actions of the

defendant . . . in relation to the water supply and in relation to land use . . . were undertaken with malice and intent to harm the plaintiffs . . . [and this] . . . conduct of the defendant amounts to misfeasance by a public officer in the discharge of public duties and an abuse of public office" was abandoned. As a result there is no need to recount that history other than to say it was clearly a source of annoyance and frustration for both parties and that the plaintiffs ultimately persuaded the defendant to accept their position on most of the points in issue.

[11] The remaining water issue is the plaintiffs' claim for $1950 in action No. 852020.

[12] In May 1984, the defendant advised the plaintiffs it would install new water meters and would do so with care in light of the plaintiffs' continuing assertion that meters previously installed were inaccurate and had impeded proper flow to their tenants.

[13] According to the agreed facts, the plaintiffs believed sand and gravel were introduced into their distribution system and pressure release valves [PRVs] when the defendant installed the new meters. Before and after remedial work by the plaintiffs, they informed the defendant that water pressure in the mobile home park had diminished. An official of the Ministry Municipal Affairs investigated and agreed. The

defendant's officials attributed this to leaks on the plaintiffs' property rather than to improper installation of the meters.

[14] The plaintiffs' allegation that shortly after the defendant installed meters in 1984, sediment appeared in the water system at the mobile home park is supported by an affidavit from a former tenant. The plaintiffs' theory is that sediment caused PRVs to malfunction, putting their distribution system under excessive pressure which caused breaks in the pipes.

[15] An engineer, Mr. Denton, wrote a report in 1997 indicating it was possible sediment could cause the PRVs to fail raising the pressure in the system to a level higher than intended. There was no direct evidence the PRVs failed. Mr. Denton, who had not examined the system in 1984, was unable say what pressure the lines downstream of the PRVs could withstand. He agreed that clogged filters on meters above the PRVs would lower not raise the pressure in the system, "unless a continuous trickle allowed it to build up".

[16] The plaintiffs purchased material and equipment they say was required to repair breaks resulting from what they allege was improper installation of the meters in 1984. They billed the defendant $1,950 for this, which the defendant declined to pay. Mrs. McKay testified that the bill had been sent and

remained unpaid, but she gave no evidence as to what had been purchased or done by the plaintiffs.

[17] Documents indicated that the claim was turned over to the defendant's insurer who recommended against settlement, advice which the defendant's board of directors accepted.

[18] Defendant's counsel argued that the reports of low pressure after the meters were installed are inconsistent with the plaintiffs' theory that a pressure surge caused the breaks. Low pressure persisted after the breaks were fixed, suggesting it was not caused by the breaks. If it was caused by sediment in filters up stream of the PRVs, as Mr. Denton acknowledged was possible, it is unlikely high pressure caused the breaks, counsel argued. Counsel further argued that pre-existing breaks might have been discovered only when the newly installed meters disclosed excessive flow. There was no evidence about how the breaks were actually discovered.

[19] I find the evidence on this whole issue inconclusive. This is perhaps not surprising in light of the passage of time since the event. Mr. Denton's evidence could not be based on timely observation of the works in question. The defendant's official most familiar with the situation, Mr. Hurley, who might have been able to shed more light on it, died in 1993.

[20] On the whole of the evidence, I am unable to find that the plaintiffs have proved it more likely than not that the defendant's negligence caused the damage they claim. Accordingly action No 862020 is dismissed.

DEVELOPMENT ISSUES

[21] Between 1968 and 1970 the plaintiffs acquired three contiguous parcels of land ["Lot A", "Lot 9" and "Lot 1"] on which to construct their mobile home park. It was unzoned rural land at that time. Part of Lot 9 had some occupied mobile home pads on it.

[22] Before proceeding with work on the mobile home park, including provision of underground water, septic sewer, electric and cable TV services to each pad, the plaintiffs sought and obtained approval from the health authorities respecting the septic system, the highway authorities respecting access and the improvement district respecting water distribution. These were the only approvals then required for the proposed development.

[23] A copy of a rudimentary plan of the entire proposed mobile home park, showing the location of 65 pads and a laundry building, was submitted to the improvement district. Minutes of the improvement district for 7 April 1970 note: "Mr. V. Del

Puppo consulted with the Trustees concerning approval of his trailer court plans. These plans were inspected and approved."

[24] It is the plaintiffs' position that from that day until the park was ultimately completed in 1991, the park was under continuous construction and they need not comply with any subsequent zoning or building set back requirements in light of s.705(1) of the ***Municipal Act*** as it stood in 1973. Section 705(1) provided: "A building or structure lawfully under construction at the time of the coming into force of a zoning bylaw shall for the purpose of that bylaw, be deemed to be a building or structure existing at that time".

[25] In final submissions, plaintiffs' counsel acknowledged that parts of the park completed after applicable bylaws of the defendant were in place, such as the recreation hall, had to comply with building permit requirements.

[26] The plan submitted to the improvement district indicated that work on the park would proceed in 5 stages. Part of stage 3 and all of stage 5 were on Lot 1. Stages 3 and 5 involved the construction of concrete mobile home pads with underground services.

[27] After the approvals mentioned above were obtained, the plaintiffs set to work developing the park. They purchased equipment, and Mr. Del Puppo, a retired construction supervisor, did most of the work himself, aided by Mrs. McKay

[then Mrs. Del Puppo]. The only evidence of when particular aspects of the work on stage 3 was done was Mrs. McKay's recollection. She testified at the trial that some of the work on underground services for stage 3 on Lot 1 was done before 1973.

[28] The defendant enacted the first zoning bylaw ["Bylaw 108"]applicable to the area in which the park is situated, in September 1973 after a lengthy period of public consultation. The public was asked to respond to proposed zoning at a series of well-advertised public meetings with officials of the defendant and also encouraged to provide reaction through a number of volunteer "Advisory Planning Commissions".

[29] The intention Bylaw 108 was to act as an interim control on development until a regional plan could be put in place. The initial zoning was based on existing uses as observed by the defendants' officials helped by summer students who traveled by car to make observations of the one to two thousand parcels to be covered by the zoning. The students were instructed to consider any parcel with no structures above ground as "vacant" land. In some cases this was checked against assessment records.

[30] Using this technique, the existing use for Lot 1, as shown on plans provided for public consideration before enactment of Bylaw 108, was indicated as "vacant". As a result, the

proposed zoning for Lot 1 was "R-2" which did not permit mobile home park development.

[31] According to Mrs. McKay's evidence, this came to the plaintiffs' attention and she mentioned it to an acquaintance, Mrs. Webber, a member of the Advisory Planning Commission for the area. Mrs. McKay said Mrs. Webber assured the plaintiffs the proposed zoning was a mistake which would be rectified to take into account the intended use of Lot 1 as part of the mobile home park.

[32] The plaintiffs now allege this amounted to a representation by the defendant that Lot 1 would be zoned so as to permit its use as part of the mobile home park and that the defendant's failure to zone it in that way was, as a result of the representation, "illegal".

[33] Mrs. Webber denied giving any such representation or assurance. As a volunteer she had no authority to give it or to make any change in the proposed zoning. She testified she probably showed the Del Puppos the proposed zoning map on a social occasion and that she knew they were unhappy with the proposed zoning. She acknowledged that she probably did agree to pass along their reaction to Mr. Yerex, a director of the defendant who has since died. Nothing turns on whether Mr. Yerex was informed of the plaintiffs' concern by Mrs. Webber.

[34] That is because Mr. Becker, who was then the defendant's director of planning responsible for preparing Bylaw 108, testified he recalled discussing the proposed zoning with the Del Puppos at the relevant time at least once. He further testified that they had not told him construction had actually started on Lot 1, only that they intended to proceed.

[35] Mr. Becker testified the defendant's policy was that intentions were not enough and that he would have given no assurances that zoning would be changed from that initially proposed unless he was satisfied that there was a "physical presence" manifesting construction underway when the initial zoning bylaw was to take effect. Mr. Becker testified that if he had been told there was construction underway "we'd go and check it out" and although he could not recall checking the plaintiffs' property himself "someone might have".

[36] Mr. Becker testified that a property owner merely presenting him plans of proposed construction would not have influenced him to alter proposed zoning and that anyone doing so would be told to apply for rezoning later. He testified he was not certain but believed the plaintiffs had showed him sketches or plans and mentioned land clearing but not construction.

[37] Finally, Mr. Becker testified that if there had been evidence of underground utilities in place "we'd think about"

accepting that as evidence of an existing structure but he would want pads or other evidence of some above ground structure under construction or, for example, evidence that the septic system had been certified as properly installed by health authorities, before concluding the proposed zoning should be changed.

[38] Mr. Becker denied he ever undertook to the plaintiffs to change the proposed zoning of Lot 1 before Bylaw 108 was enacted. He testified that if someone pointed out what he accepted as an error in the proposed zoning he would then follow up in writing, committing to change it. That did not occur in this case.

[39] The Further Amended Statement of Claim alleges "In enacting Bylaw 108 the defendant acted wrongly, negligently and in breach of its representation ..." The representation alleged was that the "defendant, through the agency of Jean Webber and also by its director of planning [Mr. Becker] agreed to zone the three parcels for mobile home park use and represented . . . that the zoning to be put in place for the three parcels would be compatible with the [plan approved by the improvement district in 1970] and such use."

[40] On the evidence Mr. Becker made no such representation. Mrs. Webber probably said something to the plaintiffs they interpreted as such a representation. If she did, it cannot

have had the effect of making the zoning of Lot 1 as R-2 illegal.

[41] The defendant acted as a legislator when it enacted Bylaw 108. Counsel for the plaintiffs did not contend the defendant was statutorily bound to ensure that Bylaw 108 adopted zoning which accommodated all existing uses or construction then underway on all parcels it covered, let alone intended uses earlier approved by other authorities. I have been unable to find such a statutory requirement.

[42] Even if Mrs. Webber, or anyone else on behalf of the defendant, represented that Lot 1 would be zoned to reflect existing , or "deemed" existing use under s. 705(1), such a representation was merely an expression of the legislative policy of the defendant in respect to zoning. This policy was presumably widely known in light of the public consultation process. If the policy was not actually reflected in Bylaw 108 as it applied to Lot 1 or any other parcel, that did not make Bylaw 108 invalid or "illegal" in the sense of being legally inapplicable to that parcel.

[43] In light of the technique used to determine actual use of each parcel leading to the enactment of Bylaw 108, there would almost certainly be parcels which were not zoned in accordance with the announced policy of the defendant, that is parcels for which the zoning did not reflect what was on the ground.

[44] If Bylaw 108 did not actually reflect what was on the ground on Lot 1 or any other parcel, on the date of its enactment, through oversight or otherwise, that cannot affect its validity. If a specific representation was made to the plaintiffs that Lot 1 would be zoned in accordance with the policy, that would put the plaintiffs in no different position than any other property owner who relied an the understanding that the zoning would reflect existing uses, including structures "deemed" existing because they were under construction..

[45] Section 706 of the ***Municipal Act*** at the relevant time provided: "Property shall not be deemed to be taken or injuriously affected by reason of the adoption of a zoning bylaw ..." It appears intended to absolve the enacting municipal government of any liability for limiting the use of land through zoning.

[46] In short, the defendant's enactment of Bylaw 108 cannot be characterized as negligent or wrongful because the defendant was under no legal obligation to ensure the zoning accommodated every building or structure, then built or under construction, as an approved use. A comment by Mrs. Webber, perhaps misinterpreted by the plaintiffs, cannot have created such a legal obligation on the part of the defendant.

[47] The whole point of s.705(1) of the ***Municipal Act*** was to protect those who had built or were building structures which did not conform to subsequently enacted zoning. Existing structures or those deemed existing by the subsection are legal non-conforming uses thereafter. No doubt the policy of accommodating existing uses in Bylaw 108 was intended to minimize the number of such non-conforming uses. To the extent Bylaw 108 failed to reflect this policy, property owners were protected by s.705(1).

[48] Whether a property owner is entitled to this protection is a question of fact in each case - was there an existing or deemed existing structure on the parcel at the time of zoning? Normally, that question of fact arises when a property owner is apparently in breach of zoning requirements and raises s. 705(1) as a shield.

[49] In this case the plaintiffs, according to a minute of the defendant's "District 71 Committee" dated September 14, 1981, knew Lot 1 had been zoned R-2 in 1973 but told the Committee they had been advised "that the matter would be corrected" and "claimed that until recently, they had assumed the property was rezoned properly". Apparently on the basis of that assumption they proceeded with construction of ten mobile home pads on Lot 1. This did not come to the defendant's attention until 1981.

[50] At the trial, the plaintiffs led no evidence to show, nor was it argued on their behalf, that they were assured between 1973 and 1981 the zoning would be "corrected".

[51] The plaintiffs' real problem is that having proceeded on the assumption their project on Lot 1 complied with the zoning, when they were confronted in 1981 with the fact it did not, they could not prove that the underground services to the ten pads on Lot 1 had been under construction in 1973 before Bylaw 108 was enacted.

[52] In the end, this was of no real significance, because Lot 1 was rezoned after the ten pads were constructed and occupied contrary to the R-2 zoning. The plaintiffs never had to remove tenants from the ten pads. This rezoning was at the suggestion of the defendant's officials and against the strong objection of some of their neighbours.

[53] In fact it was the objection of a neighbour, Mr. Bush, which brought the zoning question to the attention of the defendant. In July 1981, Mr. Bush complained that there were ten mobile homes on Lot 1. The R-2 zoning permitted only one. Mr. Phillips, then the bylaw enforcement officer, wrote the plaintiffs on 28 July 1981, pointing out the apparent zoning contravention and advising the plaintiffs they would have to remove nine of the mobile homes unless the plaintiffs could

"produce any documents allowing this situation" or produce "evidence to the contrary to this alleged violation".

[54] The plaintiffs provided the 1970 plans approved by the improvement district. The defendant's officials took the position this did not overcome the zoning problem. Mr. Phillips obtained a legal opinion which confirmed his view that the 1970 approval did not permit the use of Lot 1 as a mobile home park.

[55] The opinion does not refer to s. 705(1) of the ***Municipal Act***, but does refer to the question of whether the ten pads in question had been under construction at the time the R-2 zoning was put in place. Mr. Grant, who wrote the opinion, noted ". . . I understand that an adjacent owner, one Jack Bush . . . is prepared to swear that at the time that Bylaw 108 became effective, no use was being made of any part of Lot 1". Mr. Bush's reported statement cannot, of course, be taken as evidence of the truth of its content. But it does show that the defendant was aware of the possibility s. 705(1) might apply.

[56] Mr.Grant, also noted in the opinion, "I am advised that the only response which has been made to this [apparent zoning infringement], by the solicitor to the Del Puppos, is that some vested right or other to commercial use of Lot 1 arose by

reason of some sort of inspection and approval by [the improvement district] in April of 1970".

[57] Mr. Phillips, who obtained the opinion, testified that he had not withheld from Mr. Grant any information he had received from or on behalf of the plaintiffs. There is no evidence that the plaintiffs ever claimed, or provided any evidence to the defendant either in 1973 or 1981 to support the claim, that construction was underway on Lot 1 before the initial R-2 zoning came into effect.

[58] The plaintiffs sought legal advice in order to respond to Mr. Phillip's letter of 28 July 1981. I infer from Mr. Grant's opinion the plaintiffs' lawyer did not advance the argument that s. 705(1) applied because construction on Lot 1 was underway before the 1973 zoning.

[59] Mr. Egan, who became a director of the defendant in November 1981 ardently championed the plaintiffs' position form that time onward. He testified he formed the opinion at the time the mobile home park was "in stream" before Bylaw 108 and that as a consequence Bylaw 108 did not apply to the park in light of the ***Municipal Act***, presumably referring to s.705(1). He testified that he made his opinion known to Mr. Hudson, Mr. d'Easum and Mr. Chapman, who were then the defendant's Chairman, Administrator and Director of Planning, receptively.

[60] On cross-examination, Mr. Egan acknowledged that his only knowledge of the state of construction of the mobile home park in 1973 was from casual observation as he drove by from time to time. Nevertheless he testified he was "utterly convinced" the park was "in stream". That may be, but Mr. Egan's evidence sheds no light on the question of whether construction was actually underway on Lot 1 before Bylaw 108.

[61] Mrs. McKay made a written submission to the District 71 Committee dated 14 September 1981. It does not refer to construction being underway on Lot 1 before Bylaw 108.

[62] The lack of any documentary evidence from either 1973 or 1981 that the plaintiffs had or even claimed to have started construction on Lot 1 before the 1973 zoning took effect leaves Mrs. McKay's testimony at the trial as the only evidence of any pre-1973 construction on Lot 1. Whether she is correct is now rather beside the point in light of the subsequent rezoning. The point is, the plaintiffs never told the defendant about this in 1981.

[63] In final submissions plaintiffs' counsel argued that even if there was no evidence the plaintiffs had in 1981 raised the point that construction was underway on Lot 1 in 1973, entitling them to rely on s. 705(1), the defendant was aware of this possibility and therefore obliged to investigate to be satisfied s. 705(1) did not apply before rezoning Lot 1.

Having investigated and found there had been construction underway in 1973, counsel argued, the defendant's board ought to have passed a resolution to the effect that there was construction underway on Lot 1 before Bylaw 108 so s.705(1) applied to Lot 1 and Bylaw 108 did not. Counsel characterized the defendant's failure to do these things as "unlawful".

[64] At the District 71 Committee meeting of 14 September 1981 the committee suggested the plaintiffs apply to rezone Lot 1 and they agreed. Thereafter, there was no reason for the defendant to investigate whether there had been any construction on Lot 1 before it was zoned R-2. That is because, as Mr. d'Easum testified, the result of rezoning was the same from a practical point of view as considering the ten pads on Lot 1 as a use permitted by s 705(1).

[65] Counsel for the plaintiffs suggested to Mr. d'Easum on cross-examination that he ought to have investigated in 1981 to find out if there had indeed been construction underway on Lot 1 in 1973. Mr. d'Easum explained that would have been futile since Bylaw 108 was in place and could not be changed except through the normal rezoning process, which the plaintiffs ultimately agreed to follow.

[66] Counsel for the plaintiffs also suggested to Mr. d'Easum on cross-examination that considering the project as "under construction" on Lot 1 before Bylaw 108 would have been a more

"gentle" means of resolving the issue than rezoning which Mr. d'Easum did not propose because he and other staff opposed concessions to the plaintiffs. Mr. d'Easum did not accept this, but even if he had, that would not demonstrate that the defendant acted unlawfully by proposing rezoning to accommodate the ten pads rather than treating them as a permitted non-conforming use under s. 705(1).

[67] It is not clear that it was legally open to the defendant to recognize pre-Bylaw 108 construction on Lot 1 either by resolution or otherwise. Counsel offered no precedent for a resolution of the type he argued the defendant was legally obliged to pass.

[68] Quite apart from the question of legality, there were practical considerations militating against the defendant proceeding with such a resolution. First, the plaintiffs to that point in time (1981) had neither advanced the proposition that s.705(1) applied nor offered any evidence that there had been construction underway on Lot 1 before Bylaw 108 was enacted. It is far from certain that an investigation in 1981 would have settled the question of whether there had indeed been construction on Lot 1 before Bylaw 108. Second, such a resolution almost certainly would have been challenged by the neighbours who resisted rezoning. They could plausibly have characterized the resolution as an improper means of effectively changing existing zoning without public input.

[69] Plaintiffs' counsel argued that the fact part of the mobile home park on adjoining parcels was under construction or indeed completed and occupied before 1973 was evidence of "commitment", to similar use on Lot 1, even in the absence of proof anything was under construction on Lot 1 at the relevant time.

[70] None of the cases cited on this point support that argument. ***Cowichan Valley Regional District v Little*** [1992] 71 B.C.L.R. (2d) 356 (B.C.C.A) and ***Sunshine Coast Regional District v. Bailey et al*** [1995] 15 B.C.L.R. (3d) 16 (B.C.S.C.) both deal with whether existing structures on a single parcel manifest a commitment to further related construction. Neither is authority for the proposition that structures on one parcel can be taken as evidence of commitment to construct on another parcel.

[71] Similarly, ***Cowichan Valley (Regional District) v. Yole*** [1988] 41 M.P.L.R. 9 (B.C.C.A.), dealt with the question of whether building a barn before rezoning which prohibited livestock could be taken as evidence of commitment to use of the single parcel in question for keeping horses. The question of whether a structure on one parcel could be taken as evidence of commitment to use on an adjoining parcel was not addressed.

[72] Having carefully considered the whole s. 705 of the ***Municipal Act*** in light of the fact that the whole point of

zoning is to distinguish the uses permitted on individual parcels, I conclude that a "building or structure" existing or under construction on one parcel cannot be evidence of commitment to the same use on another parcel where there is no evidence of intended use other than a pre-existing plan.

[73] The defendant's failure in 1981, before rezoning Lot 1, to investigate to determine whether s. 705(1) might apply was neither negligent nor otherwise unlawful. Such an investigation, particularly in light of the plaintiffs' failure to prove they, in 1981, advanced pre-1973 construction on Lot 1 as an answer to the zoning question, was not a legal precondition to the defendant suggesting rezoning Lot 1 to the plaintiffs nor to rezoning it in 1982 in response to their application to rezone.

[74] I find the plaintiffs have not at this trial proved on a balance of probabilities that there was "a building or structure lawfully under construction" as contemplated by s. 705(1) of the ***Municipal Act*** on Lot 1 before Bylaw 108 was enacted. I infer that even if the defendants had investigated in 1981 they would not have been able to establish construction was underway in 1973. The consequence of that finding is that Lot 1 was subject to R-2 zoning from 1973 until it was rezoned in 1982.

[75] While that rezoning permitted the ten pads already on Lot 1 to remain it did not permit the plaintiffs to complete the mobile home park as they originally planned on Lot 1. That is because more or less contemporaneously with the 1982 rezoning the plaintiffs consolidated Lots 1, A and 9 into one parcel. They allege they were required to do so by the defendant. There is no evidence to support that allegation.

[76] The evidence is that the defendant was unaware of the consolidation until a complaint was made by neighbours about the construction of 3 mobile home pads on what had been the northern half of Lot 1. In July 1982, the defendant investigated, found the pads were under construction without a building permit and issued a stop work order. The defendant's position was that the three new pads exceeded the overall density limits for the consolidated parcel.

[77] Although the 1982 rezoning permitted the use of all of Lot 1 as a mobile home park, and the size of Lot 1 was sufficient to accommodate 3 more pads on Lot 1 under the existing density provisions of the zoning bylaw, the effect of consolidation of Lot 1 with the other two lots, which already had more pads than the density provisions permitted, was to preclude more pads on the merged parcel, since the density provision for the consolidated parcel would be exceeded.

[78] The plaintiffs ignored the stop work order. The Del Puppos intended to occupy one of the pads themselves, and had ordered a new mobile home which they were anxious to install.

[79] Again, the defendant's officials suggested a solution, the re-subdivision of that part of the former Lot 1 on which the three new pads were being constructed. The plaintiffs agreed and this was done expeditiously so they would not be caught by an impending model bylaw which required mobile home parks on contiguous property to be on a single legal parcel.

[80] The plaintiffs' position is that the defendant ought to have warned them of the consequences of consolidating all of Lot 1 with the other lots and had the defendant done so the re-subdivision would have been unnecessary. Accordingly, the plaintiffs claim the expenses associated with the re-subdivision and the loss of rental income arising from the delay in obtaining occupancy of two of the pads.

[81] A memo entitled "Planning Department Comments", undated but clearly prepared by the defendant's staff in contemplation of the proposed rezoning of Lot 1, discusses the density issue in detail. According to the memo, after rezoning, the whole of Lot 1 would be permitted 13 pads under then applicable density restrictions. Lot 1 was bisected by Miller Road. The southern part was about one acre and limited to six pads. The northern part was 1.2 acres and so limited to seven pads. The memo

recommends rezoning only the southern portion of Lot 1 and requiring the plaintiffs to consolidate that portion of Lot 1 with the two lots containing the other then existing pads and restricting the plaintiffs to six pads on the consolidated portion of Lot 1 as a precondition of rezoning.

[82] There is no evidence this proposal was ever discussed with the plaintiffs. Had it been, it clearly would have been unacceptable to them since it would have permitted only six of the ten pads then in place on Lot 1 and one not the three pads the ultimately built on the northern part of Lot 1. The rezoning as it proceeded, of all of Lot 1, would have permitted all 13 pads ultimately constructed on it, had the plaintiffs not consolidated all of Lot 1 with the other two lots.

[83] The memo suggests the defendant was not aware the plaintiffs were in the process of consolidating all of Lot 1 at the time rezoning was under consideration. There is no evidence the defendant was aware of that fact. Had the defendant been aware of it, it is possible the defendant might have agreed to rezone both parts of a subdivided Lot 1 and permitted the plaintiffs to keep ten pads on the southern portion as a non- conforming use after it was consolidated with the other two lots. That is, in effect, what eventually occurred, even though it is not consistent with the recommendations in the memo.

[84] Was it negligent or otherwise unlawful for the defendant not to propose this solution to the plaintiffs at the time of the rezoning, as the plaintiffs now assert? The defendant's approval of the consolidation was not required. It was not therefore legally required to take into account the consequences of consolidation in light of existing or proposed zoning.

[85] This is particularly so since there is no evidence the defendant was even aware the plaintiffs had initiated the consolidation. I conclude therefore, the defendant did not act unlawfully in failing to alert the plaintiffs to those consequences or to propose means to get around them. The plaintiffs' claim for the expenses of consolidation and re-subdivision of Lot 1 is accordingly dismissed.

[86] The rezoning and re-subdivision of Lot 1 allowed all the last 13 of 59 pads on the completed mobile home park to be constructed and occupied. Six of the originally planned 65 pads had been abandoned to accommodate "double wide" pads and a storage compound. Nevertheless, the number of pads exceeded that permitted by density restrictions, so 17 of the 59 pads constituted a legally permitted non-conforming use after 1982. The plaintiffs never accepted this. Ultimately in 1989, with some support from the then Minister of Municipal Affairs, Mrs. Johnson, they persuaded the defendant to adopt development

permit zoning of the whole mobile home park, making the 59 pads a "conforming" use.

[87] The plaintiffs claim the $900 in fees charged them by the defendant to process this zoning application and conduct the required public hearing. They do so on the basis that had the defendant recognized the whole of their original plan as a permissible use continuously under construction from the outset, this final rezoning would have been unnecessary to make the completed park conform to zoning.

[88] That is not correct. Even if in 1981 the defendant had concluded the ten pads on the southern part of Lot 1 had been under construction in 1973 and recognized this by resolution or otherwise, as plaintiffs' counsel argued the defendant should have, that would have left the 10 pads on Lot 1 as a non-conforming use under s. 705(1) of the ***Municipal Act***.

[89] Further, according to a table prepared by the defendant's counsel, at no time from the inception of zoning in 1973, even assuming Lot 1 had been initially zoned like the other two parcels RM-1, would the maximum number of pads allowed on all three lots have exceeded 58. Under the zoning actually in place from time to time the maximum never exceeded 48. Nothing the defendant could have done short of adopting special zoning to accommodate the plaintiffs' 65 pad plan in 1973, which the plaintiffs did not contend the defendant was obliged to do,

would have made the completed 59 pad park anything other than a permitted non-conforming use under s. 705(1). The only question was the extent of its non-conformity.

[90] The plaintiffs' counsel explained their desire to obtain the final rezoning on the basis it was necessary or desirable in order to obtain financing. There was no evidence of this.

[91] The only limitation imposed on non-conforming uses referred to by counsel is in s. 705(4) of the ***Municipal Act***. It provides that any non-conforming building or structure which is damaged to the extent of 75% or more "above its foundations" may not be rebuilt. Since a mobile home pad is, in effect, the foundation for a mobile home, it is at least arguable this would have no practical implication for a mobile home park.

[92] The entire history of this matter leads me to the inference that the plaintiffs insisted on the development permit zoning for the park as some sort of political vindication of their position that they should have been permitted to complete their project uninhibited by zoning and building requirements which came into effect after the park was started. That inference is supported by a letter from Mrs. McKay [then Mrs. Del Puppo] to the defendant in March 1989, which lists six demands, one of which is the "spot" rezoning. The others are echoed in the claims made by the plaintiffs in the present litigation.

[93] Whatever may have prompted the plaintiffs to seek it, I am unable to conclude that the spot rezoning was required as a result of anything done or undone by the defendant which can be characterized as negligent or otherwise unlawful. Accordingly the claim for the expense of this rezoning is dismissed.

[94] During the course of consideration of the spot rezoning, the defendant asked the plaintiffs what they wished to have accommodated in the rezoning to complete the park. They indicated they intended to build a recreation hall. The original plan submitted to the improvement district showed a laundry building. It was partly constructed in the early 1970's. When the plaintiffs realized most new mobile homes had their own laundry facilities, they abandoned construction of the laundry and at some point decided to build a recreation hall for their tenants which would incorporate the unfinished laundry building.

[95] When this aspect of their plan was disclosed during the spot rezoning process some neighbours objected, anticipating the recreation hall might be a source of noise. The plaintiffs submitted alternative plans. Eventually, the rezoning as adopted in 1989 permitted a recreation hall sited as the plaintiffs requested.

[96] In November 1990, the plaintiffs engaged Mr. Schnurch, a carpenter, to construct the recreation hall for $61,000 dollars. He contracted to obtain the necessary building permit. He presented an application form and plan to Mr. Bedard, the defendant's chief building inspector. About a week later he visited Mr. Bedard again and was asked a number of questions about the project and asked to provide a drawing of the building certified by an engineer in light of a building bylaw requirement for buildings intended for public occupancy.

[97] Mr. Schnurch testified that he returned to see Mr. Bedard about two weeks later at which time Mr. Bedard asked him if he "should get involved" because the permit process "could take a long time". He testified he thought Mr. Bedard had some vendetta against Mrs. McKay and that Mr. Bedard told him he, Bedard, had had problems with her in the past.

[98] Mr. Schnurch testified "I've learned not to piss on Claud Bedard's rug." Anticipating that Mr. Bedard might complicate other jobs for him if he got on Mr. Bedard's wrong side, he decided to abandon the project and gave this explanation to Mrs. McKay, refunding her deposit.

[99] Mr. Bedard, who joined the defendant's staff in 1989, testified he had never met Mrs. McKay before Mr. Schnurch made the initial contact with him about the building and did not know the long history of the defendant's disputes with the

plaintiffs about the mobile home park. He denied warning Mr. Schnurch against working on the project and said he had no reason to harass Mrs. McKay.

[100] In March 1991, Mr. Carten, a lawyer engaged by Mrs. McKay wrote Mr. Bedard disputing the defendant's classification of the building and requirements respecting the number of washrooms in the building. Mr. Bedard replied pointing out applicable provisions in the building code and applicable building bylaw.

[101] Mrs. McKay engaged another contractor, Mr. Farren, to start construction. He later told Mr. Bedard Mrs. McKay had instructed him to proceed without a building permit on the basis she would deal with the defendant.

[102] Mr. Farren followed those instructions and on 6 May 1991 Mr. Bedard, on discovering construction underway, delivered building inspector's reports to both Mr. Farren and Mrs. McKay ordering them to stop work and giving them five days to apply for a building permit.

[103] The stop work order was ignored. On 14 May 1991, Mr. Bedard extended the time to apply for a permit to 17 May 1991 and posted a stop work order at the building site. It too was ignored. The board of directors of the defendant on Mr. Bedard's recommendation agreed to apply for an injunction

against further construction. On 13 June 1991 an injunction was obtained and served on Mr. Farren who ceased work.

[104] Eventually a building permit was obtained. Mr. Farren never completed the building, and Mrs. McKay engaged Mr. Schnurch to finish it. The final cost of the building was $28,000 more than Mr. Schnurch's original quote of $61,000. Part of the additional cost was $8,000 for repairing the floor which warped as a result of being open to the elements for several months before the permit was issued and the building completed.

[105] The plaintiffs claim this $28,000 on two bases. First, that a building permit should have been issued in 1990 when Mr. Schnurch applied for it. Second, that Mr. Bedard wrongfully dissuaded Mr. Schnurch from completing his contract with Mrs. McKay.

[106] There was no record of Mr. Schnurch's permit application. Mr. Bedard's synopsis of events dated 27 May 1991 states: "In November 1990 a contractor was in to make application for permit but he did not have adequate plans, therefore he took the application saying he would return." A prerequisite to obtaining a permit for an "assembly occupancy" building like the recreation hall, under the defendant's Building Bylaw No. 1262 Article 4.2.15 was submission of a design drawing certified by an engineer or other approved

designer. Mr. Schnurch admitted he had no such drawing to submit with the application.

[107] Mrs. McKay, until May 1991, took the position that the building was exempt from building permit requirements because of the approval of the original lay out plan of the mobile home park by the improvement district in 1970, despite the fact the plan did not even show a recreation building. She later abandoned that position and submitted the certified plan as required. Plaintiffs' counsel in final submissions properly acknowledged that the building was subject to permit requirements. In that light it is clear that Mr. Bedard acted properly in insisting that those requirements be met before issuing a permit. There can be no liability arising from the fact he did not issue a permit to Mr. Schnurch in 1990.

[108] Mr. Schnurch's evidence that he perceived Mr. Bedard had some vendetta against Mrs. McKay is hard to credit in light of the fact Mr. Bedard had never met her and knew nothing of her history with the defendant. I find Mr. Bedard anticipated that the issuance of a permit would take some time and communicated this to Mr. Schnurch who decided he did not wish to become involved in what turned out to be a lengthy process. It was not negligent for Mr. Bedard to make such a statement.

[109] Plaintiffs' counsel argued Mr. Bedard intentionally interfered with the plaintiffs' contractual relations with

Mr. Schnurch by encouraging Mr. Schnurch to breach his contract with Mrs. McKay. That claim, which constitutes a separate tort, is neither pleaded in the Further Amended Statement of Claim nor proved on the evidence.

[110] In summary, any additional cost incurred by the plaintiffs as a result of Mr. Schnurch abandoning the project is not attributable to negligence or any other wrongful act of the defendant.

[111] The plaintiffs claim the $8,000 cost of repairing water damage to the floor which occurred after the injunction prevented them from completing the roof. This is based on Mrs. McKay's evidence that Mr. Bedard had given her permission to complete the roof. Mr. Bedard denied this, testifying that his usual practice when agreeing to partial completion after issuing a stop work order was to note it on the order.

[112] A week after the injunction was granted the defendant's solicitor wrote the plaintiffs' solicitor indicating that the defendant would not regard the placing of a "canvas or poly covering" over the uncompleted building to protect it from the elements as a breach of the injunction but would regard the installation of metal roofing then on the site as such a breach. This letter can only have been prompted by a request from the plaintiffs. There is no evidence they then asserted Mr. Bedard had granted permission to complete the

roof. There is no evidence the canvas or ply cover was ever installed.

[113] I find Mr. Bedard did not agree to completion of the roof. The defendant did agree to means which would have permitted the plaintiffs to mitigate any damages. In these circumstances, there is no legal basis for finding the defendant liable for damage to the floor.

[114] The plaintiffs advanced one further claim for general damages. It was based on an assurance they say was given them after their 14 September 1981 meeting with the District 71 Committee by the committee chairman, Mr. Moore, that they would be permitted "to complete their project". Plaintiffs' counsel argued this was negligent advice, in light of the subsequent difficulties the plaintiffs encountered in completing the project.

[115] The evidence is clear that directors of the defendant agreed or formed the "political will" at that meeting which was maintained thereafter, that the plaintiffs should be permitted to complete the mobile home park as originally "approved" by the improvement district. Mr. Moore no doubt reflected that in his comments to the plaintiffs after the meeting. In fact, the plaintiffs were permitted to complete the park. I have already concluded the defendant did nothing illegal in following the processes necessary to allow that to happen.

[116] Essentially, this aspect of the plaintiffs' claim is not that Mr. Moore's advice was wrong but that they ought to have been spared the expense, frustration and delay of having to participate in those processes. Having won the political battle to complete their park, they now claim compensation for having to fight it.

[117] I have already dealt with the specific damage claims advanced by the plaintiffs. A more general claim was that they lost revenue from pads unrented during their long dispute with the defendant over completion of the park. They allege their business reputation was damaged by the dispute and that the defendant was slow to issue building permits to prospective tenants who then went elsewhere.

[118] While a 1982 stop work order was in place respecting the three pads then under construction on what had been the northern part of Lot 1, Mrs. McKay testified, prospective tenants for existing pads were delayed in getting building permits to "hook up" and therefore did not take up residence. Her evidence was that all vacancies at the park between 1981 and 1989 were a result of this and other action or inaction of the defendant which she said compromised the reputation of the mobile home park. In fact, the vacancy rate dropped after 1981. The evidence does not support the inference that vacancies for the period 1981-1989 were attributable to action

or inaction by the defendant, nor to loss of the plaintiffs' business reputation caused by the defendant.

[119] Mrs. McKay could recall the names of only a few prospective tenants she says were influenced by building permit delays. At this distance in time it is impossible to determine why delays occurred or if those delays were abnormal. I am not able, on the basis of the evidence presented by the plaintiffs, to infer there were abnormal delays caused by the defendant. The plaintiffs have failed to prove these alleged damages.

[120] Mr. Egan, a director of the defendant who the documentary evidence makes clear was a an ardent supporter of the plaintiffs throughout his period of office from 1981 to 1993, testified that he never suggested staff of the defendant ever did anything except "rigidly enforce what was legitimate" and that he objected to this rigidity. What Mr. Egan regarded as "rigidity" his fellow directors evidently regarded as proper process, as the minutes of their deliberations and votes indicate.

[121] However the processes followed by the defendant to give effect to its director's political will that the plaintiffs project be completed are characterized, they were not, as I have found "wrongful", "negligent" or otherwise illegal.

[122] The plaintiffs' final claim was for general damages for the "frustration and worry" they had experienced as they dealt with the defendant over completion of their project. Despite abandoning the plea that the defendant had acted vindictively they did not formally abandon their claim to punitive or exemplary damages. Plaintiffs' counsel relied on ***Barthopp el al v. Corporation of West Vancouver and Field*** [1979] 17 B.C.L.R. 202 (B.C.S.C.) as authority for such awards.

[123] The awards in that case were made consequential on a finding the defendant had illegally delayed issuance of a building permit and over 26 months had dealt with the plaintiffs in a "high-handed, insolent and arrogant manner." Here, there was no illegality on the part of the defendant nor any conduct by the defendant I would characterize in the way the defendant's conduct was characterized in ***Barthopp***.

[124] I was directed to no case supporting the proposition that a municipal authority may be found liable to compensate someone for the frustration and worry of dealing with that authority, where that authority has not acted illegally. On principle, there is no basis for such an award. Nor was I directed to any case where an award of punitive or exemplary damages was made in the absence of an award of general damages. Again, there is no basis in principle for such an award.

[125] Actions No. S 1042 and No. 862020 are dismissed with costs.

[126] In dismissing these actions, I cannot help reflecting on the tragic irony that the plaintiffs were ultimately successful in having approved and completing the project they originally planned. It was generally acknowledged to be an exemplary project. The irresistible force of the plaintiffs' determination to complete their park, manifested by their belief that they required no approvals even after zoning came into effect in 1973, collided with the not immovable but deliberate object of the defendant's obligation to enforce its bylaws. The means whereby the defendant met that obligation while moving to accommodate the plaintiffs' project, were no doubt frustrating in their delays and worrying in their uncertainty to the plaintiffs. Yet they were legal means open to the defendant, which acted in good faith.

"E.R.A. Edwards, J."
THE HONOURABLE MR. JUSTICE E.R.A. EDWARDS