IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Meena Holdings d.b.a. Palace Hotel v. City of Nanaimo & 612316 B.C. Ltd. Dizzy's v. City of Nanaimo,*** 2005 BCSC 521

Date: 20050407
Docket: No. S36903
Registry: Nanaimo

Between:

Meena Holdings Ltd. d.b.a. Palace Hotel

Plaintiff

And

City of Nanaimo

Defendant

AND

No. S37542
Nanaimo Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

612316 B.C. Ltd. D.B.A. Dizzy's

Plaintiff

And:

City of Nanaimo

Defendant

Before: The Honourable Mr. Justice Lander

Reasons for Judgment

Counsel for the plaintiffs:	G.E. Beaubier
Counsel for the defendant:	N.C. Carfra
Date and Place of Trial:	March 08, 2005 Nanaimo, B.C.

2005 BCSC 521 (CanLII)

[1] This case involves two related actions which were heard together, pursuant to a Consent Order issued June 4, 2004.

[2] The plaintiff Meena Holdings Ltd. is an incorporated company which carries on business as The Palace Hotel, at 275 Skinner Street, Nanaimo. That business includes a pub, which conducted "off-sales" of wine, beer and cooler products to the public.

[3] The plaintiff 612316 B.C. Ltd operates "Dizzy's Nightclub", a nightclub cabaret located at 44 Commercial Street, Nanaimo.

[4] Meena Holdings and 612316 B.C. Ltd. are both owned by Gurdev Holdings Ltd., a company owned by Mr. Gurdev Manhas. Both of the businesses are located in an area designated by the City of Nanaimo as C-11 (Core Area Commercial Zone), pursuant to City of Nanaimo Zoning Bylaw 1993 No. 4000.

[5] In March 2002, the Liquor Control and Licensing Branch ("LCLB") announced a number of reforms to its liquor licensing regime. Two of these reforms are relevant to this action. First, on April 2, 2002 the LCLB began to permit the sale of spirits in Licencee Retail Stores ("LRSs"). Second, the LCLB announced plans to lift the 1992 moratorium on LRSs, on the condition that new LRS licenses would only be granted to applicants who already held "liquor primary licences". The deadline to apply for LRS licenses was November 29, 2002.

[6] Prior to December 2, 2002, both plaintiffs were properly licensed by the LCLB to conduct their respective businesses. Meena Holdings had a license to sell "off

2005 BCSC 521 (CanLII)

sales" of beer and wine to the public, and 612316 had a license to sell beer, wine and spirits to be consumed on the premises. Effective December 2, 2002, a regulation came into force which consolidated seven liquor license categories and 19 liquor license classes into two license types: liquor primary (bars and pubs) and food primary (restaurants). On December 2, 2002, the licenses held by both plaintiffs became liquor primary licenses.

2005 BCSC 521 (CanLII)

[7] Prior to the November 2002 deadline, both plaintiffs went through the steps to apply for an LRS license. This included submitting architectural plans to the Ministry of Health and the city fire authorities for approval. The Ministry of Health approved both sets of plans, but the City of Nanaimo refused to approve the plans. The attached letter from the city, dated September 16, 2002, stated as follows:

> The C-11 zone does not allow "Cold Beer and Wine Stores".
> Therefore, we are unable to approve your plans that were submitted.

[8] In September and October 2002, the plaintiffs corresponded with the city to advance their view that LRSs were a permitted use in the C-11 zone. On November 29, 2002, the plaintiffs submitted incomplete LRS applications with the LCLB, as there were unable to obtain the required authorization from the city. On December 16, 2002, Nanaimo sought support from the LCLB "to hold all applications in the downtown area pending completion of the zoning exercise and direct staff to bring forward the necessary amendments, once the Provincial liquor licensing deadline has passed".

[9] On May 1 and 2, 2003, the LCLB granted the plaintiffs pre-clearance approval for the establishment of LRSs. However, because the City of Nanaimo maintained that an LRS was not an allowable use in a C-11 zone, the LCLB declined to issue LRS licenses to either of the plaintiffs.

[10] The plaintiffs submit that according to the wording of Bylaw No. 4000, a LRS is an allowable use within the C-11. Therefore, the plaintiffs submit that by denying approval for the LRSs, and preventing the plaintiffs from obtaining LRS licenses, the City of Nanaimo committed an actionable wrong. The plaintiffs claim damages for loss of revenue and loss of related business starting from September 9, 2002, damages for loss of long term future revenue, and a declaration that the plaintiffs are permitted to operate LRSs in the C-11 zone.

[11] The key issue to be determined is whether an LRS is a permitted use in a C-11 zone. The plaintiffs submit that C-11 zoning permits “retail stores”, and that LRSs fit within the definition of “retail stores” set out in the Bylaw.

[12] The City submits that an LRS is not a “retail store” as defined in the Bylaw, but is instead a “cold beer and wine store”, as defined in the Bylaw prior to February 10, 2003, or a “liquor store”, as defined in the Bylaw as amended February 10, 2003. The City contends that neither cold beer and wine stores nor liquor stores are permitted uses within the C-11 zone.

[13] The zoning regulations for the C-11 zone are set out in section 9.11 of Bylaw 1993 No. 4000. Section 9.11.1 sets out a complete list of permitted uses. Neither

2005 BCSC 521 (CanLII)

liquor stores nor cold beer and wine stores are included in that list, although retail stores are included as a permitted use.

[14] "Retail store" is defined in section 4.1 of the current Bylaw, as amended November 1, 2004:

> "Retail Store" – means a store in which any type of goods or wares are sold or rented to the final consumer, provided that the product may be stored an sold from within a building. This definition specifically includes *Furniture and Appliance Sales, Personal Service Use* and *Pharmacy.*

[15] The previous version of the definition, before it was amended, had the same text except that "furniture and appliance sales" and "personal service use" were not specifically included.

[16] The following definitions are also relevant:

> "License Retail Store (Cold Beer and Wine Store)" – [repealed February 10, 2003] means a licensed establishment through which a hotel or pub operator may retail to the general public British Columbia beer, wine, cider and cooler products that have been supplied at less than prevailing government liquor store prices and is licensed through the Liquor Control and Licensing Branch of the Ministry of Labour and Consumer Services.
>
> "Liquor Store" – [enacted February 10, 2003] means a retail store licensed under the *Liquor Control and Licensing Act* for the sale of beer, wine, or other alcoholic beverages.

[17] The defendant City submits that because an LRS fits within the old definition of "LRS/cold beer and wine store", and the new definition of "liquor store", it is therefore not a permitted use within the C-11 zone. The plaintiffs submit that their proposed LRSs were not "Cold Beer and Wine Stores", as defined in the Bylaw, but

2005 BCSC 521 (CanLII)

rather were “Retail Stores”. In particular, the plaintiffs note that their intention was to sell hard liquor as well as other alcohol, which is not included in the Bylaw’s definition of “LRS/Cold Beer and Wine Store”.

2005 BCSC 521 (CanLII)

[18] Clearly, on the plain meaning of the text, an LRS would fit with the definition of “retail store”, as it is “a store in which goods or wares are sold or rented to the final consumer”, and the “product may be stored and sold from within a building”. However, in ***S.R.V. Developments Ltd. v. Courtenay (City)*** (1992), 12 M.P.L.R. (2d) 154 (B.C.S.C.), aff’d (1992), (1992) 42 M.P.L.R. (2d) 261 (B.C.C.A.), Fraser J. considered a factually similar case in which a municipality refused a permit to an applicant seeking to open a liquor store in a shopping centre in a “C-2” zone. The city maintained that although the zoning bylaw permitted “retail and wholesale outlets” in C-2 zones, because “liquor stores” were specifically permitted in C-1 zones, they could not be permitted in C-2 zones under the generic “retail and wholesale outlet” classification. Fraser J. found in favour of the city, and stated as follows:

> The issue in this case boils down to whether the inclusion of "liquor store” in the permitted uses in C-1 zones precludes the establishment of a liquor store in a C-2 zone.
>
> In Thomas C. Watkins Ltd. v. Cambridge Leaseholds Ltd., the Supreme Court of Canada allowed an appeal from the Ontario Court of Appeal, expressly endorsing the reasons of McGillivray, J.A., who had dissented below. In that case, the zoning by-law in question established five different commercial zones. All five listed "retail stores" as a permitted use but only one listed "department store" as a permitted use. The issue was whether the expression "retail store" included a department store. McGillivray, J.A. said that, by making the two items separate and distinct in the by-law, the Municipality was

> making a distinction between the two terms, even though, as a generic term, "retail store" would include a department store…
> …
>
> I conclude that it is open to a municipality to limit the ordinary definition of words. By using "liquor store" in C-1, this is what the City has done. It has hived off "liquor store" from the more generic classification of "retail and wholesale outlets". Thus, a liquor store is not a permitted use in a C-2 zone.

2005 BCSC 521 (CanLII)

[19] Similarly, in ***Kimberley (City) v. Schwigon****,* 2000 BCSC 328, McEwan J. found that a bed-and-breakfast operation did not fit within the generic category of "home based business", and was therefore not a permitted use under the zoning bylaw, because "bed and breakfast" was defined separately elsewhere in the bylaw. McEwan J. found that to interpret otherwise would lead to an illogical result:

> ¶ 15 Even assuming (although I do not decide) that the definition of "Home Based Business" is broad enough to include a "Bed and Breakfast" as urged by the respondents, such a construction would render the definition, and the inclusion of "Bed and Breakfast" in the several zones where it is permitted, an inexplicable and redundant enumeration of one class of home based business. It would also mean that clauses including the words "Bed and Breakfast" in addition to "Home Based Business" would have the same meaning as those including only the term "Home Based Business".

[20] The plaintiffs attempted to distinguish *S.R.V.* on the basis that at the time of their applications, an LRS did not fit into the category of "cold beer and wine store", because they wished to sell spirits, which were not included in the definition of "cold beer and wine store". Also, at the time of their applications, "liquor store" was not a defined category. However, as the plaintiffs have admitted, at the time in question, the LCLB was in the process of changing its liquor licensing system, and part of that

restructuring was to replace the cold beer and wine store license category with the LRS store category.

[21] The City's Bylaw was modelled after the provincial regulations, so it was reasonable that Bylaw amendments were required after the LCLB regulatory changes were finalized. The Government of British Columbia did not consult with or inform Nanaimo in advance of these regulatory changes,

[22] At all material times, Nanaimo has regulated licensed alcohol retailers separately from other retailers in regard to zoning. Following the LCLB's regulatory changes, the category of cold beer and wine stores no longer exists. LRS are the only category of private liquor stores in British Columbia. Essentially, the category has been renamed and license holders are now permitted to sell hard liquor. In all other material respects, the categories are the same, and the two terms are used interchangeably by the public and by LCBC staff.

[23] Operations selling liquor were and are clearly "hived off" from other retail operations in the Bylaw at the relevant time, as in *S.R.V.*. This is highlighted by the fact that in the C-23 zone, both "Cold Beer and Wine Store" and "Retail Store" are permitted uses. This clearly indicates that the City intended that retail stores selling alcohol were to be considered separate uses from other retail stores. Otherwise, the "Cold Beer and Wine Store" category would be redundant. Under the rule of effectivity, legislation should not be interpreted in such a way as to make words or phrases meaningless: ***DeGrasse v. Insurance Corp. of British Columbia***, [1994] B.C.J. No. 2743, aff'd [1997] B.C.J. No. 1498 (C.A).

2005 BCSC 521 (CanLII)

[24] This statutory interpretation argument is strengthened by the fact that in the definition of "Retail Store", "Furniture and Appliance Sales, Personal Service Use and Pharmacy" are specifically included in the retail store category, even though they are defined elsewhere as individual categories. Under the *exclusion* principle, the fact that LRSs and other liquor stores are not specifically included in this list indicates that their exclusion was deliberate.

[25] In 2002, the province enacted regulatory changes to liberalize the sale of spirits by private operators. To find that the plaintiffs were permitted to operate an LRS in a C-11 zone simply because they wanted to sell spirits as well as beer and wine would effectively allow the plaintiffs to avoid the spirit of the zoning bylaw on the basis of a technicality.

[26] It would be illogical to find that a zoning bylaw restricted the sale of beer and wine in a particular zone, but did not restrict the sale of beer and wine in that zone when sold in conjunction with hard liquor. Therefore, there is no reasonable interpretation of the Bylaw which would permit a LRS in the C-11 zone.

[27] The plaintiffs' actions are dismissed with costs to the defendant on Scale 3.

"C.R. Lander, J."
The Honourable Mr. Justice C.R. Lander

April 8, 2005 – ***Revised Judgment***

Corrigendum to the Reasons for Judgment issued advising that on page one, the matter proceeded in open court and was a trial and not a chambers application.

In paragraph 27, it is stated that the plaintiff's applications are dismissed with costs to the defendant on Scale 3. Given that this was a trial, it should state that the plaintiffs' actions are dismissed with costs to the defendant on Scale 3.

2005 BCSC 521 (CanLII)