

## *Wu v. Vancouver (City), 2019 BCCA 23*

The release of the Court of Appeal's decision in *Wu v. Vancouver (City)* has been highly anticipated by municipal lawyers. If denied, the appeal would have established a duty for municipal officials to make decisions on development permits within a reasonable time. The trial judge found that the City, through its officials and Council, acted intentionally and in bad faith in delaying a decision on the subject development permit application until a change in applicable by-laws removed a right to compensation. In a novel application of the law of negligence, the judge recognized a private lay duty of care to make a decision within a reasonable time, and found that the City, in bad faith, had breached that duty. By allowing the appeal, the Court has determined that no such duty exists.

The facts of the case are as follows. The Wus bought a WWI era house in the First Shaughnessy District (FSD) in Vancouver in December 2011. At the time of purchase, the City's bylaw required that if the City refused the Wus' application to demolish their house, and the parties could not agree on terms for its retention, the City was obligated to compensate the owners for the property's resulting loss of value. The FSD was within a Development Plan Area and the City had adopted guidelines against which any application for new development would be reviewed. In 2012, the City required that all pre 1940 homes be evaluated for merit prior to approving demolition permits. Ultimately, the Director of Planning would decide if a property had heritage merit. If so, that determination would have to be addressed in any subsequent application for a development permit and the City would encourage the property's retention. If the Director of Planning favoured retention, but the homeowner still wished to demolish the home, the Director could recommend to Council that the house be protected by a designation as "protected heritage property". In that event, the City would be required to compensate the homeowner for any loss of value under the existing bylaws.

The Wus complied with the requirements above, and de-

spite a recommendation that the house be retained, submitted a development permit application to the City for the demolition of the house and construction of a new single family dwelling on January 30, 2013. The trial judge found that the application was complete at this point and that the respondents had submitted all of the materials the City required to make a decision with respect to the application, which is the conclusion at issue in the appeal. Instead of issuing the permit, the City granted the property temporary heritage protection for 120 days and again encouraged the Wus to retain the house. The respondents reiterated that they were not interested. Following the expiry of the temporary protection period, the respondents did not hear anything further from the City regarding their application. On September 29, 2015, Council passed new bylaws designating FSD as a heritage conservation area and preventing the demolition of any house in the area unless the Director of Planning decided the house was no longer of sufficient heritage character or value. Designation of FSD as a heritage conservation area had the effect of removing the requirement that the City pay compensation to homeowners under s. 595 of the *Vancouver Charter*. The Wus brought an application for *mandamus*, and alleged abuse of office, expropriation, and negligence.

The trial judge found that the City had embarked upon a "circuitous course of delay" with respect to the application. The judge was satisfied that the City had acted in bad faith in dealing with the application. She inferred that the only rational explanation of the City's actions was that it delayed making a decision until the HCA Bylaws were passed, thereby avoiding the requirement to pay compensation. Given her findings that the City never intended to grant the respondents a development permit because of the heritage merit of the property, and given that the respondents were not interested in retention, the judge concluded the only option for the City was to designate the property as herit-

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age and provide compensation. The City's failure to do so within a reasonable time wrongfully deprived the plaintiffs of the compensation they were owed under the existing bylaw.

The appeal court disagreed. The Court began by noting that *mandamus* compelling an official to make a decision is the appropriate remedy for delay. The public law obligation to make a decision in a reasonable time should not be converted into a private law duty of care. There is no duty of care imposed on officials to act in accordance with authorizing statutes or regulations. The law has not recognized an action against a government authority for negligent breach of statutory duty by acting outside or contrary to the law. The court nonetheless engaged in an *Anns/Cooper* analysis to determine if a novel private law duty of care existed. The court of appeal found that the trial judge's analysis did not engage sufficiently with the law concerning the circumstances in which proximity can be established in connection with the existence of a scheme of regulation in the public interest. Further, the court found it is difficult to convert public law duties into private law duties where those public law duties exist to promote a public good.

In this case, the statutory framework conferred duties on the regulators and provided statutory rights to property owners in making development permit applications. The intention of the bylaws at issue was protection of the heritage character of the FSD. The regulatory framework therefore could not be said to create a relationship of proximity capable of giving rise to a *prima facie* duty of care. Reasonable foreseeability that a delay in issuing a development permit could cause monetary damage does not create proximity. The court declined, however, to absolutely say that a relationship of proximity could not be created in the context of a scheme, similar to the one analyzed, with specific facts and circumstances arising from interactions between the parties. Here, the court of appeal defined the representations made by the City as general statements about process, not actionable misrepresentations. The court also buttressed its finding by noting that even if the proximity analysis was wrong, policy reasons existed to negate a *prima facie* duty of care. The standard of care to be applied was indeterminate, and incapable of having any predictable or objective content. It is not apparent what concrete meaning can be given to "a reasonable time" given the scarcity of resources public authorities can deploy in processing applications and given the competing and shift-

ing priorities public authorities face while discharging their responsibilities. What is reasonable will vary contextually depending on the policy choices a public authority makes. Generally, discharging public law duties does not give rise to a private law duty of care to particular individuals.

Accordingly, the Court of Appeal determined that the City did not owe the respondents a private law duty of care. In doing so, the court effectively prevented a fundamental shift in the way in which public and private spheres have historically addressed improper governmental action.

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**Emily McClendon** has been working in the area of local government and commercial real estate law since she moved to B.C. in 2015. With a background in Urban and Environmental Planning, Emily brings a practical approach to the legal advice that she provides. Emily has experience in relation to a broad range of solicitor and litigation matters, including land development, land use, planning, expropriation, development charges, commercial leases and other commercial, environmental and local government contracts, bylaw drafting and enforcement, aboriginal title claims, FOIPPA, procurement and building and construction regulation. Emily has acted for local governments in mediation and has appeared in Provincial and Supreme Court, as well as a variety of administrative tribunals, including an expropriation inquiry hearing, a development permit appeal and representing a municipality as an intervenor in a Federal Public Sector Labour Relations and Employment Board matter. Emily has written and presented on a variety of topics of interest to local governments, including environmental issues, urban agriculture and development legislative tools.

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