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0956375 B.C. Ltd. v. Regional District of Okanagan-Similkameen, 2020 BCSC 743

On May 13, 2020, the Supreme Court of British Columbia considered two actions against the Regional District of Okanagan-Similkameen ("RDOS") regarding a downzoning of a property on Osoyoos Lake ("Property") to correct an error.

Mr. Grelish, a sophisticated land and property developer, was the directing mind of both corporate Plaintiffs. Since 2002, Mr. Grelish had made several fruitless attempts to have the zoning of the Property changed from Large Holdings ("LH") to RM1, to increase the Property value. In 2005, an RDOS staff member accidentally entered the zoning designation for the Property into the database as RM1. A re-enactment of the zoning bylaws three years later, which included new zoning maps (that contained the error) led to an inadvertent zoning change to RM1. When Mr. Grelish became aware of the change, he suspected it could have been done inadvertently, but deliberately refrained from making inquiries of RDOS. RDOS learned of the mistake in 2014 and implemented a downzoning of the Property to correct the error.

While the decision was primarily based on standing, the court provided commentary on whether local governments, when exercising discretionary legislative or quasi-judicial powers (i.e. downzoning a property) in the public interest, owe a duty of care to persons who rely upon a valid law that is, for some reason, defective and, therefore, can be found liable in negligence. The court further considered misfeasance in public office and negligent misrepresentation. Ultimately, the RDOS was successful in having both claims dismissed.

Background

The Property was originally designated as LH under the zoning bylaws. Since 2002 Mr. Grelish wished to increase the value of the Property. Therefore, in 2003, Mr. Grelish inquired with the RDOS about the possibility of changing the zoning to "comprehensive development" or RM1. RDOS rejected the request.

In 2005, the Property zoning designation was mistakenly entered as RM1 into the database, but the annotation layer included the correct LH zoning status. A re-enactment of the zoning bylaws in 2008 led to the inclusion of the error into the zoning maps and the inadvertent zoning change to RM1.

In 2009, an official from RDOS was quoted in a newspaper article stating that the Property was zoned as RM1. Following this statement, Mr. Grelish's representative visited the offices of the RDOS and confirmed the same. After considering the evidence, Justice Giaschi concluded that Mr. Grelish suspected that the zoning could have been changed inadvertently, but deliberately refrained from making direct inquiries of the staff at RDOS as to the zoning change.

By March 2014, Mr. Grelish, through the Plaintiff corporations, submitted applications for development permits in support of a proposed development plan. The plan involved the construction of 115 units in total over four structures. The submissions of the applications led to the discovery of the error in the zoning of the Property by RDOS.

The downzoning was implemented in August 2014, rezoning the Property back as LH, to correct the error.

The Plaintiffs' Allegations

The Plaintiffs did not seek a judicial review of RDOS's decisions. Instead, they claimed damages for negligent misrepresentation, failing to provide correct zoning information, negligence, failing to conduct a fair and transparent process, and misfeasance in public office.

The Court's Analysis

It is settled law that public regulators are not immune from claims in negligence. However, to establish a claim in negligence and negligent misrepresentation, a plaintiff must prove, on the balance of probabilities, that the defendant owed a duty of care. Therefore, the court started its analysis by considering whether RDOS owed a duty of care to conduct a fair and transparent process about the downzoning of the Property or a duty to provide correct zoning information to the Plaintiffs.

In his decision, Justice Giaschi emphasized the different

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functions of local governments, i.e. legislative, quasi-judicial, and business, which lead to different legal duties. Giaschi J. confirmed that local governments do not owe a private law duty of care when exercising discretionary legislative or quasi-judicial powers, including in relation to rezoning applications. A rezoning application merely invokes the legislative authority of local governments, who act in the public interest. Similarly, local governments do not owe to individuals a duty of care while holding public hearings if they fail to comply with principles of natural justice. When local governments breach their statutory obligations, the injured party may seek remedies in administrative law, such as a judicial review. On the other hand, when local governments exercise their business or operational powers, they can be held liable for negligence.

The court held that the RDOS did not owe a private law duty of care because the enactment of a bylaw that erroneously zoned the Property as RM1 was a legislative function. Further, the court held that the representation by an RDOS's representative that the Property was zoned RM1 was not inaccurate, given that the bylaw containing the error did in fact zone the Property as RM1 (regardless of the fact that this zoning designation was inadvertent). Finally, the court held that there was no reasonable reliance by Mr. Grelish because he was sophisticated and was aware of the risk of error. Therefore, the claims for negligence and negligent misrepresentation were dismissed. The claim for misfeasance in public office was also dismissed on the basis that a failure to name the individual public officer as a defendant is fatal to such a claim.

Key Takeaways

This case confirms that local governments do not owe a private law duty of care such that a claim for damages can be brought when acting in their legislative or quasi-judicial capacity, and that enacting a bylaw that inadvertently contains an error, even if due to a data entry error, is no exception.

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Adrienne brings over 25 years of legal experience in litigation and dispute resolution representing local governments and other public entities, insurers and corporations, including in-house as Senior Staff Lawyer at Municipal Insurance Association of BC. Adrienne has represented and provided strategic and practical advice in relation to a variety of complex matters, including procurement, construction (including builders' lien, delay and defect claims), environmental, regulatory, expropriation, bylaw and FOIPPA disputes and processes, municipal jurisdiction, procedure, constitutional challenges, judicial reviews, remedial action orders, administrative hearing processes, contract claims, and privacy, insurance and risk management issues. Adrienne has extensive experience at all levels of Court in British Columbia, administrative tribunals, mediations and arbitrations. Adrienne regularly writes and presents on a variety of matters of interest to public entities and the construction industry.

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