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Civic Legal LLP

The Architectural Institute of British Columbia v. Langford (City), 2020 BCSC 801

In 2016, the City of Langford's Chief Building Inspector issued a building permit for the construction of a residential / commercial strata complex. An architect was not involved in the project - the design and drawings were completed by a designer. The Architects Act (the "Act") required the involvement of an architect in the project as the building exceeded 470 m^2 in gross area. The AIBC (the professional body that regulates the profession of architecture in British Columbia) brought a petition seeking a declaration that the decision to issue the building permit was unreasonable.

The City's Building Bylaw (s.2.3.9) provided that the Chief Building Inspector "may refuse to issue any permit…where the proposed work does not comply with…any enactment respecting health or safety." The Building Bylaw (s.2.3.6.1) also provided that the Chief Building Inspector "may require design and field review by an architect, where in the opinion of the Chief Building Inspector the site conditions, the size or complexity of the building, part of a building or building component warrant it."

The City's evidence was that it did not consider the requirements of the Act when it issued permits because the reference to an "enactment respecting health and safety" in the Building Bylaw did not include the Act. But the Court disagreed and found that the Act was an "enactment respecting health or safety." The Court held that there was no evidence that the building inspector gave any consideration to the Act. A discretionary decision may be unreasonable where the decision makers fail to consider relevant criteria or turn their mind to all the factors relevant to the proper fulfilment of its statutory decision-making function. And further, the decision to issue the building permit without requiring the involvement of an architect was unreasonable "given the size and complexity of the building" and the legal constraints imposed by the Building Bylaw and the Act.

The AIBC did not seek to overturn or quash the permits and did not seek damages. It only sought a declaration for the purpose of educating local governments. Consequently, the Court declared that the decision of the Chief Building Inspector to issue a building permit for the property was unreasonable because: (1) the drawings submitted by the applicant seeking the building permit were not in compliance with the Act, a provincial law relating to the safety of buildings; and (2) the drawings submitted were prepared by an unlicensed person who provides design services, not an architect, contrary to the Act. In providing the remedy, the Court stated that a declaration would "provide guidance to municipal officials in exercising their permitting powers."

The case turned on the Building Bylaw language. To reasonably exercise their discretion, local governments with similar language in their building bylaws should not simply ignore the provisions of the Act or other enactments respecting health and safety when issuing permits. In this case, the City did not put forth any evidence outlining their building permitting process and they did not turn their mind to the requirements of the Act, which, according to the Court, was not a reasonable exercise of discretion. Going forward, we do not believe the outcome of this case means that local governments must consider every statutory or regulatory requirement regarding health and safety. However, local governments that have similar language in their Building Bylaw should turn their minds to what enactments will be considered during the permitting process and be able to demonstrate how its discretion is being exercised. The process of turning the mind to the issue, making a reasoned decision and exercising discretion is also necessary when invoking the policy defence to defend against negligence claims. How time and resources are allocated in terms of which statutory and regulatory requirements to

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consider, could be characterized as policy related decisions which may be defensible in a negligence action.

Where a decision is a policy decision, as opposed to an operational decision, a public authority is exempted from owing a duty of care in a negligence claim, unless the decision was made in bad faith or was so irrational as not to be a proper exercise of discretion. "True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints…"[1]

In a negligence claim, the Court will consider the following:

- whether the issue was considered and a decision was made (this is required to be considered a policy);
- the nature of the decision (specifically whether it was policy related or operational in nature);
- who made the decision (typically the higher the level of decision making - the stronger the evidence of a policy, however this is not determinative);
- whether there were clear / definable procedures and systems in place (a policy need not be in writing);
- the basis of those procedures and systems (specifically whether the decision was based on social, political or economic considerations or factors); and
- whether the policy was followed (documents / records with sufficient details, relevant to the policy, fully filled out forms, etc.).

The policy defence is a significant defence and local governments should have these considerations in mind when exercising their discretion.

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[1] *Suncourt Homes Ltd. v. Cloutier, 2019 BCSC 2258*

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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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Navneet is an associate lawyer of the firm. Prior to joining Civic Legal LLP, Navneet practiced in the Okanagan Valley with a primary focus on real estate law. In addition to her formal education, Navneet has extensive practical experience in business and real estate, as her family owned and operated hotels in the Northeast United States for several decades. Navneet's entrepreneurial upbringing, unique background and viewpoint – having been a consumer of legal services as an owner / developer, allows her to fully understand the client's position and perspective.