IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gibsons Alliance of Business and Community Society v. Gibsons (Town),* 2018 BCSC 448

Date: 20180321
Docket: S179571
Registry: Vancouver

Between:

Gibsons Alliance of Business and Community Society

Petitioner

And

Town of Gibsons and The George Gibsons Development Ltd.

Respondents

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the Petitioner:	R. Kasting
Counsel for the Respondent: Town of Gibsons:	R. Harding
Counsel for the Respondent: The George Gibsons Development Ltd:	A. Cameron G. Lamb
Place and Dates of Hearing:	Nanaimo, B.C. January 16 & 17, 2018
Place and Date of Judgment:	Vancouver, B.C. March 21, 2018

Introduction

[1] The Gibsons Alliance of Business and Community Society (the "Petitioner") brings this petition pursuant to s. 2(1) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, (the "*JRPA*") and Rule 16-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, seeking the following relief:

(1) An order in the nature of certiorari quashing Development Permits DP-2013-02, DP-2013-03, and DP-2017-18 (the "Permits") issued by the Town of Gibsons (the "Town") in early August 2017 to the respondent The George Gibsons Development Ltd. (the "Developer");

(2) An injunction against the Town to prevent or enjoin the issuing or re-issuing of any development permits to the Developer with respect to the lands referred to in this petition;

(3) An injunction against the Developer to enjoin it from acting upon the Permits; and,

(4) Costs.

[2] The Town and the Developer say that the Petitioner has no standing and that this proceeding is an abuse of process. They urge me, as well, to exercise my discretion under the *JRPA* to grant no remedy.

[3] The case on its merits, meanwhile, involves consideration of the interrelationship between various provisions of the *Local Government Act,* R.S.B.C. 2015, c. 1 (the "*LGA*"), the *Environmental Management Act,* S.B.C. 2003, c. 53 (the "*EMA*"), and the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "*CSR*"). Briefly, the Petitioner asks me to quash the Permits on the basis that s. 557(2) of the *LGA* prohibited the Town from issuing them. The Developer and the Town argue that the s. 557(2) prohibition does not apply.

Background

[4] The Developer is in the midst of negotiating approval for a sizeable construction project on Gibsons Harbour. The plan is to build 39 residential units,

116 hotel rooms, a conference centre, a health centre, a waterfront restaurant, a marina, and a parking lot for 200 vehicles. The site of this proposed activity is five parcels of land civically described as 377, 385, 397 and 407 Gower Point Road and 689 Winn Road and an adjacent water lot ("the site").

[5] The Petitioner is a society incorporated in 2009 whose purposes, according to the pleadings, include "the protection and enhancement of the livability of Gibsons in the four areas that define a sustainable community--social cohesion, environmental health, economic well-being, and cultural flourishing." I received little evidence about the Petitioner's membership or activities, other than that it is "an inclusive coalition of community members and business people", and has a mailing list of approximately 300 "local supporters."

Application for the Permits

[6] In February 2013, a company associated with the Developer applied for the Permits in tandem with an application to amend the Town's Official Community Plan ("OCP") and zoning bylaws to allow the project to proceed. On October 6, 2015, the Town adopted the proposed amendments and issued the Permits in August 2017. Throughout this process, the Town seems to have followed the ordinary course of local government business including public notices and consultations.

[7] All three of the Permits address the issue of soil contamination on the site. DP-2013-03 in particular requires the Developer to undertake any environmental remediation required by provincial and federal authorities and to provide the Town with confirmation of compliance. The scope of the work permitted includes excavation and removal of contaminated soils and sediments from the site, and specifies that remediation must be completed in accordance with a plan made on the Developer's behalf by its environmental consultant, Keystone Environmental Ltd. ("Keystone"), and approved by the Ministry of the Environment (the "Ministry"). There could be no such remedial work without the Permits: see ss. 488 and 489 of the *LGA.*

Site Remediation

[8] The *EMA* scheme places the onus on property owners, or people who have an interest in property, when they know or ought reasonably to know that the property is contaminated, to provide a site profile either to their local municipal or regional government under s. 40(1)(b) of the *EMA*, or to a Ministry-designated director of waste management under s. 40(2) of the *EMA*, (the "Director").

[9] If s. 40(1)(b) is engaged, s. 556 of the *LGA* and s. 40(4) of the *EMA* require the municipality or regional district to asses the site profile, and, where contamination is suspected, to forward the profile to the Director. When this happens, s. 557(2) of the *LGA* imposes a prohibition against approving development permits which remains in force until removed by the satisfaction of one of the conditions set out in s. 557(2)(a)-(g). In the present case, the only potentially relevant condition is found in s. 557(2)(e), which provides that a municipality may approve development permits if the Director has received and accepted a notice of independent remediation for the site.

[10] The crux of this petition is whether the s. 557(2) *LGA* prohibition applies to the Town. I have decided that it does not. This case has nothing to do with s. 40(1)(b) of the *EMA* because, in 1997, the Town filed a notice under s. 4(4) of the *CSR* that it did not wish to receive site profiles, and it has no procedures for accepting, vetting or forwarding them to the Director. Gibsons property owners, or people who have an interest in property there, are under no duty to provide site profiles to the Town. Instead, they must send them directly to the Director under s. 40(2) of *EMA*.

[11] Keystone performed this task on the Developer's behalf, delivering a site profile to the Director on December 2, 2016. The Director promptly ordered a detailed site investigation under s. 41 of the *EMA*. Keystone performed this investigation and on March 20, 2017 provided the Director with an updated "site risk classification report." This report noted excessive levels of a contaminant called tributyl-tin in addition to the previously documented detection of copper and lead in the sediments of the water lot portion of the site.

[12] The Developer complied with the Director's order to give notice of this contamination to surrounding water lot leaseholders and later provided the Director with a summary of proposed remedial methods and activities. Keystone submitted a formal remediation plan to the Director on June 29, 2017. This calls for excavation of the noxious water lot sediments during development of the site and their safe disposal elsewhere under Ministry oversight. The Developer's ultimate goal is to obtain a Certificate of Compliance under s. 53(3) of the *EMA*.

[13] In a letter to the Developer dated July 12, 2017, the Director's delegate, a Mr. Hanemayer, expressed the Ministry's overall approval and support for Keystone's remedial approach, and issued the following additional requirements pursuant s. 54(3)(d) of *EMA*:

> 1. Maintain up-to-date records of monitoring, inspections, and maintenance of any works. The records shall be available for inspection by the director;
> 2. Submit a report signed by an Approved Professional [Keystone] to the director for review. The report shall include the following:
>
> a. A summary of remedial activities undertaken during the reporting period;
>
> b. Assessment of overall remediation progress, including evaluation in comparison to the proposed remediation schedule;
>
> c. Evaluation of the performance of any risk management or treatments works; and
>
> d. Supporting documentation (e.g. analytical reports, tables and figures, records of inspection, maintenance of treatment works, etc.).

[14] The letter stipulated that reports are to be submitted quarterly commencing September 29, 2017 and continuing pending site remediation to the Director's satisfaction. Mr. Hanemayer also specified that:

> It will not be a requirement of [the Developer] to obtain a ministry legal instrument (i.e. Certificate of Compliance, Approval in Principle of a remedial plan, etc.) once remediation has been completed in accordance with the accepted remedial plan and schedule. The Ministry will continue to oversee site investigation, remediation, and monitoring as long as the site remains classified as a high risk or risk-managed high risk site.

[15] If the s. 557(2) prohibition applies to the Town, a proposition which, as I have said, the petitioner supports but both respondents reject, the parties disagree both about whether the Developer's remediation proposal, composed by Keystone, constitutes a notice of independent remediation, and whether Mr. Hanemayer's letter constituted an acceptance of it within the meaning of those terms in s. 557(2)(e) of the *LGA*.

Other Legal Proceedings

[16] On July 24, 2017, the Petitioner filed a notice of appeal against Mr. Hanemayer's handling of the matter with the Environmental Appeal Board ("EAB"). The Petitioner alleged that his July 12, 2017 letter was an appealable decision because it constituted the exercise of "a power" under s. 99(c) of the *EMA*.

[17] The power exercised, according to the Petitioner, was Mr. Hanemayer's acceptance of the Developer's remediation plan. This plan, the Petitioner argued, amounted to a notice of independent remediation, and the Director's acceptance of it had the effect of lifting the prohibition against issuing the Permits in question. The Petitioner's grounds for appeal are set out at para. 15 of EAB Decision No. 2017-EMA-010(a):

> 1. The [Director's] Decision fails to address adequately or at all the known presence of toxic tributyl-tin (TBT) in sediments and suspected presence of TBT in soil at the subject site and the evidence of off-site migration of metals contamination in the sediment from boat hull cleaning and painting.
> 2. The Decision purports to approve a remediation plan that does not adequately protect the environment and public health, including the Gibsons aquifer.
> 3. The Decision letter does not provide adequate reasons for the decision, including without limitation why the Director concluded that the remedial plan is supported by the Ministry, whether the Director addressed TBT in sediments or considered this to be outside of the contaminated sites regime, and whether and why the decision is intended to "release" the [s. 557(2) *LGA*] "freeze" on municipal approvals.
> 4. The Decision violates the principles of fairness because [the Petitioner] was denied an opportunity to provide informed input prior to decision-making despite the Director being aware that [the Petitioner] had long

> asked for such an opportunity and not telling [the Petitioner] that such an opportunity would not be provided.
>
> 5. Other reasons for the appeal may be identified when the Director provides yet provided.

[18] After arguing the matter this way before the EAB, and before publication of the above-cited decision, the Petitioner brought this application for judicial review on contradictory grounds. The wrong alleged here is precisely that Mr. Hanemayer's letter did not amount to acceptance of a notice of independent remediation for the purposes of s. 557(2)(e) of the *LGA*. Thus, according to the Petitioner's argument in this forum, the prohibition against approving the Permits continued in force and the Town acted unlawfully in issuing them.

[19] Before the EAB, the Developer and the Ministry – which has declined, by the way, to participate in the hearing before me – argued that Keystone's proposal for site excavation was not, was not intended to be, and was not accepted as a notice of independent remediation for the purposes of s. 557(2)(e) of the *LGA*. They also argued that Mr. Hanemayer's letter was not the exercise of a "power" under s. 99(c) of the *EMA*. The EAB ruled in their favour on the former but not the latter point.

[20] The EAB panel determined that Keystone's plan did not amount to an independent remediation proposal, and the Director could not accept it as such. Mr. Hanemayer's letter did, however, involve the appealable exercise of statutory powers under s. 99(c) of the *EMA,* including the power to review a remediation under s. 54(4) of the *EMA*, and the power to enforce a protocol for remediation under s. 64(1)(d) of the *EMA*. The appeal will proceed on that basis later this year.

[21] The Town, incidentally, was not a party to the EAB hearing. It maintains that the panel's decision is not binding on me. In an alternative argument, assuming I determine that the prohibition in s. 557(2) of the *LGA* was binding on the Town, it urges me to conclude that Keystone's plan did constitute a notice of independent remediation and Mr. Hanemayer's letter its acceptance, and the prohibition was lifted therby. The Town encourages me, in other words, to render a ruling inconsistent with

the EAB's on this issue. Such are the hazards of dual proceedings on more or less the same subject matter.

Discussion

Standing

[22] The Petitioner bears the burden of persuading the court that it has public interest standing. The relevant factors to this determination were set out in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45 at para. 37: whether the case raises a serious justiciable issue (which is conceded by the Developer); whether the Petitioner has a real stake or genuine interest in the issue; and, whether the proposed suit is a reasonable and effective way to bring the issue before the court.

[23] I will not dispose of this petition on the standing issue, even if there is a paucity of evidence in the record indicating that the Petitioner has a real stake in the proceedings or is meaningfully engaged in the issues it raises. I will merely say that it seems to have been common ground before the EAB that the Petitioner was a "person aggrieved" under s.100 of the *EMA*, which this court ruled in *Gagne v. Director, Environmental Management Act*, 2014 BCSC 2077 means a person who can demonstrate a *prima facie* prejudice to his or her individual interests (para. 74). Such status, in my view, is good enough for standing to bring the present petition.

Abuse of Process

[24] The Petitioner took a firm position on the s. 557(2)(e) issue before the EAB while pleading the opposite in this court. In *Glover v. Leakey*, 2018 BCCA 56, the Court of Appeal held that "in some instances relying upon inconsistent pleadings may amount to an abuse of process" however, "there must be something more giving rise to an injustice" (para. 32).

[25] In my view, the "something more" in the present case comes from putting the Developer to the time and expense of responding to contradictory arguments advanced simultaneously in two different forums. The court system has always been

vigilant to discourage this sort of thing, and not only because it is vexatious and burdensome for individual litigants. It can also lead to the mischief of inconsistent results from different arbiters on the same issue with resulting damage to the reputation of the justice system.

[26] The Petitioner's substantive complaints about the legality of the Director's decisions, and, in particular, the adequacy of the Developer's remediation plans for the site, are squarely before the EAB. This is a specialised expert tribunal established expressly for dealing with such matters. In my respectful view, this is the where the present dispute belongs. Whether or not it is an abuse of process, therefore, I find that the petition before me is unnecessary.

The *JRPA*

[27] For similar reasons, I conclude that this a fitting case in which to exercise my discretion under ss. 8 and 9 of the *JRPA* not to grant the remedy sought. The Developer is satisfying all *EMA* requirements and is working cooperatively with the Director towards remediation of the site in compliance with provincial environmental standards. The Permits themselves require site decontamination to the Ministry's satisfaction. The Petitioner's valid concerns about the Developer's plans and the Director's approval of them are before the EAB for determination. Issuing the Permits in this case caused no harm to the public interest or any substantial wrong or miscarriage of justice.

Statutory Interpretation

[28] In any event, I have concluded that the petition must fail on its merits. I take the s. 4(4) *CSR* exemption quite plainly to mean that the Town has opted out of any statutorily mandated role in site profiling, preferring to leave such *EMA* preoccupations entirely to the Director. This does not mean, as the environmental requirements set out in the Permits show, that the Town is not keenly interested in the remediation of contaminated sites, but only that it has decided to take no official role in the receipt, evaluation and distribution of site profiles. For Gibsons property

owners, site profiling and remediation requirements under the *EMA* are dealt with in direct consultation with the Ministry.

[29] Because of this exemption, s. 40(1)(b) of the *EMA* has no application to this case. In turn, the corresponding positive duties referred to in s. 40(4) of the *EMA* and 556 of the *LGA* do not bind the Town, and the prohibition against issuing development permits in s. 557(2) of the *LGA* does not arise. In my view, the Permits could lawfully issue in the absence of the Director's confirmation of receipt and acceptance of a notice of independent remediation.

[30] In short, the Town issued the Permits in accordance with OCP and bylaw amendments specifically enacted to allow the Developer to begin work on the site. All concerned have acknowledged that the site and one or more of its adjacent water lots are contaminated, and the Developer has committed to complete site remediation to *EMA* standards up to a certificate of compliance. The process of achieving this objective is well in hand under active Ministry supervision. The Developer was entitled to the Permits and the Town that had no lawful basis to refuse them: see *Westfair Foods Ltd. v. Saanich (District)* (1997), 30 B.C.L.R. (3d) 305 (S.C.), aff'd 49 B.C.L.R. (3d) 299 (C.A.).

Disposition

[31] The petition is dismissed. The respondents will have their ordinary costs.

"Baird J."