IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *North Saanich (District) v. Rawlins,* 2022 BCSC 2182

Date: 20221214
Docket: S221177
Registry: Victoria

Between:

District of North Saanich

Petitioner

And

Kenneth Mark Rawlins

Respondent

Before: The Honourable Justice Walkem

Reasons for Judgment

Counsel for the Petitioner:	J.A. McKay
Appearing on his own behalf:	K.M. Rawlins
Place and Date of Hearing:	Victoria, B.C. October 27, 2022
Place and Date of Judgment:	Victoria, B.C. December 14, 2022

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Introduction

[1] The District of North Saanich (the “District”) is a municipality incorporated under the *Local Government Act*, R.S.B.C. 2015, c. 1 [*LGA*].

[2] The Respondent, Kenneth Rawlins, is the sole owner of a 1.1-acre property located at 9275 East Saanich Road, in the District of North Saanich, British Columbia (the “Property”). The Respondent is a firefighter, landscaper and Red Seal certified carpenter.

[3] The District seeks: (1) a statutory injunction to prevent the continued occupancy of unpermitted suites on the Property; and, (2) the decommission of those suites.

[4] The District has the authority and jurisdiction to enact and enforce bylaws within its boundaries pursuant to the *LGA* and the *Community Charter*, S.B.C. 2003, c. 26. It is agreed between the parties that *The District of North Saanich Zoning Bylaw No. 1255* (the “Zoning Bylaw”) and *The District of North Saanich Building and Plumbing Bylaw No. 1150* (the "Building Bylaw”) apply to the use of the Property.

[5] There are multiple dwelling units and structures on the Property, namely:

a) a suite comprised of the entire upper level of the main single-family dwelling (Building A – “Main Dwelling Unit”);

b) an unauthorized secondary suite on the lower level of the main single-family dwelling, (Building A – “Lower Dwelling Unit” or “Basement Suite”);

c) an accessory building, permitted as an office/studio, but constructed into a suite without authorization (Building B – “Guest Cottage”);

d) a detached garage, permitted as a single story detached garage, but upper floor was constructed to create a suite without authorization (Building C – “Carriage House”);

e) an accessory building, currently under Stop Work Order, which the District alleges is being constructed to create a dwelling unit ("Building D"); and

f) a trailer/RV being occupied at rear of Property with permanent service hook-ups (the "Trailer").

[6] Some of the buildings were permitted when they were built, such as the office and garage, but then subsequently modified to dwelling units, without the new uses being permitted. Others, such as Building D, were not permitted.

Background

[7] The Property is on a fairly large lot and was originally purchased with the goal of subdividing it into two lots. The Respondent has made unsuccessful efforts to have the Property zoned for multi-family use, or alternatively, to have the Property subdivided or put into a strata title. The Respondent met with the District's engineering department to start this process, but ultimately, after two neighbours opposed the proposal, it was turned down by the District Council.

[8] From 2009–2010, the Respondent spoke to the District about subdivision. He said he was informed there were going to be changes in the future, which would likely see his property zoned as multi-family.

[9] The Respondent points out that the Property is currently in the Official Community Plan ("OCP") as multi-family residential, and if it was so zoned, would allow up to 23 residential units on the Property. As well, he argues that if the Property was subdivided, given its size, upon subdivision it would be capable of being approved for a larger number of units, in different configurations.

[10] The District points out that the OCP is not a zoning bylaw. In *Lypka v. White Rock (City),* 2015 BCSC 550, the Court considered how to interpret an OCP:

> [41] Like all such documents, the OCP establishes long-term goals and a vision for the community which are intended to be used as a guide for future development. Given its nature and purpose, an official

> community plan is not to be construed on judicial review with the same kind of scrutiny that a court gives to interpretation of a statute.

[11] OCPs are visionary planning documents that set out what land use could look like into the future, but they are not zoning bylaws, and they do not, on their own, authorize land uses.

[12] The outbuildings on the Property were not built as housing, they supported the Respondent's landscaping business. When the Respondent ran into financial difficulties, some building uses were changed to accommodation to generate rental income, and new buildings were added without appropriate permits.

[13] The Respondent engaged in a "self-help" approach following a "build first, and seek permits later" policy. He believed that the size of his lot and lack of affordable housing in North Saanich supported his creation of additional tenanted dwellings absent District permits.

[14] Over the years, the District has issued warnings, and then either: (1) taken no further action, or (2) engaged in a process whereby the Respondent rectified the non-compliance.

[15] In July 2009, the District first contacted the Respondent concerning an illegal secondary suite and construction occurring on the Property. In April 2012, the District issued a s. 57 Notice on Title on the Property for failure to secure a Building Permit for work on Building C when the upper floor had been converted to a suite/carriage house. There appears to have been no further action taken by the District until March 2021.

[16] In March 2021, the District posted a Stop Work Order on Building D for work without a Building Permit. The District also sent a letter by registered mail to the Respondent on March 8, 2021, concerning the unauthorized renovation to Building D.

[17] On or about May 11, 2021, the District issued two Municipal Ticket Informations to the Respondent with respect to the ongoing contraventions of unauthorized renovation to an accessory building on the Property.

[18] The District proceeded to schedule an inspection of the Property for May 27, 2021. The Respondent refused to allow the District access to the dwelling units on the Property, saying he needed to provide adequate notice to tenants.

[19] The District obtained an Entry Warrant on July 29, 2021. An inspection on the Property occurred on August 5, 2021, which confirmed the existence of the non-permitted suites.

Efforts to Resolve the Issue

[20] The parties have been unable to agree on a process to bring some of the units into compliance. Based on zoning, not all can be brought into compliance.

[21] The Respondent seems to have thought that this issue was negotiable and could be talked out. He argued that inspections of the buildings could be done, and minor modifications made, to bring the units into compliance with District bylaws.

[22] The District points out that this application was filed in April 2022, after lengthy communications and discussions, and adjourned twice after it was initially set down.

[23] Most recently, though I appreciate that a full record of these events was not before me, there were two offers made by the District, which the Respondent rejected. The Respondent said he rejected the offers on the grounds that he could not guarantee the tenants would leave within the prescribed time and did not want to agree to the $5,000 fine for non-compliance. Further, he did not think he could meet the proposed timelines to decommission or modify some of the buildings, as proposed by the District.

Respondent's Position

[24] The Respondent made attempts to resolve matters with the District, but found the process difficult.

[25] The Respondent argues that there is an affordability housing crisis within North Saanich, reflected in a lack of affordable housing for a growing population that is experiencing increasing financial pressure. The Respondent says the Saanich Peninsula Affordable Housing Needs Assessment Report (2016) shows a growing need for low-and moderate-income housing. There are relatively few legal suites in North Saanich, with the majority of suites being non-legal.

[26] The Respondent points out that the rental levels he charges are low to moderate (below market rents), and that he has not increased the rents on the units for a number of years for long-term tenants. The tenant of the Main Dwelling Unit is a single parent with two children. The tenant of the Basement Suite has a mental disability and lives in the suite rent-free, in exchange for helping with the yard work. The Respondent argues that the current tenants are long-term renters whose lives will be disrupted if the orders sought by the District are granted. The Respondent points out that there have been no public complaints about the well-maintained Property.

[27] The Respondent says, as a dad with child and spousal support payments, he works two jobs and struggles financially, and rents the units to be able to keep the Property.

[28] The Respondent argues that with fewer available rental units, rents would have to rise to sustain the Property, and it is likely the current tenants could not afford to stay. The Respondent argues that the orders sought by the District would result in a hardship for himself and his tenants, in a community with a lack of affordable housing.

District's Position

[29] The District argues that the Respondent has caused, suffered or permitted: The Property to contain more than one secondary suite, contrary to the provisions of the Zoning Bylaw; and, continuation of construction on an accessory building on the Property without first obtaining a permit and against a Stop Work Order posted on the Property, contrary to the provisions of the Building Bylaw.

[30] The District points out that the Respondent owns another home where he lives. The Property and the Respondent's home are each worth over a million . The District therefore disputes any hardship argument on his personal behalf.

[31] The District argues that the Respondent is not free to unilaterally disregard Zoning and Building Bylaws, and that it is the public interest which is harmed if such actions are allowed.

The Bylaws

Zoning Bylaw

[32] The Property is located in an area zoned for "single family residential" as the principal use under s. 502.1 of the Zoning Bylaw, which provides:

> This zone is intended solely for the purpose of low density single family residential housing on land that is serviced by both community water and community sewer systems.
>
> 502.1.1 Permitted Uses
>
> (a) Principal
>
> (i) Single Family Residential
>
> (b) Secondary
>
> (i) Secondary Suite [See Section 206]

[33] Secondary uses allowed are set out in ss. 202-206 of the Zoning Bylaw.

Evidence of the Uses

[34] There are five units located on the Property, including the Main Dwelling Unit, Basement Suite, Guest Cottage, as well as a Carriage House and the Trailer.

[35] The parties agreed that the Main Dwelling Unit, Basement Suite and Guest Cottage were tenanted.

[36] The Respondent argues that the Carriage House and Trailer are not tenanted. The Respondent says that while someone was living in a trailer on the Property, that person is no longer there. The Trailer is set up as a camping area so he and his young daughter can camp there.

Secondary Suite or Guest Cottage

[37] The secondary uses permitted in the single-use residential 502.1 Zone are subject to their own uses in the Zoning Bylaw.

[38] A “secondary suite” is defined as:

> … a self-contained dwelling unit, with no more than two bedrooms, located entirely within but clearly accessory to a single family residential dwelling, the secondary suite and single family residential dwelling being a single property, and established in accordance with Section 206 of this Bylaw.

[39] Per this definition, the Basement Suite is a secondary suite.

[40] A “guest cottage” is defined as “a self-contained dwelling unit accessory to a principal dwelling unit situated on the same lot, but not temporary accommodation, and subject to the provisions of Section 204”.

[41] The District acknowledges that it may be possible to permit either the Basement Suite or Guest House as a secondary suite, per the Zoning Bylaw. All conditions need to be satisfied for secondary suite use to be met, as set out in ss. 206 (b)(c) and (d).

[42] Section 204.1.6 provides that either the Guest Cottage or the single-family residential dwelling must be owner occupied.

[43] The Zoning Bylaw additionally contains a density prohibition. A property with correct permits can have a Basement Suite or Guest Cottage, but not both.

Carriage House and Trailer

[44] Section 107 of the Zoning Bylaw provides that, unless a use is specifically permitted, it is a prohibited use.

[45] The Zoning Bylaw defines “carriage house” as “a detached one-family dwelling accessory to a principal single-family residential dwelling constructed on the top floor of a garage of a site on which is situated a one-family dwelling.”

[46] Under the Zoning Bylaw, the Carriage House is not permitted on the Property under s. 502.2, as it is defined as a prohibited use.

[47] Section 107.1.1(d) prohibits “the use of a tent or trailer for habitation”.

Summary of Options – Zoning Bylaw

[48] The Respondent does not currently reside at the Property and so does not fulfill the requirement of having a Guest Cottage under the Zoning Bylaw which would require that the Main Dwelling Unit or a Guest Cottage be owner occupied.

[49] The District argues that the Zoning Bylaw allows two permitted options going forward: the Main Dwelling Unit is a legal suite; which then allows occupancy (assuming proper permits were in place) of either the Basement Suite or Guest Cottage. The density prohibition, mentioned above, would prevent both the Basement Suite and the Guest Cottage from being occupied. The Guest Cottage could only be occupied if the Respondent lived in it, or the Main Dwelling Unit.

Building Bylaw

[50] The Building Bylaw sets out a series of requirements regarding permissions required to construct a building:

> 2.1(a) No building or structure, or part of a building or structure, shall be constructed or demolished except in accordance with the requirements of the Building Code and of this Bylaw.

[51] Requirements are set out at 2.2. and include:

> 2.2 Every person shall apply for and obtain: 2.2.1 A building permit before constructing, repairing or altering a building or structure;
>
> 2.2.5 A plumbing permit before installing any plumbing installations;

[52] Section 13.3 covers Stop Work Orders. Section 13.3.2 requires:

> 13.3.2 The owner of property on which a Stop Work notice has been posted, and every other person, shall cease all construction work immediately and shall not do any work until all applicable provisions of this bylaw have been substantially complied with and the Stop Work notice has been rescinded in writing by a building official.

[53] Section 13.3.7 requires that a Stop Work Order, once posted, remain posted on the building.

[54] The District argues that the Respondent has disregarded Stop Work Orders, and points to two such orders issued in the past in relation to different buildings. Those include the initial Stop Work Order 2011 in relation to the "garage", now the Carriage House, and the "office" which is now the Guest Cottage.

[55] The Respondent argues that he put a covering over a Stop Work Order, but did not remove it. He also argues that an insulation company installed insulation subsequent to the Stop Work Order, but only because they were booked well in advance and he forgot they were coming.

Discussion

[56] The District seeks a statutory injunction on the basis of s. 274 of the *Community Charter*. Section 274 reads:

> 274(1) A municipality may, by a proceeding brought in Supreme Court, enforce, or prevent or restrain the contravention of,
>
> (a) a bylaw or resolution of the council under this *Act* or any other Act, or
>
> (b) a provision of this Act or the *Local Government Act* or a regulation under those Acts.

[57] The injunction the District seeks is a statutory, rather than an equitable remedy. As such, "once a clear breach of an enactment is shown, the courts will refuse an injunction to restrain the contained breach only in exceptional

circumstances": *Vancouver (City) v. Maurice*, 2005 BCCA 37 at para. 34 and *Maple Ridge (District of) v. Thornhill Aggregates Ltd.*, 54 B.C.L.R. (3d) 155, 162 D.L.R. (4th) 203 (B.C.C.A.) [*Thornhill*]. The BC Court of Appeal has adopted the principle that "…any attempted violation, may be restrained by injunction. Proof of violation or attempted violation in my judgment is the sole essential to obtain an injunction": *Shaughnessy Heights Property Owners' Association v. Northup,* 12 D.L.R. (2d) 760, 1958 CanLII 289 (B.C.S.C.), quoting Justice O'Halloran in an earlier decision.

[58] In cases such as this, it has been found that local governments, in enforcing zoning or building bylaws, are enforcing the "public right" in terms of safety, zoning or building standards. In *Thornhill* at para. 9, the Court of Appeal stated:

> Where an injunction is sought to enforce a public right, the courts will be reluctant to refuse it on discretionary grounds. To the extent that the appellants may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed.

[59] In *Burnaby (City) v. Oh,* 2011 BCCA 222 [*Burnaby*] at para. 41, Rowles J.A, writing for the Court, noted: "Once the municipality applying for the injunction has demonstrated that there has been a breach of a bylaw, the court has limited discretion to deny a statutory injunction to enforce a public right".

[60] Here, the Respondent raised the concern that there are other unpermitted suites not being pursued. In *Burnaby,* the Court answered the concern about unequal Bylaw enforcement, and clarified that unequal enforcement provides no defence: the Respondent "could not rely on the City's alleged non-enforcement of the Bylaws against others in order to defeat the application the City had brought against her." (at para 42). Justice Rowles, at para. 42, cited the decision of the Supreme Court of Canada in *Toronto (City) v. Polai,* 1969 CanLII 339 (ON CA), [1970] 1 O.R. 483, aff'd [1973] S.C.C. 38 as follows:

> I do not think that lax enforcement of zoning by-law—and I am by no means sure that it can be called "lax enforcement" in this case—can afford any defence against an application for an injunction under s. 486 of *The Municipal Act*, which provides:

> 486. Where any by-law of a municipality or of a local board thereof, passed under the authority of this or any other general or special Act, is contravened, in addition to any other remedy and to any other penalty imposed by the by-law, such contravention may be restrained by action at the instance of a ratepayer or the corporation or local board.
>
> This is a case of persistent and defiant infringement. The defence really amounts to a claim for immunity until the list is disregarded and everybody else prosecuted. ... The City, in this action, is seeking to protect and enforce a public right, and should not be denied the remedy of injunction merely because others, in addition to the defendant, are guilty of similar violations and have not been restrained.
>
> [Emphasis in original.]

[61] In *Surrey (City) v. Singh*, 2022 BCSC 1455, the Court contemplated the very limited and exceptional circumstances where a court may not grant a status injunction in similar circumstances, at para. 38:

> … The public interest favours the enforcement of municipal laws. While the court has a discretion to refuse to enforce legislative requirements, it will only be exercised in exceptional circumstances… Generally speaking, personal hardship resulting from the requirement does not qualify.
>
> [Citations omitted.]

Analysis

[62] The law in this matter is clear. Once breach of the District's bylaw(s) is shown, and the local government applies for a statutory injunction, the injunction ought to be granted, barring exceptional circumstances. The District is presumed to be enforcing the public right.

[63] In this case, proper permits were not sought by the Respondent prior to renovating or imposing a new use to existing buildings, or new construction (Building D). Some of the actions may have been permitted if District approvals were sought and proper processes followed, including regarding the Basement Suite or Guest Cottage. It would not be possible to get a permit for the garage conversion into a Carriage House under the current Zoning Bylaw.

[64] Following the posting of the Stop Work Order, the continued work on Building D was contrary to s. 13.3 of the Building Bylaw.

[65] The combination of buildings, and the manner in which they were built or renovated for use, beyond their permitted use, are in contravention of both the Zoning Bylaw and the Building Bylaw.

[66] It is not open to property owners to circumvent the jurisdiction of the District by building or renovating residences as they see fit. To allow this approach would be contrary to the public interest and defeat the purpose of the District's Zoning and Building Bylaws.

Remedy

[67] In *Ovcharick v. District of North Saanich*, 1998 CanLII 5703, [1998] B.C.J. No. 1042, at para. 34, the Court found a breach and asked if demolition (a further step than the decommission asked for here) was too harsh, noting that the construction was done "without regard to the zoning by-law," without a permit, and at significant cost. The Court found: "If the petitioner is permitted to retain the benefits of the newly constructed pier and newly installed ramp, it will be difficult for the respondent to enforce its zoning by-law".

[68] The Respondent has likely incurred significant costs in the construction and renovation of the units on the Property. The Respondent appears to have been motivated, at least in part, by laudable intentions in providing low to moderate cost rental units to his tenants. His willingness to provide accommodation in exchange for yard work to a tenant with a disability who faced challenges in finding suitable housing reflects this. However, he did so fully aware he did not have, or had been denied, the proper permits and knowing he was in contravention of District Bylaws. This is unfortunate for his impacted tenants.

Delayed Implementation

[69] Justice Shergill addressed a delay in the issuance of an injunction in *Nanaimo (Regional District) v. Saccomani*, 2018 BCSC 752. In that case, the property was being used as a vacation rental in contravention of a zoning bylaw. A delayed

injunction was granted because many bookings had been made for a period of approximately five months: para. 66.

[70] Justice Shergill cited other—albeit rare—examples of a similar result:

> [64] In *Alberni-Clayoquot Regional District v. Durmuller*, 2013 BCSC 2533, at para. 37, after noting that the authorities establish that the Court has the jurisdiction to suspend the imposition of an injunction, Thompson J. weighed the hardship that would arise were the injunction not suspended, against the inconvenience and bother of a continued violation. He concluded that the injunction should be suspended. In *Saanich (District) v. Trace*, [1988] B.C.J. No. 1249, operation of an injunction flowing from breach of municipal bylaws was suspended for 18 months.

[71] After reviewing these cases, Justice Shergill concluded:

> [66] I find that the circumstances of this case support the exercise of my discretion to allow the respondents time to comply. The hardship that would result to the respondents and their customers who have already booked their vacations for the summer 2018 season, outweighs the inconvenience of continued vacation rental use, at least for the short term.
>
> [67] Enforcement of the statutory injunction is therefore suspended until September 15, 2018.

[72] In *Fraser Valley Regional District v. Petrie,* 2005 BCSC 1385, the defendants constructed a residence on their property, which was zoned as a campground-holiday park. Though they acknowledged they were in breach of zoning bylaws, the defendants argued the district was estopped from enforcing the bylaws as they had not actioned beyond posting stop work and no occupancy notices. In addition, as one of the defendant's was in ill health, they argued the Court should exercise its discretion to not grant an injunction based on exceptional circumstances. The Court found that the defendants were in breach of the zoning bylaws, and as such, the district was entitled to an injunction. However, recognizing the circumstances of the defendants, in granting the mandatory injunction, the Court suspended its operation to allow the defendants to bring their structure into compliance with the zoning bylaw.

[73] Mr. Justice Melnick suspended the operation of the injunction for three years, saying:

> [36] In this case, I take into account the following factors: that the FVRD did not enforce its bylaws for many years resulting in a situation in which there are numerous property owners in contravention of the bylaws, undoubtedly after the expenditure of considerable amounts of money to create improvements in violation of the bylaws; that, even if the FVRD continues action to enforce the bylaws against every owner in breach of them, it will undoubtedly take many years to resolve; Mr. and Mrs. Petrie are elderly and Mrs. Petrie is in ill health; and Mr. and Mrs. Petrie have very limited financial means. Taking all of these circumstances into consideration, I conclude that the operation of the injunction should be suspended for three years.

Summary

[74] Three suites on the Property are currently tenanted: The Main Dwelling Unit, Basement Suite, and the Guest Cottage. I accept that the Trailer is not tenanted. I understood only the Main Dwelling Unit to be permitted for its use. It appears that either the Basement Suite or Guest Cottage, but not both, could be brought into compliance with the current Zoning and Building Bylaws. The orders the District applies for are granted, except as noted here.

[75] Given the difficulty the tenants may face in finding alternative accommodation, and taking into consideration the hardship that will be experienced by the tenants, the operation of the injunction is suspended for a period of eight months regarding the Basement Suite and Guest Cottage. During that time, if the parties wish to do so, it may be possible for them to reach an agreement which would allow the Respondent to bring some of the units into compliance.

[76] I make no order regarding the Trailer as I accept the Respondent's submission that it is not tenanted.

"A. Walkem J."