Negligence of Public Officials Update:

Wu v. Vancouver (City), 2017 BCSC 2072

Case Summary

On November 14, 2017, the British Columbia Supreme Court released its decision in *Wu v Vancouver (City),* 2017 BCSC 2072: ("*Wu*"), in which the Court ruled that the City had been negligent in processing a development permit ("DP") application, and was liable for the plaintiff's losses. The case is notable because the Court recognized for the first time that local governments owe a duty to DP applicants to process their applications in a reasonably competent manner, and more specifically, within a reasonable period of time. Failure to do so, as in this case, may result in a finding of bad faith and an order that the local government compensate the plaintiff for its losses.

The litigation centred on a DP application to demolish a house located in Vancouver's First Shaughnessy neighbourhood – a house that the City believed had heritage value. The Court harshly criticized the City's actions relating to the manner in which it processed the DP application.

The chronology of events spanned approximately 4 years, as follows:

- December 2011 – owners purchase the property for $4.65 million with the intention of demolishing the existing house and building a new house; the property was not a designated heritage property, but was listed on a heritage inventory
- March 2012 – owners begin DP pre-approval process
- May 2012 – the City expresses its preference that the house be retained
- October 2012 – the City advises the owners that the house has heritage merit and that it will seek retention of the house; conversely, the City also advises that its first step in the DP approval process would be to confirm whether the house is a house of merit (to be retained); the timeline for DP approval is estimated to be 10 to 14 weeks

- January 2013 – owners submit a DP application; City requests a report as to the heritage merit of the house ("SOS Report")
- July 2013 – the owners submit the SOS Report; the City determines that the house has heritage merit and should be added to the Heritage Registry
- December 2013 – City Council grants temporary heritage protection on the house for 120 days, per s.589 of the *Vancouver Charter*, but does not designate the house as a heritage property
- March 2014 – City staff prepares draft report recommending that the house be designated has a heritage property
- May 2014 – the owners file the lawsuit
- June 2014 – the City implements temporary heritage control on all of First Shaughnessy and prohibits the demolition of any houses in the area for a period of one year
- September 2015 – City designates the First Shaughnessy District a protected heritage area and prevents demolition of any house unless the planning department finds that the house no longer has sufficient heritage value; no compensation is payable to property owners seeking to demolish their homes and build new

Throughout this period the City repeatedly urged the owners to consider retention of the house, and each time the owners asserted that they were not interested in retention.

The Court found that the City had two choices regarding the owners' DP application: 1) declare the house to be a heritage property and compensate the owners, or 2) process the DP for the demolition of the house.

The Court found that by repeatedly asking the owners to consider retaining the house despite the owners' strong preference against retention, requiring the SOS Report when the City had already determined that the house had merit, adopting the 120-day freeze, and never seeking heritage designation, the City had embarked on a "circuitous course of delay".

Furthermore, the Court found that "the only rational conclusion for the actions of the City is that they wanted to delay the Application until the new legislation was passed that designated all of

First Shaughnessy District a protected heritage zone, thereby avoiding the required compensation." Remarkably, the Court found that the City's conduct amounted to bad faith.

The Court did not accept the City's argument that the DP application was incomplete and therefore could not be processed, because the alleged shortcomings of the application could have been addressed by conditional approval or "prior-to" letters. Further, the Court did not accept that the DP application had lapsed (having extended beyond 12 months). On that point, the Court found that it "defied logic to accept that an application can lapse while applicants are actively dealing with the City".

The Court stopped short of finding that the City's conduct amounted to abuse of public office, because the tort of abuse of public office relates to a specific individual, and not the planning staff as a whole.

The Court also stopped short of finding that the City's conduct amounted to expropriation, because the plaintiffs did not have the unconditional right to develop their property (and therefore did not lose that right) – in other words, there was always the risk that the City would designate the house as a heritage property.

Instead, the Court found that the City was liable in negligence. As there were no previously decided cases in which liability in negligence in relation to processing a DP application had been recognized, the Court embarked on an analysis of the relationship between the City and the applicants, and concluded that the City owed a duty of care to the applicants, and breached that duty by delaying the DP approval.

The Court noted that at the time the owners filed the lawsuit, it had been over 2 years since they embarked on the pre-approval process (which evidently started the clock running for the purpose of processing a DP application). This far exceeded the 10 – 14 weeks processing time, estimated by the City in its own bulletin, and the 1-year period within which DP applications lapse.

The Court was careful not to set out an expected timeline for processing DP applications, remarking that "what is reasonable [processing time] with respect to a different application will turn on the facts of that specific case".

The Court left damages to be assessed at another hearing, but remarked that damages would include loss of property value due to the house being designated as heritage, as well as the expenses incurred as a result of the City's "delay tactics" (i.e. carrying expenses, consultants' fees).

Implications for Local Governments

Local governments should take note that they owe DP applicants a duty to process applications in a timely manner. Furthermore, if the local government wishes to deny a DP on the basis of *bona fide* concerns (as was the case here) it must do so decisively and within the bounds of its authority. Here, the City could have designated the house as a heritage property at the outset of its dealings with the plaintiffs, and thereby avoided liability. Of course, the City would have been required to compensate the owners for reduction in market value at that time. As the Court made clear, not making a decision (to approve the DP or to designate the house as heritage) was not an option.

Please contact us should you wish to discuss the implications of this decision in more detail:

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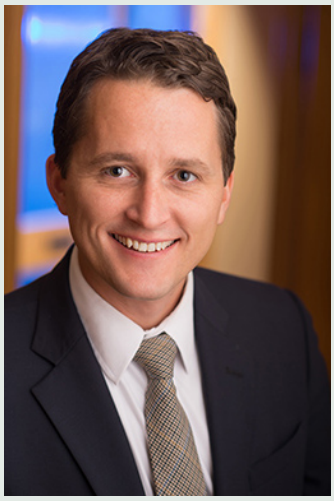

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