COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sunshine Coast (Regional District) v. Vanderhaeghe,* 2023 BCCA 192

Date: 20230413
Dockets: CA48748; CA48749

Between:

The Sunshine Coast Regional District

Appellant
(Respondent)

And

Lorna Vanderhaeghe

Respondent
(Petitioner)

Before: The Honourable Mr. Justice Hunter
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated December 1, 2022 (*Vanderhaeghe v. Sunshine Coast (Regional District)*, 2022 BCSC 2100, Vancouver Dockets S216560 and S219609).

Oral Reasons for Judgment

Counsel for Applicants, M. Aidelbaum and B. Aidelbaum:	J.L. Carpick B.S. Dumanowski J. Benton, Articled Student
No one appearing on behalf of the Appellant	
Counsel for the Respondent:	N. Baker K. Ho
Place and Date of Hearing:	Vancouver, British Columbia April 4, 2023
Place and Date of Judgment:	Vancouver, British Columbia April 13, 2023

Summary:

The parties to this appeal are a property owner and the regional district in which the property is located. A dispute arose between the parties concerning the property owner's attempt to redevelop their property, culminating in a stop work order on a project in which building and development permits had been issued. On judicial review, the District was ordered to reconsider an amendment application on the basis that the redeveloped house was a legally conforming structure. The District has appealed. The applicants are neighbours of the property owner who are opposed to the redevelopment. They apply to be added as respondents to the appeal.

Held: Application dismissed. The applicants have no legal, financial or reputational interests that will be affected by the outcome of the appeal. It is not in the interests of justice that they be given party status in the appeal.

[1] **HUNTER J.A.**: The applicants, Dr. Martin Aidelbaum and Barbara Aidelbaum, apply to be added as respondents to this appeal pursuant to Rule 18 of the *Court of Appeal Rules*, B.C. Reg. 120/2022.

Background to Appeal

[2] This appeal concerns a dispute relating to the redevelopment of a property owned by the respondent, Lorna Vanderhaeghe in the Sunshine Coast Regional District (the "District"). When the redevelopment process began, there was a cottage on the property sited 9.5 metres from the natural boundary of lake. The District's bylaws require a setback of 20 metres.

[3] In 2018, District staff advised Ms. Vanderhaeghe that she could build a new dwelling on the footprint of the existing cottage.

[4] In March 2019, the District issued a development permit, building permit and demolition permit authorizing the demolition of the cottage and the construction of a new dwelling within 9.5 metres from the lake.

[5] On December 17, 2019, the District placed a partial stop-work order on the Property pertaining to the portion of the new dwelling located within the approved setback. Two months later, the District posted a full stop-work order.

[6] In July 2021, Ms. Vanderhaeghe filed an application for judicial review of the District's decisions. In October 2021, the District filed a petition for various declarations and an order requiring Ms. Vanderhaeghe to bring her property into compliance with its bylaws. The two petitions were heard together.

[7] On December 1, 2022, in reasons indexed as 2022 BCSC 2100, the chambers judge found in favour of the petitioner, Ms. Vanderhaeghe, and dismissed the District's petition. The judge found that the redeveloped house was a legally conforming structure under the relevant legislation and made the following orders and declarations (at para. 224):

> a) The District authorized the demolition of the legally nonconforming Old Cottage located on the Property and the construction of the legally conforming New Dwelling with an approved setback variance from 20 metres to 9.5 metres from the natural boundary of the Lake by issuing the Permits;
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> b) The as-built New Dwelling complies with this approved setback variance from 20 metres to 9.5 metres from the natural boundary of the Lake and the applicable height and square footage requirements under the *Zoning Bylaw*, and therefore does not require a development variance permit to vary, or to obtain approval of, any of the as-built New Dwelling's setback, height or square footage;
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> c) The District's decision to require the petitioner to apply for fresh permits for the New Dwelling and to refuse to process to Amendment Application was unreasonable. Accordingly, I order that the Amendment Application be remitted to the District for reconsideration and dealt with appropriately within 60 days;
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> d) The Board breached the rules of procedural fairness at the November 12, 2020, PCDC meeting and the November 26, 2020, Board meeting;
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> e) As it appears, from the above conclusions, the petition of the District is dismissed.

[8] The District filed a Notice of Appeal on December 15, 2022, appealing both the dismissal of its petition and the granting of the declarations sought by the petitioner. The District's Notice of Appeal states that it seeks an order that Ms. Vanderhaeghe bring the property into compliance with the District's bylaws.

[9] On March 17, 2023, the applicants filed a Notice of Application to be added as respondents to this appeal.

Positions of the Parties

[10] The applicants are Ms. Vanderhaege's neighbours. They say that the height of Ms. Vanderhaege's new house adversely affects their use and enjoyment of their property. While they assert their property value may decrease as a result of the redevelopment, they say their primary concern is privacy, use, and enjoyment. They submit that they complained to the District throughout its construction that it was being built unlawfully, and participated in the public hearings arguing for the District to take steps to stop its construction. They did not participate in the judicial review proceedings.

[11] The applicants argue that, as owners within 100 meters of Ms. Vanderhaeghe's property, they were denied further procedural rights that they were owed to notice of a variance application prior to its issuance.

[12] On this basis, the applicants submit they have interests that will be affected by the relief sought by the District on this appeal. They advocate for a broad interpretation of the type of interests contemplated by Rule 18, submitting that the language in the new rule may well be broader, and at least is not narrower than that in the former Rule 2(2).

[13] Ms. Vanderhaeghe opposes the applicants' request on the basis that their legal interests are not affected, they seek to improperly expand the issues raised by the parties, and their application is an abuse of process.

[14] She says that the applicants are not directly affected by the orders below, and that while they made submissions to the District, they were not parties to the legal proceedings and the relief sought on appeal will not affect their financial interests or any private property interests protected by law. She submits that having an interest in the subject matter, without more, is not sufficient to confer party status.

[15] Ms. Vanderhaeghe says that the applicants raise new issues to challenge the issuance of certain permits, but if the applicants had wished to argue that these

permits were unlawful or violated their procedural rights, they should have sought that relief on judicial review, and cannot do so in the context of these appeals.

[16] The District takes no position on the application.

Analysis

[17] Rule 18 provides that a justice may add respondents to an appeal. The provision reads:

> 18 (1) A justice may make an order under subrule (2), if
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> (a) a person was not named as a respondent in a notice of appeal or notice of cross appeal, and
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> (b) the justice determines that the person has interests that could be affected by the relief sought in the appeal or cross appeal.
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> (2) On application by a person referred to in subrule (1)(a), a justice, in the circumstances referred to in that subrule, may order that
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> (a) the person be added as a respondent to the appeal,
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> …
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> [Emphasis added.]

[18] Rule 18 replaced the former Rule 2(2). Rule 2(2) stated:

> 2 (2) If a justice considers that a person who was not named as a respondent in a notice of application for leave to appeal, a notice of appeal or a notice of cross appeal could be affected by the order requested, the justice may order that
>
> (a) the person be added as a respondent to the proceeding,
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> …
>
> [Emphasis added.]

[19] I do not consider that the new language of the rule permitting applicants to be added as parties has changed the considerations relevant to the application. Applicants must show that they have interests that could be affected by the relief sought in the appeal, and the application judge must then engage in an exercise of judicial discretion, governed by an overarching concern with the interests of justice.

[20] Judgments under the previous sub-rule have reviewed the type of interest that could support an application for party status. Applicants have been added as

party respondents to an appeal when their legal, financial or reputational interests will be affected by the result of the appeal.

[21] In *Held v. Sechelt (District)*, 2021 BCCA 92 (Chambers), Justice Fisher explained that the "usual threshold" for the addition of a party as a respondent is "whether the order from which the appeal is taken has a direct effect on the legal rights of the applicant": at para. 11.

[22] In *Held*, the issue was the interpretation of the *Land Title Act,* R.S.B.C. 1996, c. 250*,* with respect to the types of covenants the Province's approving officers could issue. The Province had not participated in the court below. The respondent-plaintiffs argued that the Province's interest in the appeal was more akin to that of an intervener. Justice Fisher was satisfied that the Province had demonstrated that its interests were sufficiently affected, as the appeals would clearly affect the Province's interests in its regulatory duties involving the legislative provision at issue.

[23] The recent judgment in *Crowe Mackay & Company Ltd. v. 0731431 B.C. Ltd.*, 2022 BCCA 158 (Chambers), also decided under Rule 2(2), is an example of a consideration of financial and reputational interests. A trustee in bankruptcy had been ordered by a trial judge to repay substantial amounts paid to the trustee and its legal counsel, Faskens. Faskens had not been a party to the litigation. Justice Newbury added the law firm as a respondent on the basis "that orders I have reviewed in these reasons affected Fasken not only financially but reputationally, and the orders sought on the appeals are likely to do so as well": at para. 61.

[24] In *Hirakawa v. Bonner*, 2021 BCCA 304, the proposed respondent Monaker Group Inc. had acquired shares in which the respondent-plaintiff claimed a beneficial interest. Justice Voith noted that Monaker's addition to the appeal as a respondent was not opposed by the parties, and stated that "[i]t is clear that Monaker is directly affected by the outcome of this appeal": at para. 37.

[25] A similar order was made in *J.P. v. British Columbia (Children and Family Development),* 2015 BCCA 481, where the trial judge had made findings of misfeasance of public office against the proposed respondent, a government social worker, who did not have legal representation at trial. On appeal, he sought to be added as a respondent.

[26] In allowing the application, Justice Bennett referred to the interests at stake in these terms:

> [29] … The within case is somewhat similar to *Butty v. Butty* (2009), 98 O.R. (3d) 713 (Ont. C.A. [In Chambers]), where under the Ontario equivalent to R. 2(2), LaForme J.A. permitted former trial counsel to be added as a party to address the findings of the trial court that he had deliberately misled the court, suppressed information and otherwise conducted himself unprofessionally.
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> [30] In this case, the order of the trial judge specifically finds wrongdoing by Mr. Strickland. It is clear his interests are engaged, and he is affected by the order. While the Province has appealed this order, it is not clear that the Province will represent Mr. Strickland's interests to the extent he will.

[27] A common theme in this jurisprudence is that the interests asserted must be direct and tangible. They must be of sufficient significance to support an order that will give the applicant a share of the carriage of the appeal, with the right to address the court and to seek leave to appeal a judgment considered unsatisfactory.

[28] In this case, the Aidelbaums do not assert a legal interest in the outcome of the appeal. They suggest that their property value may decline as a result of Ms. Vanderhaeghe's redevelopment, but provided no evidence that this will be or has been the result of the construction. Their principal argument is that the location and size of Ms. Vanderhaeghe's new house interferes with their use and enjoyment of their own property. They assert that as the direct neighbour, their interests are affected in a manner different from the public at large, and they should be permitted to participate in the appeals to protect those interests.

[29] To support their application, the Aidelbaums place considerable reliance on the judgment in *Adams Lake Indian Band v. British Columbia,* 2011 BCCA 339 (Chambers). In *Adams Lake*, Sun Peaks Resort Corporation sought to be added as

a party in litigation between the Crown and the First Nation where the issue was the adequacy of consultation. Sun Peaks submitted that Rule 2(2) set a low threshold and that it merely needed to be a person who "could be affected by the order requested" to be added. Adams Lake submitted that the jurisprudence sets out a more stringent approach, requiring that "the order from which the appeal is taken have a direct effect on the legal rights of the parties": at para. 17.

[30] Sun Peaks had entered into a master development agreement ("MDA") with the Province that contemplated a phased expansion of the ski hill by the development of resort facilities and recreational improvements. To facilitate this expansion, the MDA permitted the purchase of Crown lands within the traditional areas claimed by the Adams Lake Band. The order under appeal required the Province to engage in a deep consultation process with the Adams Lake Band concerning development on the mountain. Sun Peaks asserted that the judgment under appeal affected its rights as a party to the MDA.

[31] Justice Garson discussed the "direct effect" approach illustrated in *South Pacific Import Inc. v. Ho*, 2009 BCCA 9 (Chambers) in which an application to be added as a respondent to the appeal was dismissed on the basis that issues as between the non-party applicant and the parties were not adjudicated upon in the decision appealed from. However, she considered that the context of a polycentric consultation supported a more flexible approach:

> [19] It is my view that in a polycentric consultation case such as this, the usual requirements to add a party on appeal ought to be applied in a somewhat more flexible manner than might be the case where the legal relationship(s) at issue are more clearly defined as they usually are in a case based on contract or tort. Here, it is the Crown who bears the responsibility to consult, not the private entity, but it is the private entity's rights that may be severely impacted if that consultation duty is not adequately fulfilled by the Crown, or by the manner in which the consultation is conducted by the Crown.

[32] Justice Garson went on to hold that while it was far from certain that Sun Peaks' rights were affected by the decision under appeal, she was satisfied that its rights may be affected, perhaps significantly. On that basis, and balancing the

prejudice between the parties, she permitted Sun Peaks to be added as a respondent.

[33] I do not consider that the result in the complex situation described in *Adams Lake* assists the Aidelbaums in their application. In *Adams Lake*, Sun Peaks was able to point to a tangible legal interest in a master development agreement and real uncertainty as to the affect the order for deep consultation would have on their legal rights under that agreement. The chambers judge was satisfied that their legal rights might be affected, perhaps significantly.

[34] In the case at bar, there is no suggestion that the Aidelbaums' legal rights are affected by the order under appeal, which concerns the rights of Ms. Vanderhaeghe to redevelop her own property and the dealings between her and the District.

[35] In my view, it would be exceptional to grant party respondent status when the applicant cannot show that their legal or financial interests will be directly affected by the appeal.

[36] As a reference point, even the grant of intervener status (other than public interest interveners) requires that an applicant have a direct interest in the appeal: *Halalt First Nation v. British Columbia*, 2012 BCCA 191 at para. 5 (Chambers). To show a direct interest in the proceeding for purposes of an intervener application, an applicant's own legal rights or obligations must be affected by the proceedings: *Thomas v. Rio Tinto Alcan Inc*., 2022 BCCA 415 at para. 32.

[37] Status as a respondent is significantly more intrusive to the parties of an appeal than status as an intervener. A respondent can speak to the appeal as of right; an intervener must seek leave of the division. A respondent will normally be at liberty to address any issue in the appeal; an intervener may be constrained on the points it can address. A respondent has a right of appeal; an intervener does not.

[38] In my view, a stranger to the appeal should normally be granted respondent status only when the order under appeal directly affects the applicant's legal or financial interests and the application judge is of the view that the impact on the

applicant is such that the applicant should be able to defend its interests as a full party. This does not preclude granting respondent status when the applicant's reputational interests are at stake, or in complex litigation where the impact on the applicant's legal interests are uncertain, but as a general proposition, respondent status should be reserved for cases where the impact on the applicant's interests are significant and tangible. For interests of lesser significance, intervener status may be sought.

[39] In this case, the Aidelbaums do not have a legal interest at stake in the appeal, and there is nothing exceptional about their asserted interests that would support granting them respondent status in the appeal.

Disposition

[40] For these reasons, it is not in the interests of justice to provide party status in this appeal to the Aidelbaums. The application is dismissed, with costs.

"The Honourable Mr. Justice Hunter"