Court of Queen's Bench of Alberta

Citation: Davidson v. Calgary (City of), 2006 ABQB 801

Date: 20061107
Docket: 0601 09572
Registry: Calgary

Between:

James W. Davidson and Patricia M. Davidson

Applicants

- and -

The City of Calgary, 1167648 Alberta Ltd., Vango Custom Homes Inc. and the Registrar of the Land Titles Office (South Alberta Land Titles District)

Respondents

Reasons for Judgment
of the
Honourable Madam Justice L. Darlene Acton

Introduction

[1] In 2006 the Respondent, the City of Calgary, granted the Respondent's subdivision application, which the Applicants in this judicial review say was, in essence, the same decision that the City made in 2005 (less three of the eight conditions of approval that were attached to the 2005 decision). The Applicants allege that the City subdivision authority was *functus officio* and could not revisit its decision. Further, and in the alternative, they argue that the decision was made without reasons and is therefore both patently unreasonable and in breach of the Regulations which require the subdivision authority to provide reasons for decision.

[2] The City submits that it can, and did, hear a new application for subdivision approval and that under the *Municipal Government Act* it can hear such applications over and over, even though prior subdivision applications have been approved. The City argues that there is a presumption of regularity and therefore the Applicants have not established, merely by the absence of reasons, that the decision was unreasonable. Moreover, it argues that the Regulation overreaches its empowering legislation by requiring reasons when the *Municipal Government Act*, RSA 2000, c. M-26, (*MGA)*, only requires the subdivision authority to provide reasons if it denies a subdivision application.

Jurisdiction of the Court to Hear the Application

[3] The Applicants, being adjacent landowners to the subject property, have no rights to appeal an approval of subdivision; accordingly, the only review of the approval of the 2006 decision is by way of judicial review. Justice Moreau in ***Morris v. Wetaskiwin (County)*** (2002), 326 A.R. 281, 2002 ABQB 1090, (appeal dismissed (2003) 339 A.R. 355, 2003 ABCA 356) stated that the statutory right of appeal "does not extend to neighbouring owners as they do not fall within the categories of those eligible to appeal referred to in s. 678(1)," (at para. 29).

Standard of Review

[4] The standard of review of an administrative tribunal decision is determined under the pragmatic and functional approach, which requires the Court to consider the following four factors: 1) the presence or absence of a privative clause, 2) the expertise of the tribunal, 3) the nature and purpose of the Act as a whole and the provision in question, and 4) the nature of the issue: ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982 . Our Court of Appeal has indicated that this analysis must be undertaken in each case, ***Alberta (Workers' Compensation Board) v. Appeals Commission*** (2005), 371 A.R. 318, 2005 ABCA 276 (at para. 12):

> There is no one, correct, standard of review of general application for all decisions of a specific tribunal or all questions within a general category. In each case, the court must select the standard of review, using the functional and pragmatic approach***: Dr. Q***. at para. 21. This analysis must be employed on every judicial review application, to every question under review, from every administrative decision-maker.

[5] In ***Canada Lands Co. CLC v. Edmonton (City)*** (2005), 367 A.R. 180, 2005 ABCA 218, the Court of Appeal affirmed that the pragmatic and functional approach must be applied to appeals of subdivision approvals made by subdivision and development appeals boards, as long as those decisions were adjudicative or policymaking, and notwithstanding the parties' agreement on the standard of review (at para. 5). There is no reason to think that there is any difference in this requirement when the decision-maker in question is the subdivision authority, rather than the subdivision appeals board.

[6] The decision by the City of Calgary to grant subdivision approval was an adjudicative decision as it determined the rights, privileges or interests of the Respondents, 1167648 Alberta Ltd. and Vango Custom Homes Inc.

[7] There is no privative clause protecting the decisions of a subdivision authority, and their decisions are subject to appeal to, generally, a subdivision appeals board (s. 678). This factor suggests less deference is required.

[8] Subdivision authorities are appointed by the municipal council by-law, and may include any or all members of the council, a designated officer, a municipal planning commission, and any other person or organization (s. 623 of the *MGA*). Such broad legislative criteria for membership in the authority suggests that there is no requirement for expertise. In practice, however, it appears that the legislative intent was to provide a municipality with sufficient flexibility to implement a subdivision authority with the expertise it considered appropriate in its

circumstances. The City of Calgary has delegated its subdivision authority to employees in certain titled positions, in this casse, Judy Lupton, Section Head New Community Design and Subdivision Services; this suggests a specialized expertise.

[9] It is important to note, however, that expertise is a relative concept: the expertise of the tribunal relative to that of the reviewing court on the issue in question***, Dr. Q v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226 at para. 26. This requires an analysis of the nature of the issue here.

[10] The Supreme Court of Canada in ***Canada (Director of Investigation and Research, Competition Act) v. Southam Inc***., [1997] 1 S.C.R. 748 has held that (at para. 35) :

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

[11] The question of whether the City has the jurisdiction to revisit and change its decision is a question of law. The question of whether it was required to give reasons is also a question of law - the interpretation of the *MGA* and Regulations. Questions of law, including interpretation of legal principles and legislation, are clearly areas in which the Court has at least as much expertise as the subdivision authority. Such decisions are not entitled to a great deal of deference.

[12] Whether the City should have approved the application for subdivision is a finding of mixed fact and law, applying the statutory requirements to the facts raised by the application. This suggests less deference since it deals with the core area of the City's expertise.

[13] The purpose of the planning provisions of the statute were outlined in detail by Wittmann J.A. in ***Lethbridge (City) v. Daisley*** (2000), 250 A.R. 365, 2000 ABCA 79 at para. 51. He noted that the planning sections of the *MGA* replaced the provisions of the *Planning Act*, RSA 1980, c. P-9, and that the purposes expressly set out in the latter remain substantially the same in the *MGA*, even if not expressly set out there. These include providing a means for plans and related measures to be prepared and adopted in order to achieve orderly, economical and beneficial development and use of land, and to maintain and improve the quality of the physical environment where people live.

[14] The particular sections in question are about the process and criteria to be followed in a subdivision application.

[15] In my opinion, the appropriate standard of review is correctness on the issue of whether the City could revisit essentially the same application and on whether it was required to give reasons.

[16] The decision to approve the subdivision involved issues of policy as well as the application of statutory criteria. In ***Morris***, the Court of Appeal held that the decision to grant approval by the County Council, the subdivision authority in that case, was subject to the

patently unreasonable standard since the decision was more policy oriented. In a Supreme Court decision the year after ***Morris***, the Court noted that the standard of patently unreasonable would be applied rarely, and in limited circumstances: ***Voice Construction Ltd. v. Construction & General Workers' Union, Local 92***, [2004] 1 S.C.R. 609:

> A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard. By its nature, the application of patent unreasonableness will be rare. A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd. Between correctness and patent unreasonableness, where the legislature intends some deference to be given to the tribunal's decision, the appropriate standard will be reasonableness.

[17] In my opinion, the following factors suggest that the standard of review of the subdivision approval is reasonableness *simpliciter*:

a. the absence of a privative clause;
b. the question is one of mixed fact and law, requiring the application of statutory criteria, and
c. the fact that while there is a policy dimension to the decision, the decision is made by an employee and not the elected Council.

Can the City Revisit and Change its Decision?

[18] The relevant legislative provisions are:

653(1) A person may apply to a subdivision authority for subdivision approval in accordance with the subdivision and development regulations by submitting to the subdivision authority a proposed plan of subdivision or other instrument that describes the subdivision.

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(4) On receipt of an application for subdivision approval, the subdivision authority must give notice of the application to owners of the land that is adjacent to the land that is the subject of the application.

***

(5) A notice under subsection (4) must describe the nature of the application, the method of obtaining further information about the application and the manner in which and time within which written submissions may be made to the subdivision authority.

(6) A subdivision authority, when considering an application under this section,

(a) must consider the written submissions of those persons and local authorities to whom an application for subdivision approval or notice of application was

given in accordance with this section but is not bound by the submissions unless required by the subdivision and development regulations, and

(b) is not required to hold a hearing.

656(1) A decision of a subdivision authority must be given in writing to the applicant and to the Government departments, persons and local authorities to which the subdivision authority is required by the subdivision and development regulations to give a copy of the application.

(2) A decision of a subdivision authority must state

(a) whether an appeal lies to a subdivision and development appeal board or to the Municipal Government Board, and

(b) if an application for subdivision approval is refused, the reasons for the refusal.

(3) If an application for subdivision approval is refused, the subdivision authority may refuse to accept for consideration, with respect to the same land or part of the same land, a further application for subdivision approval submitted to it within the 6-month period after the date of the subdivision authority's decision to refuse the application.

678(1) The decision of a subdivision authority on an application for subdivision approval may be appealed

(a) by the applicant for the approval,

(b) by a Government department if the application is required by the subdivision and development regulations to be referred to that department,

(c) by the council of the municipality in which the land to be subdivided is located if the council, a designated officer of the municipality or the municipal planning commission of the municipality is not the subdivision authority, or

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(2) An appeal under subsection (1) may be commenced by filing a notice of appeal within 14 days after receipt of the written decision of the subdivision authority or deemed refusal by the subdivision authority in accordance with section 681

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(b) in all other cases, with the subdivision and development appeal board.

[19] The Davidsons contend that the City is precluded from revisiting and changing its decision, relying on ***Brochu v. Grande Prairie (City)*** (2004), 358 A.R. 220, 2004 ABQB 182 at paras. 49 to 52. In that case, the Chief Administrative Officer (CAO) of Grande Prairie received a petition to stop the City from continuing with a water line project. On August 13, 2003, the CAO issued a document that concluded that the petition met the requirements of the

MGA; on August 29, 2003, he purported to issue another document that declared the petition insufficient. Veit J. held that the principle of *functus officio* applied to the City, and that the CAO's initial decision exhausted his jurisdiction. Veit J. relied on the reasoning in ***Chandler v. Alberta Association of Architects***, [1989] 2 S.C.R. 848.

[20] The Supreme Court of Canada discussed the application of the principle of *functus officio* to administrative tribunals in ***Chandler***, noting, first of all, that it was necessary to consider the legislation in question to determine whether the tribunal has the power to rescind, vary, amend, or reconsider a final decision. In the absence of such authority, the Court said the next step was (at para. 9), "to consider (a) whether it had made a final decision, and (b) whether it was, therefore, *functus officio.*"

[21] The Court discussed the development of the principle in general and held that there were policy reasons that differed between the principles underlying *functus* for the Courts and for tribunals (at paras. 20):

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in ***Paper Machinery Ltd. v. J. O. Ross Engineering Corp***., *supra*.

[22] The Davidsons argue that the Respondent should have appealed the decision to the subdivision appeal board, since the subdivision authority's decision was a final one, as in ***Brochu***.

[23] The Respondents, on the other hand, argue that the 2006 decision was a decision based entirely on a new application, and therefore ***Brochu*** does not apply.

[24] The first step, as discussed in ***Chandler,*** is to note that the legislation provides no express authority permitting the subdivision authority to revise its decision. An example of such a provision can be found in the *Labour Relations Code*, RSA 2000, c. L-1, (s.12(4)). There is no similar provision in the *MGA*.

[25] Moreover, the Supreme Court in ***Chandler*** indicated that the rationale underlying the rule in the administrative tribunal context was interest in finality (para. 21). The Respondents did not appeal the decision, and the Applicants are entitled to the reasonable expectation, that once the decision was made, conditions set, and no appeal taken, that the matter was at an end. To permit the Respondents to continue to make the essentially same application repeatedly renders the appeal process irrelevant.

[26] The next portion of the analysis is whether the decision was final. When one examines the 2005 decision made by the City of Calgary, it is clear that that decision was unequivocal both as to content, date, and the conditions that attached to the decision.

[27] The City argues that this was a new application, and therefore it was not *functus*. I do not agree. In my view, the 2006 decision, based on the identical documents submitted in 2005, with some alterations written on the document by a City official, was merely a reconsideration of the 2005 decision, the only changes being to eliminate the conditions objected to by the Respondent Vango. In my view, having made that decision, the City of Calgary was then *functus officio* and, as articulated in the ***Brochu*** decision, the City was not in a position to revisit and change that decision.

[28] The City submits that the Respondent Vango could make as many subdivision applications as it wished, and, while I agree that Vango could make more subdivision applications, in my view, the meaning of that section must be taken to mean that it is coming to the City with a new and different proposal for subdivision from the one they made previously. In this case, the 2006 application was identical to the 2005 application. The Respondents were simply attempting to get the undesirable conditions eliminated without proceeding to appeal the 2005 decision as was the Respondent Vango's right under s. 658 of the *Municipal Government Act.*

[29] Further, the Respondents submit that the condition linking subdivision and development approval was not a legal condition. However, without making a finding as to whether such a linking of subdivision approval and development approval is, or is not, illegal, in my view, for the Respondents to attempt to rely on that error, if it was an error, does not assist them. Once the City made its decision in 2005, it had no further jurisdiction to revisit that decision on the facts of this case where the 2006 application was, in essence, a re-submission of the 2005 application without any changes. As noted by the Supreme Court in ***Chandler***, the "decision cannot be revisited because the tribunal ... made an error..."

[30] I am satisfied that the City erred in law in rendering the 2006 decision to replace its 2005 decision. The decision to revisit this subdivision approval was not within its jurisdiction, and the decision must be quashed.

Must the City Provide Reasons for its Decision?

[31] If am wrong and the City was able to revisit its decision, I will address whether it was required to give reasons for its decision.

[32] Section 656(2)(b) provides that a subdivision authority must state its reasons for decision if it refuses an application. It is silent as to whether the authority must provide reasons if it grants the application. The *Subdivision and Development Regulation*, A.R. 43/2002, however, provides:

> 8 The written decision of a subdivision authority provided under section 656 of the Act must include the reasons for the decision, including an indication of how the subdivision authority has considered
>
> (a) any submissions made to it by the adjacent landowners, and

(b) the matters listed in section 7.[1]

[33] The Respondents argue that this section must be read within the limits of the enabling legislation, and that where subordinate legislation conflicts with the statute, it is *ultra vires*. However, the Regulation does not conflict with the statute. LaForest J. in ***Friends of the Oldman River Society v. Canada (Minister of Transport,),*** [1992] 1 S.C.R. 3 discussed the basic principles of subordinate legislation in relation to parent legislation (at para. 42):

> The basic principles of law are not in doubt. Just as subordinate legislation cannot conflict with its parent legislation, so too it cannot conflict with other Acts of Parliament,

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[1] Section 7 of the Regulation reads:

> 7 In making a decision as to whether to approve an application for subdivision, the subdivision authority must consider, with respect to the land that is the subject of the application,
>
> (a) its topography,
>
> (b) its soil characteristics,
>
> (c) storm water collection and disposal,
>
> (d) any potential for the flooding, subsidence or erosion of the land,
>
> (e) its accessibility to a road,
>
> (f) the availability and adequacy of a water supply, sewage disposal system and solid waste disposal,
>
> (g) in the case of land not serviced by a licensed water distribution and wastewater collection system, whether the proposed subdivision boundaries, lot sizes and building sites comply with the requirements of the Private Sewage Disposal Systems Regulation (AR 229/97) in respect of lot size and distances between property lines, buildings, water sources and private sewage disposal systems as identified in section 4(4)(b) and (c),
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> (h) the use of land in the vicinity of the land that is the subject of the application, and
>
> (i) any other matters that it considers necessary to determine whether the land that is the subject of the application is suitable for the purpose for which the subdivision is intended.

> unless a statute so authorizes. Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation. However, as a matter of construction a court will, where possible, **prefer an interpretation that permits reconciliation of the two**. "Inconsistency" in this context refers to a situation where two legislative enactments **cannot stand together**; ... the underlying rationale is the same as where subordinate legislation is said to be inconsistent with another Act of Parliament -- there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments. There is also some doctrinal similarity to the principle of paramountcy in constitutional division of powers cases where inconsistency has also been defined in terms of contradiction -- i.e., "**compliance with one law involves breach of the other**"; see ***Smith v. The Queen***, [1960] S.C.R. 776, at p. 800.
>
> (Emphasis added; citations removed)

[34] The parent legislation does not prohibit the provision of reasons when a subdivision application is granted, only requires reasons if an application is refused. Therefore, complying with s. 8 of the Regulation does not breach s. 656 of the *Act*, and there is no conflict.

[35] Moreover, there is ample justification to require reasons for the approval of an application. Adjacent landowners no longer have a right of appeal, a recent change in the process. As noted previously, their only recourse is judicial review. Section 653(6) requires the subdivision authority to consider the submissions of those persons entitled to notice, including adjacent landowners; likewise, s.8 requires the subdivision authority to explain how it considered those submissions. Judicial review, in the absence of reasons, is generally an empty remedy: ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817.

> 39 Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. **Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review**...
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> 43 In my opinion, it is now appropriate to recognize that, in certain circumstances, **the duty of procedural fairness will require the provision of a written explanation for a decision**. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this **where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances**, some form of reasons should be required.

[36] Thus, even where there is no legislative requirement for reasons, there may be a common law one.

[37] The Respondents argue that the presumption of regularity applies, and that the parties must assume that the authority properly considered all the criteria in coming to its decision. However, the absence of reasons makes it virtually impossible to determine if a decision was reasonable since the Court must ascertain whether there is some rational basis for the decision: ***Law Society of New Brunswick v. Ryan***, [2003] 1 S.C.R. 247 at para. 55:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere.

[38] This test cannot be meaningfully applied in the absence of reasons.

[39] Moreover, the test for whether a decision is patently unreasonable may be similarly unworkable in the absence of reasons, ***Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.***, [1997] 1 S.C.R. 748 (at para. 57):

> If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable.

[40] Had it been necessary to decide, I would have remitted the decision back to the City for it to provide reasons for its decision.

Conclusion

[41] Accordingly, the application to quash the 2006 subdivision approval is granted.

[42] Costs may be spoken to within 20 days of the release of this decision if the parties cannot otherwise agree.

Heard on the 28th day of September, 2006.
Dated at the City of Calgary, Alberta this 3rd day of November, 2006.

L. Darlene Acton
J.C.Q.B.A.

Appearances:

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