

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Yearsley v. White Rock (City of)***,
2009 BCSC 719

Date: 20090529
Docket: S084149
Registry: Vancouver

Between:

Jacqueline Yearsley and Robert Yearsley

Petitioners

And

Corporation of the City of White Rock

Respondent

Before: The Honourable Madam Justice Dillon

Reasons for Judgment

Counsel for the Petitioners:

J.L. Carpick
Z.J. Ansley

Counsel for the Respondent:

M. Woodward

Dates and Place of Trial/Hearing:

January 26 and 27, 2009
Vancouver, B.C.

Introduction

[1] The petitioners seek a declaration that the decision on October 9, 2007 by the respondent, Corporation of the City of White Rock (“White Rock”), to refuse to issue a development permit for property owned by the petitioners is unlawful and of no force and effect because White Rock exceeded its jurisdiction by acting on improper and extraneous considerations. The petitioners also seek an order in the nature of *mandamus* that a development permit issue or, in the alternative, that White Rock be compelled to specify precisely what changes the petitioners must make so that a development permit will be granted. White Rock opposes the petition and says that the decision to refuse to issue the permit was lawful and reasonable in accordance with city bylaws.

Facts

[2] The petitioners own property in White Rock at 14955 Victoria Avenue (“the Property”) which is currently occupied by a 2-storey commercial building. The Property is situate one block back from Marine Drive in a location that is zoned Marine Commercial/Residential Zone, CR-2. The proposed development is to replace the existing building with a 6-storey commercial/residential building consisting of 804 square feet of commercial space and 19 residential units on a site of 0.21 acres, meeting the density requirements of the CR-2 zone. The proposed building is 29.9 feet above the average natural grade, meeting the 30-foot height limit, and all other requirements of the CR-2 zone, according to municipal documents.

[3] The streetfront façade of the proposed building has six storeys. The topography of the Property slopes upwards from the front street side towards the back. The effect is to allow a building higher at street level than would be permitted if the lot were level because of the manner of calculation of allowable height according to White Rock’s bylaw CR-2. While the proposed 6-storey building is within the allowable height of the CR-2 zone, most nearby buildings typically are 3 to 4 storeys in height. In particular, nearby residential developments known as “Mainsail” and “Victoria Terrace” contain buildings that are 2 or 3 storeys in height. These buildings are zoned differently than the Property, are on a different scale of land, and were constructed in 1980 and 1986 respectively.

[4] The Official Community Plan (“OCP”) for White Rock provides development permit guidelines applicable to all areas of the city. The first guideline for “form and character” states:

- i) Building design should take into consideration the surrounding physical environment and the character, scale and form of other nearby buildings.
- ...
- v) Avoid use of extensive solid walls, reflective glass or other similar material on the ground floor façade of any building facing a street. Use variation in building mass, materials, architectural detailing, or colour to provide articulation to solid walls.

The director of development services for the city reported that this provision allows the city the opportunity to review the form, character, and site of the proposal.

[5] The area of the Property is within Development Permit Area 5 – Waterfront Business Area (DPA 5). The OCP also provides development permit guidelines for this specific area as follows:

Development Permit Area 5 – Waterfront Business Area (East and West Beach)

...

These distinct commercial areas comprise the waterfront's two commercial districts. The character of the area is largely defined by the historic development pattern on narrow (9m) lots. New development should reflect the area's unique setting and respect historical development patterns.

In addition to the guidelines contained Section 1.0 of this Appendix, the following guidelines apply:

Form and Character

...

ii) Building facades should be consistent with the historic pattern of Marine Drive. Building modules of approximately 9.1m (30 feet) width are suggested. These modules can be defined through architectural articulation, materials and colour, to create an image of individuality and small scale. Building details such as canopies, trim, doors and signage, should be used to create colourful accents.

(the DPA 5 guideline)

The buildings on Marine Drive are two to three storeys, having maximized available height as defined in the same zoning bylaw, according to the petitioner's architect.

For the purpose of development permit issuance, White Rock assumes that the Marine Drive properties' sites are level so the benefit of steep grade on the property allowing for greater height within the zoning bylaw is not available to the Marine Drive properties. The "Mainsail" and "Victoria Terrace" properties, while not within CR-2 zone, are within DPA 5.

[6] The OCP is enacted pursuant to section 876 of the **Local Government Act**, R.S.B.C. 1996, c. 323 (the **Act**). By operation of section 920(1) of the **Act** a development permit is required for construction of buildings within designated areas. By operation of section 919.1(1)(f), the OCP could establish objectives for the "form

and character” of developments. By section 920(4), a development permit cannot vary the density of the land from that permitted in the zoning bylaw. A development permit may include requirements respecting “the character of the development, including landscaping, and the siting, form, exterior design and finish of buildings and other structures” (section 920(8) of the **Act**). There is no suggestion that White Rock’s OCP guidelines are invalid.

[7] The process established for issuance of a development permit is provided by *White Rock Zoning & Development Procedures By-Law, 2002, No. 1678*. Upon receipt of an application, the City Planner refers the application to appropriate city departments and an Advisory Design Panel for review. The application is then referred to city council with a recommendation. If an application is not in conformity with the OCP, it must first be submitted to city council for direction. If an application for a development permit has received resolution for further consideration, a public information meeting must be held. Final approval may then be given, or not.

[8] The petitioners first applied for a development permit in November 2006 (the application). The first city planner’s report concerning the application recommended on November 20, 2006 that council receive the report for information and that council deny the proposed development permit. Certain options were suggested including referral of the application to a public meeting. At the city council meeting of November 20, 2006, concerns were raised that, among others, the project did not meet the DPA 5 guideline as it should be similar to other buildings in the area which were ground floor retail with maximum height of 35 feet. The matter was referred back to the Advisory Design Panel for further consultation with the developer in an

effort to create a proposal that would meet the DPA 5 guidelines. As a result, staff prepared information on various properties in the area, including the “Mainsail” and “Victoria Terrace” properties which are also in DPA 5. In a letter from White Rock dated January 5, 2006, the petitioners were informed of specific concerns that should be addressed and of the necessity for a public meeting. The petitioners made form, siting and character amendments to the application and also reduced the number of units.

[9] Revised development permit drawings were submitted by the petitioners to White Rock in July 2007. These were considered part of the original application so as not to attract additional fees. White Rock’s Advisory Design Panel suggested that the application proceed to council on August 28, 2007 with certain comments, none of which specifically pertain to the guidelines of the OCP. The planning department of White Rock provided preliminary comments to the petitioners through their architect via email of September 10, 2007. None of these comments indicated violation of bylaws or the OCP.

[10] Mr. Richardson, White Rock’s director of development services at the time, sent a report to the White Rock mayor and council on September 17, 2007. The report identified that the proposed development met all of the CR-2 zoning requirements except for two variances. Specifically, the building proposal met the height and density requirements. The allowable height was based upon the height above the average natural grade of the site which, in this case with a steep grade to the back, meant that the building would be higher at street front than if the property were level. The application was within the zoning density requirements. The two

minor variances, the sign variance and a reduced driveway width as requested by White Rock, do not form the basis for any argument here as the petitioner is willing to comply with White Rock's requests. Neither formed a basis for the decision made on October 9, 2007. The White Rock staff did not oppose a variance of the signage bylaws to allow for an 8-inch projection of signage from the building. Additional information about access ramps and waiting bays was requested and subsequently given.

[11] Mr. Richardson's report offered two options: to refer or to not refer the matter to a public hearing. Mr. Richardson recommended on September 17, 2007: "That Council authorize staff to schedule the required public meeting". This was not a recommendation that the application be denied, but a recommendation that the application move forward to the next stage of approval. By this, it can be inferred that the application met both the zoning and OCP design criteria according to Mr. Richardson and his staff. There was no suggestion for changes to the application to meet the requirements of either the zoning bylaw or the OCP.

[12] The Committee of the Whole of White Rock city council met to consider this report and recommendation on September 17, 2007. Following discussion and presentation by Mr. Richardson and the petitioner's architect, it was recommended that the required public meeting be scheduled. Councillor Todd voted against this recommendation.

[13] Public meetings were held on October 1 and 9, 2007. The purpose of the public meetings as stated on the notice was to review the form and character of the

proposed 6-storey mixed-use development. Prior to the first meeting, Councillor Todd expressed his view against the application in writing. He said:

The top levels of the building might be attractive to most people when viewed from a distance, but what will a pedestrian see and feel as they walk past this building? It is dominated by two parking garage entrances. They will be uncomfortable, unwelcome places for people. The effect will be similar to a blank wall or window with the blinds always closed, only worse since these will also have cars coming in and out of them. For residents and visitors passing by, no matter how you dress them up, the dominant features of this building will create a feeling of discomfort and unbelonging. Is that the kind of atmosphere we're wanting to create in White Rock, especially on the waterfront?

The competing argument is that the proponent has no choice: it is necessary to have two parking ramps to achieve the target density due to the nature of the lot. This is something I find frustrating. Too many projects come to Council treating the maximum permitted density as their entitlement. The proponent's density expectations are clearly ill-suited to the nature of the lot. This is made obvious by the fact that they have not been able to design a building that can accommodate their density target without creating an unpleasant street level experience. What's more important, how the community will experience the property or how many units a developer gets to squeeze out of it?

While I don't wish to argue whether or not a property owner is entitled to the maximum potential of their property, I do wonder how to best define or measure the developable potential. We seem to accept that this potential can be limited by the maximum allowable building height of the area. We should accept that other requirements might also limit a property's potential density. I don't believe that allowing two parking ramp entrances is a reasonable nor acceptable compromise for allowing maximum density.

[14] On October 1, the mayor outlined that the purpose of the meeting was for review of the form and character of the proposed 6-storey mixed-use development. Mr. Richardson provided a review of the proposed development permit. Many members of the public spoke and the petitioner's architect responded. It was apparent that there were concerns for view and character of the neighbourhood. Many speakers were of the impression that the proposed building did not meet the CR-2 zoning requirements with respect to height and density. The latter is a

misplaced consideration as the application had met the height and density requirements of the CR-2 zoning bylaw. The meeting was adjourned to October 9 to allow all those on the speakers list the opportunity to speak.

[15] The agenda for the October 9 meeting stated the recommendation: "That staff be authorized to issue Development Permit No. 292." At the October 9 meeting, several public speakers expressed concern about the 6-storey height of the proposed building, about it not fitting with the form and character of the surrounding area, and about approval of the development setting a precedent for the area. From the evidence, it appears that some councillors also spoke out against the height of the building at this meeting, notwithstanding that no notes or minutes were taken.

[16] It was resolved (Resolution 2007-432 DP292) by vote of 5-2 that staff not be authorized to issue the permit and (Resolution 2007-436 DP292) that the issue of measuring height "on this property" be referred to staff to review the issues raised by the public and report back to council. An amendment to Resolution 2007-436 DP292 (Resolution 2007-437 DP292) changed "on this property" to "in the C2 zone". The denial of the development permit was reported to the petitioners on October 11, 2007. No reasons were given for the refusal.

[17] On December 7, 2007 counsel for the petitioners wrote to city council to complain that council voted to refuse to issue the permit "for what appear to be extraneous considerations that might be relevant to a rezoning application but not to a development permit application." The petitioners requested reconsideration of the matter. Legal authority was cited to the effect that councillors must apply objective

standards set out in bylaws and the OCP when passing or refusing to pass a resolution to grant a permit.

[18] When no reply was received by March 11, 2008, petitioners' counsel sent another letter suggesting that there was no lawful basis for refusal of the permit and that the failure to articulate reasons for the rejection indicated bad faith. It was pointed out that the fact that citizens might not like the building was irrelevant to the application since it complied with all existing guidelines. It was also stated that the record showed that council rejected the application because the building was too high; however, height was an irrelevant consideration because the building met the zoning requirements for height by virtue of the steeply sloping site. Reconsideration was again requested with the warning that failure to issue the permit would result in legal action to compel issuance of the permit.

[19] Legal counsel for White Rock responded on March 26, 2008 that there was confusion after the December 7 letter because it was believed that Mr. Richardson had been dealing with the petitioner's architect in the interim to resolve issues. A report was to go to council on April 7, 2008. Council met on April 7 to receive legal advice. On April 9, 2008, counsel for White Rock wrote to the petitioner's lawyer to advise that the matter would be brought before city council at the meeting of April 14, 2008 so that those councillors who voted against issuance of the permit on October 9, 2007 could provide reasons for their votes.

[20] At the meeting of White Rock city council on April 14, 2008, councillors that voted in favour of Resolution 2007-432 DP 292 provided reasons for the refusal of

the development permit in order for reasons to be documented in the official minutes. The reasons as enunciated were:

Councillor Coleridge	Because of the character of the neighbourhood and the shape of the building.
Councillor Todd	Because the pedestrian experience was not in keeping with the vision for the neighbourhood, the entrance to the parking garage was too dominant, the vertical element at the front of building was too strong, and generally the character of the design was not in keeping with the neighbourhood, the plans, or the vision for the neighbourhood.
Councillor Peddemors	Because the design is out of character for the neighbourhood; the Main Sail and Victoria Terrace properties show the character of the neighbourhood.
Councillor McLean	Because the people who spoke at the meeting were concerned the design did not fit the form or character of the neighbourhood.
Mayor Forster	Because an overwhelming amount of people came to Council expressing their concern and outrage about the potential character and form of the building eroding the neighbourhood. The Main Sail and Victoria Terrace properties are in keeping with the character of the neighbourhood.

Issues

[21] The issues to be decided are:

1. Did White Rock exceed its jurisdiction by taking into account irrelevant or extraneous criteria outside of the bylaws and the OCP guidelines in refusing to issue the development permit?

2. If White Rock acted within its jurisdiction, did it act reasonably?
3. If White Rock acted outside of its jurisdiction, what is the appropriate remedy?

Discussion

1. Standard of Review

[22] This petition for judicial review is brought pursuant to the **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241. The petitioners say that White Rock exceeded its jurisdiction because councillors based their decision upon impermissible and irrelevant criteria outside of the OCP guidelines. Particularly, council rejected the application because of an impermissible concern for height, because White Rock is requiring the petitioners to build a smaller building than zoning permits contrary to section 920(4) of the **Act**, because of the application of irrelevant and impermissible criteria related to public and personal opinion, because of the failure to apply the OCP guidelines, and because of the failure to provide directions as to how to comply with the guidelines. On this basis, the petitioners say that the correctness standard applies.

[23] The respondent asserts that the reasonableness standard applies to development permit issuance. In any event, the councillors who voted against the application applied the OCP guidelines reasonably.

[24] In **Dunsmuir v. New Brunswick**, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 62 (**Dunsmuir**), the Supreme Court of Canada summarized the process of

judicial review as a two step process to identify the proper standard of review. The first is to review the jurisprudence to ascertain whether it has already been determined in a satisfactory manner the degree of deference to be accorded with respect to the particular category of question. If this inquiry is not fruitful, then courts must proceed to an analysis of the factors making it possible to identify the appropriate standard of review. The Court said at para. 57 that an exhaustive review is not required in every case and that existing jurisprudence will be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard.

[25] Upon review of the jurisprudence related to issuance of a development permit, it is apparent that the standard to be applied to the question of whether council failed to apply the criteria set out in the OCP guidelines and instead acted on other considerations is correctness. Finch J.A. (as he then was) said in *Westfair Foods Ltd. v. Saanich (District)* (1997), 49 B.C.L.R. (3d) 299, 46 M.P.L.R. (2d) 104 (B.C.C.A.) (*Westfair Foods*) that, in exercising a discretionary power to grant or refuse a permit, council is acting in a quasi-judicial capacity in the exercise of a limited discretion bound by the guidelines in the OCP. Whether council applied objective standards as set out in previously adopted bylaws or the OCP is a question of jurisdiction in which the judicial standard of review is correctness.

[26] In *511784 BC Ltd. v. Salmon Arm (District)* (2001), 19 M.P.L.R. (3d) 232 at para. 49, 2001 BCSC 245 (*511784 BC Ltd.*), the Court said that the standard of review in determining whether a municipal council acted within its jurisdiction in refusing a development permit is one of correctness. This standard was also

applied to questions of jurisdiction related to issuance of permits in **Washi Beam Holdings Corp. v. West Vancouver (District)**, [1999] B.C.J. No. 617 at paras. 33-34 (**Washi Beam**), with respect to issuance of a development permit and in **L. P. Management Corp. v. Abbotsford (City)**, 2006 BCSC 1426 at para. 37, 63 B.C.L.R. (4th) 172 (**Abbotsford**), with respect to refusal to issue a permit for the removal of gravel.

[27] In my view, these cases identify the standard of review for questions of jurisdiction arising from the refusal to issue a development permit as one of correctness. The analysis having been adequately performed, it is not necessary for me to repeat this here (**Dunsmuir** at para. 57). A “jurisdiction” question includes whether the municipal council correctly applied objective guidelines under its OCP or whether it acted upon impermissible, extraneous, or irrelevant criteria. When applying the correctness standard, a reviewing court must not show deference to the reasoning process of the original decision maker. The court undertakes its own analysis to decide whether the determination was correct. If it disagrees with the decision, the court will substitute its own view and provide the correct answer (**Dunsmuir** at para. 50).

2. Did White Rock properly apply the OCP guidelines or did it act outside of its jurisdiction?

[28] The OCP provides guidelines that must apply when considering a development permit application. While the municipal council has discretion to refuse to issue a development permit, that discretion must be exercised according to the guidelines in the OCP (**Westfair Foods** at para. 21; **Washi Beam** at para. 33).

Because a landowner is entitled to know what the requirements to obtain a development permit are, these requirements cannot be based upon the likes or dislikes of individual council members who are elected from time to time (*Westfair Foods Ltd. v. Saanich (District)* (1997), 30 B.C.L.R. (3d) 305 at paras. 34 and 39, 38 M.P.L.R. (2d) 202 (B.C.S.C.), citing *Re Doman Industries and District of North Cowichan* (1980), 116 D.L.R. (3d) 358 (B.C.S.C.); *Westfair Foods* at paras. 24 and 26). Nor is council bound by the views of neighbours or members of the public, especially if those views are not consistent with applicable zoning bylaws and the OCP guidelines (*511784 BC Ltd.* at paras. 68-69).

[29] The guidelines must be applied in an objective manner consistent with zoning bylaws (*511784 BC Ltd.* at para. 28). This is stated in section 920(4) of the *Act* so that council cannot apply OCP criteria to a development permit application in a manner that is contrary to the zoning requirements.

[30] In *511784 BC Ltd.*, the petitioners' development permit application to build two 3-storey apartment buildings was refused based upon the guidelines in the OCP. Council recommended specific amendments to the proposal, including the redesign with 2-storey townhouses in the northeastern section and 3- or 4-storey townhouses in the southwestern section. The petitioners argued that height and number of storeys was irrelevant to council's considerations because the zoning bylaw permitted 3-storey buildings as contained in the proposal. In that case, the OCP guidelines specifically provided for consideration of the "massing" of buildings which was found by definition to include consideration of height and width. Because the OCP guideline by definition permitted council to consider height, it was

necessary to consider height and the number of storeys apart from the zoning requirements. On this basis, the court found that council was acting within its jurisdiction when it decided based on height in accordance with the guidelines in the OCP. However, the recommendation to change the plan to include a 4-storey structure did exceed council's jurisdiction because the proposed change did not comply with zoning bylaw requirements.

[31] The question in this case, as in **48 Fraser Hwy Land Ltd. v. Langley (Township)**, 4 M.P.L.R. (3d) 53 at para. 28 (**Langley**), is whether council addressed the form and character issues in the context of the guidelines in the OCP. The report of staff along with councillors' comments and stated reasons provide direct evidence of council's considerations of this issue. However, if the staff report is not followed, it cannot be inferred that council considered the guidelines in accordance with the report. In such case, the evidence must disclose that council has considered relevant and proper matters in reaching its decision (**Langley** at para. 34). When considering the reasons given by councillors for rejecting the application, this Court is mindful that its attention must be directed to whether councillors directed their minds to the legal requirements applicable to the case rather than minutely dissecting their reasons in a search for error (**Abbotsford** at para. 66). Reasons of council must be sufficient and referenced to the guidelines so that the applicant knows what must be done to make his plans acceptable (*ibid*; **511784 BC Ltd.** at para. 40; **Langley** at para. 37).

[32] Preliminary to consideration of the reasons given by council for refusing the application, it should be noted that the OCP guidelines applicable to DPA 5 do not

include height or number of storeys within the guidelines, unlike in **511784 BC Ltd.** where use of the word “massing” by definition included height.

[33] The respondent argued that “façade” includes height considerations. However, if the word is taken according to its usual definition and within the context of the OCP, it does not include height as a separate factor. “Façade” is defined as “the face or front of a building” (*The Concise Oxford dictionary of Current English*, 8th ed.) or “the front of a building” or “a face ... of a building that is given emphasis by special architectural treatment” (*Webster’s Third New International Dictionary of the English Language, unabridged*). For DPA 5, the guidelines say that “building façades should be consistent with the historic pattern of Marine Drive”. There is then specific reference to width. There is no reference to height. In the guidelines applicable to all areas, there is mention of the use of certain materials “...on the ground floor façade of any building facing a street”. Other references to “façade” within the guidelines clearly relate to the appearance of the building from a particular perspective (Development Permit Area 2, guideline (i)).

[34] The respondent also argues that “scale” in reference to “other nearby buildings” in the guidelines applicable to all areas includes width and height. While “scale” refers to relative dimensions or degree, or to ratios of size, this word is not specific enough to preclude otherwise allowable height within the zoning bylaw, without more.

[35] Reference is specifically made to height in other guidelines of the OCP by use of “massing” (Development Permit Area 4, guideline (i); Development Permit Area 3,

guideline (i); Development Permit Area 7, guideline (i)) or by specific reference to “two storey elevations” (Development Permit Area 4).

[36] From this, it is apparent that height is not an allowable consideration within the OCP guidelines for DPA 5 apart from the zoning requirements. This is so despite the fact that there is no specific density provision in the bylaw. “Density” includes consideration of height, which is specifically provided for in the bylaw, and there are no words in the OCP applicable to the DPA 5 that import a density consideration.

[37] The report of Mr. Richardson is clear that the application met all of the zoning requirements, particularly for height. There were no other factors cited within the report to indicate that the application ran afoul of any other provision either within the bylaws or the OCP, except for minor variances that are not in play here. Although the report did not expressly state an affirmative recommendation for approval, the staff of White Rock certainly recommended that the application move forward to a public information meeting, an inference that all requirements had been met.

[38] In this context, there must be evidence that council considered relevant and proper matters and had valid reasons for refusing to issue the development permit (***Langley*** at para. 34). Reasons must be sufficient so that the developer knows what he must do to change his plans to make them acceptable (*ibid.*).

[39] So, what were the reasons? Councillor McLean and Mayor Forster used the opinions of speakers at the public meeting as reason to oppose the application. Most public speakers opposed the height of the proposed building. Reliance on

public opinion is not a relevant consideration if it is not linked to legitimate factors within the zoning bylaw or the OCP. Counsel for the respondent agreed that the decision was not to be by “referendum”. All councillors and mayor said that the proposal was out of keeping with the “character of the neighbourhood” or the “vision for the neighbourhood”. This language is not found in the OCP where reference is made only to the character of nearby buildings or to the “historical pattern of Marine Drive”, and not to a general neighbourhood. Without reference to objective specifics, this appears as a subjective consideration. However, two councillors defined the character of the neighbourhood to be epitomized by the “Mainsail” and “Victoria Terrace” properties, the main attributes of which are that these are 2- or 3-storey residential complexes. It can be reasonably inferred that this comparison is to height, given the circumstances as a whole. These two properties, while also within DPA 5, are not directly comparable as they are not within the same zoning bylaw. Councillor Coleridge also referred to the “shape” of the building which counsel for the respondent indicated was a reference to the façade of the building. While this reason may vaguely refer to the OCP guidelines, it so lacks specificity as to be unreasonable. Another reason given, that the “pedestrian experience” is not in keeping with the “vision of the neighbourhood”, is not a criterion within the OCP. Concern for the “dominance” of the entrance to the garage is a subjective consideration when the entrance met all of the zoning requirements and the concern was not otherwise linked to a specific guideline in the OCP.

[40] Council acted to refuse the application because of unspecified, vague stated concerns that are not referenced in the OCP, including implied concern about height,

regardless that the proposed building was within the height requirements of zoning and OCP guidelines, according to the staff report. In this circumstance, the reasons must be specific enough to indicate that council has considered relevant and proper matters. The failure to give adequate reasons to inform the petitioner how to comply so that the application could be acceptable suggests that councillors could not give reasons because it was known that height was not a proper consideration within the context of this application.

[41] White Rock took into consideration matters that were not within the OCP guidelines and essentially came to a conclusion that supported public opposition to the height of the proposed development even though the development permit application met all of the zoning and other requirements, except for minor variances that are not in issue here. I conclude that council acted in excess of its jurisdiction in so doing. The decision must be quashed.

3. What is the appropriate remedy?

[42] Should this matter be referred back to White Rock to consider in accordance with the OCP guidelines and bylaws or should this court order White Rock to issue a development permit? This question, as posed by Joyce J. in **Abbotsford** at para. 72, asks whether White Rock would have no choice but to issue the permit if it considered the matter in accordance with the OCP and bylaws. In **Westfair Foods**, the permit had been denied because of the likes and dislikes of various councillors and the court concluded that there had been substantial compliance with the bylaws

such that council would have no choice but to issue the permit (***Westfair Foods*** at para. 43; ***Abbotsford*** at para. 71; ***Langley*** at para. 36).

[43] In this case, the report from staff indicates that the proposed development complies with all of the bylaws and OCP guidelines. There is no specific problem raised except for the two variances. The petitioner has agreed to comply with the request for change based upon the variance issues. On that basis, counsel for the respondent agreed that an order in the nature of *mandamus* could issue if this court was so inclined. White Rock had many months to consider reasons for rejecting the application and devoted one meeting to consideration of this matter with the assistance of legal advice prior to issuance of reasons. White Rock did not suggest in argument that there was a further or continuing legitimate problem that could require further consideration from council. In this circumstance, this Court orders that White Rock issue the development permit.

Conclusions

[44] This Court declares that White Rock Resolution 2007-432 DP292 is unlawful and of no force and effect. This Court orders White Rock to issue development permit application no. 292 to the petitioners. At the request of counsel, the matter of costs is reserved pending further hearing.

“Dillon J.”

The Honourable Madam Justice Dillon