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CLIENT BULLETIN

“WHAT’S DENSITY?” – A COMMON SENSE ANSWER

The B.C. Supreme Court, in issuing reasons for judgment in *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, has provided at least a partial answer to the long-simmering question of what constitutes “density” for the purpose of various rules in Parts 26 and 27 of the *Local Government Act* that prohibit the variance of use and density restrictions in zoning bylaws. After two days of hearing last October, the Court set aside a heritage alteration permit (HAP) that had been issued to authorize the development of a mixed-use building in the Fort Langley Heritage Conservation Area designated in the Township’s official community plan. The issuance of the permit potentially engaged the prohibition in Part 27 of the *Local Government Act* against varying “the use or density of use” specified in the applicable zoning bylaw with a heritage alteration permit. Such a prohibition is also found in Part 26 of the Act in relation to board of variance orders, development permits and development variance permits, and there are several provisions of the Act that stipulate a public hearing requirement for authorizations that vary the use or density of use. None of these provisions has previously been the subject of any direct judicial attention.

The HAP in question varied the applicable building height restriction for a new retail/office/residential building from 2 storeys to 3; varied the permitted maximum site coverage from 60% to 67%; and varied the minimum rear building setback. The first two variances were the focus of the Society’s challenge to the validity of the permit based on s. 972(4)(a) of the *Local Government Act*. Several things are notable about the Court’s treatment of this ground of attack in the Reasons for Judgment. First, the Court observes that the *Local Government Act* does not define the term “density of use”, without indicating whether that comment is being made in relation to the employment of that phrase in s. 972(4)(a) itself, or in relation to its employment in the circular definition of “density” in s. 872 of the Act. (That definition is “in relation to land, a parcel of land or an area, means (a) the density of use of the land, parcel or area, or (b) the density of use of any buildings or other structures located on the land or parcel, or in the area”.) Because s. 872 is not mentioned, one must assume that the Court is referring to the use of the term “density of use” in s. 972(4)(a) itself, which is unfortunate in that a direct judicial comment on the undefined use of that term in s. 872 might have moved the B.C. Legislature to add some substantive meaning to the statutory definition of “density”. Secondly, the Court does not examine the entire body of C-2 zoning regulations that apply to the lands in question to determine whether, in that overall context, the building height or site coverage rules must be considered to deal with “density of use”. The height and site coverage rules are, rather, considered in isolation from the rest of the C-2 regulations. Finally, the Court does not parse s. 903 of the *Local Government Act*, the source of authority for all of the zoning regulations, to attempt to shed light

on the relationship between regulations dealing with the height, size or dimensions of buildings (s. 903(1)(c)(iii) and regulations dealing with the density of use of land (s. 903(1)(c) (ii)).

The Court begins its analysis by referring to an “applicable” *Concise Oxford English Dictionary* definition of “density” as “the quantity of people or things in a given area of space”. It then turns to consider “what this HAP purported to do in regards to the lands in question”, reducing the matter in issue “in its simplest terms” to whether the Township had “changed the density of use of this parcel of land by allowing a footprint in excess of 67 percent of the area of the land [this appears to be an error in the Reasons for Judgment; the bylaw limit was 60 percent] and by allowing a building to three storeys high rather than two”. The conclusion: “Common sense, and any reasonable interpretation of density of use, suggest that they have. They are allowing a building that is approximately 50 percent higher than the current zoning allowed and they are allowing an increase, although a modest increase, in the footprint of the building on the lands in question.” The two-storey height limit for the Fort Langley area was contained in a special section of the zoning bylaw that applied notwithstanding the 12-metre height limit generally applicable to C-2 zoned properties, which would likely have permitted a three-story building. Clearly the addition of a storey (which would in this case comprise the residential units in the building) would increase “the quantity of people ... in a given area or space”. In a zone where building volume is controlled only by site coverage and height rules, common sense indeed suggests that increasing site coverage increases quantity of people or things on the parcel of land in question.

The decision in this case suggests that an interpretation of the term “density” in s. 972(4)(a) and similar provisions elsewhere in the *Local Government Act* should be informed by a common sense approach to whether an increase in the quantity of people or things in a given area is occurring, rather than a technical approach based on a planner’s parsing of the zoning bylaw or the zoning power itself. Local government staff advising boards of variance, municipal councils and regional boards ought to pay particular attention to the Court’s decision on building height, which seems to call for analysis as to whether a proposed height variance permits the construction of additional floor area in the building, or merely greater ceiling heights in floor areas otherwise allowed. The decision on site coverage seems to weaken any argument that buildings with greater coverage can be allowed by variance as long as density measured in some other way, such as residential units per parcel or per hectare or principal buildings per parcel, is not being increased.

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