2021 ONSC 3277
Ontario Superior Court of Justice

Westminister Woods Ltd. v. City of Guelph

2021 CarswellOnt 6333, 2021 ONSC 3277, 15 M.P.L.R. (6th) 108, 331 A.C.W.S. (3d) 772

Westminister Woods Ltd. (Plaintiff / Responding Party) and The Corporation of the City of Guelph (Defendant / Moving Party)

G.D. Lemon J.

Heard: March 16, 2021
Judgment: May 3, 2021
Docket: CV-13-707

Counsel: Trenton Johnson, Eric Davis, for Plaintiff
Patrick J. Harrington, for Defendant

Subject: Civil Practice and Procedure; Property; Public; Municipal
Related Abridgment Classifications
Municipal law
XVII Development charges and levies
XVII.1 Development charges
XVII.1.f Miscellaneous
Headnote
Municipal law --- Development charges and levies — Development charges — Miscellaneous
Defendant city had approved plaintiff WW Ltd.'s development plans subject to conditions — As condition of approval, city required WW Ltd to pay its share of local service charges that funded improved roads and subdivision agreement specified amount of WW Ltd.'s share and secured its obligation to pay its share — Subdivision agreement required WW Ltd. to pay for services including road improvements in area where WW Ltd. had developed land — WW Ltd. did not appeal conditions to Local Planning Appeal Tribunal (LPAT) and instead proceeded to execute subdivision agreement, paid amounts required, completed balance of its approval conditions and registered new phase of its subdivision — WW Ltd. commenced action seeking reimbursement of payments that it had made toward road improvements — City brought motion for order that Superior Court of Justice did not have jurisdiction — Motion granted — Court had no jurisdiction to hear this claim and claim was bound to fail — WW Ltd. chose not to use its legislated rights of appeal — By failing to even challenge by-laws that underlie subdivision agreement, it was plain and obvious that WW Ltd. could not succeed on any of its claims.
Table of Authorities
Cases considered by *G.D. Lemon J.*:
Nanaimo (City) v. Rascal Trucking Ltd. (2000), 2000 SCC 13, 2000 CarswellBC 392, 2000 CarswellBC 393, 183 D.L.R. (4th) 1, 251 N.R. 42, 132 B.C.A.C. 298, 215 W.A.C. 298, 9 M.P.L.R. (3d) 1, [2000] 1 S.C.R. 342, [2000] 6 W.W.R. 403, 76 B.C.L.R. (3d) 201, 20 Admin. L.R. (3d) 1, 2000 CSC 13 (S.C.C.) — considered
Statutes considered:
Development Charges Act, 1997, S.O. 1997, c. 27
Generally — considered
Municipal Act, 2001, S.O. 2001, c. 25
Generally — referred to

s. 272 — considered
Planning Act, R.S.O. 1990, c. P.13

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Generally — considered

s. 51 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 21.01(3)(d) — considered

MOTION by city for order that Superior Court of Justice did not have jurisdiction.

***G.D. Lemon J.*:**

The Issue

1 In this action, Westminister Woods Ltd. has claimed that the City of Guelph has overcharged Westminister for its contribution to expenses relating to Westminister's land development.

2 Before that action can proceed, in this motion, Guelph seeks an order that the Superior Court of Justice does not have jurisdiction to decide this issue or alternatively, Guelph seeks an order that the action constitutes an abuse of the process of the Superior Court.

The Background

3 In 1999, Guelph resolved that it would fund improvements to Clair Road and Victoria Road by using a combination of general taxes, development charges, and local service charges. Those determinations were made pursuant to publicly available background studies and were passed pursuant to the Development Charges Act, 1997, S.O. 1997, c. 27. Guelph confirmed its decision in 2004 and then carried out and completed the relevant road improvements by 2007.

4 Westminister has developed lands at the north-east corner of the intersection of Clair and Victoria. In July 2011, Guelph approved Westminister's development plans subject to conditions.

5 Pursuant to the Planning Act, R.S.O. 1990, c. P.13, municipalities may attach conditions to the approval of draft development plans. These "draft plan conditions" had to be cleared by Westminister before a plan of subdivision could receive final approval and be registered.

6 As a condition of approval, Guelph required Westminister to pay its share of the local service charges that funded the improved roads. The subdivision agreement specified the amount of Westminister's share and secured Westminister's obligation to pay its share.

7 In particular, Westminister, as the developer, agreed that:

> 16. The Developer shall pay to the City a share of the **cost of all existing services** abutting the subdivision as determined by the City Engineer including, but not limited to, a share of the cost of the existing watermain on Clair Road and Victoria Road and a share of the cost of road improvements on Clair Road and Victoria Road. [Emphasis in original.]

8 The 2011 agreement required Westminister to pay for "Stage III Services," which are described as including road improvements on Clair and Victoria. The amount of the Stage III Services payment is set out in a schedule to the subdivision agreement.

9 Before the agreement was signed, there was a discussion between representatives of Westminister and Guelph concerning the amount of the Stage III Services payment. Westminister confirms that it received and understood Guelph's explanation concerning the amount of the Stage III Services payment, though Westminister asserts that it did not agree with Guelph's explanation.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

10 Section 51 of the Planning Act provides a developer with a right of appeal to the Local Planning Appeal Tribunal ("LPAT") if the developer disagrees with the requirements of any draft plan conditions imposed by the municipality. An appeal must be filed within 20 days of the municipality issuing notice that it has given draft plan approval. The *Planning Act* also provides a developer with the right to appeal a condition to the LPAT at any time before final approval of the subdivision. Westminister did not appeal the conditions to the LPAT.

11 Instead, Westminister proceeded to execute the 2011 subdivision agreement, paid the amounts required, completed the balance of its approval conditions and registered the new phase of its subdivision in March 2012.

12 The subdivision is now fully built.

13 In September 2013, Westminister commenced this action seeking reimbursement of payments that it had made toward the road improvements.

Position of the Parties

City of Guelph

14 Guelph submits that it imposed a local service charge upon the subdivision through Condition No. 16. Guelph secured Westminister's obligation to pay this local service charge through the 2011 subdivision agreement and the Stage III Services payment. The local service charge imposed through the Stage III Services payment traces its origins back to the 1999 by-law and the 2004 by-law, when city council adopted the recommendations of its background studies concerning how the road improvements to Clair and Victoria could be funded.

15 Guelph says that Westminister's Statement of Claim is, in effect, an attempt to litigate the lawful decisions of Guelph city council. These decisions were appealable at the relevant times, but no appeals were sought.

16 In order to provide the relief sought by Westminister, this court would have to re-open and amend the city-adopted funding mechanism for the improvements to Clair and Victoria. The court would also have to retroactively delete or amend Condition No. 16 as well as the corresponding provisions in the 2011 subdivision agreement.

17 Guelph submits that none of that relief is available and that Westminister's Statement of Claim is an abuse of the Court's process because it constitutes "an out-of-time end-run" around the lawful decisions of Guelph.

18 Guelph submits that to dismiss this case as frivolous, vexatious or an abuse of process, I must be satisfied that, on the face of the action and in all the circumstances, it is plain and obvious that the action cannot succeed.

19 Guelph argues that Westminister's causes of action depend upon the court finding that Guelph's decisions to fund the improvements to Clair and Victoria through local service charges was unreasonable and/or unlawful. That finding would require the court to retroactively review and amend both Condition No. 16 and the 2011 Subdivision Agreement. These causes of action are out of time, in the wrong forum and are contrary to the applicable statutory schemes under the *Planning Act*, the *Development Charges Act*, and the *Municipal Act, 2001*.

Westminister

20 In response, Westminister says that there is a strict legal framework as to what Guelph can charge a developer as a condition of approval of a subdivision. If the work was not in relation to "local services," then Guelph did not have the authority to impose the charges that are set out in the subdivision agreement.

21 Westminister submits that the amount of what it was required to contribute was not properly a contribution to "local services" but was primarily, or entirely, for the general benefit of Guelph. Although Victoria and Clair are in the vicinity of the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

subdivision, both of these roads are major, "arterial" roads whose primary purpose is to serve Guelph as a whole. Moreover, the work was undertaken and completed several years before Westminister's construction even began on the subdivision.

22 Westminister says that it accepted Condition 16 on the basis that any such share that it had to contribute to the road work was to be determined in accordance with Guelph's legal authority. The amount of Westminister's share was not specified in Condition 16. As a result, Westminister can challenge the jurisdiction of Guelph in relation to the amount of the charges, without challenging Condition 16 itself.

23 Westminister concedes that it entered into the subdivision agreement which sets out that Westminister was to contribute:

a. To Clair Road improvements: $212,713.50.

b. To Victoria Road improvements: $516,497.00.

24 For clarity in its argument, Westminister defines these amounts as the "Impugned Charges." Westminister is challenging the amount of the Impugned Charges as not properly in relation to local services and, thus, outside of Guelph's authority to impose.

25 Westminister says that its issue is not with Condition 16 itself, but with Guelph's authority to impose the amount of the impugned charges.

26 Westminister agrees with Guelph's statement of the law that, in order for a claim to be struck under r. 21.01(3)(d) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as an abuse of process, it must be "plain and obvious" that it will not succeed.

27 Westminister submits that it is not "plain and obvious" that the claim will not succeed. Westminister has located no judicial decisions directly analyzing whether a project constitutes a "local service" or is eligible to be funded through development charges. Accordingly, the proper legal test remains open for judicial consideration.

Analysis

28 The amounts in dispute were determined pursuant to by-laws by Guelph city council in 1999 and 2004. Accordingly, contrary to Westminister's argument, it is not the subdivision agreement that is in dispute; rather, it is the city by-laws.

29 The Superior Court does not have independent jurisdiction to review a lawful decision of a municipal council as part of an action. Section 272 of the Municipal Act, 2001, S.O. 2001, c. 25 states:

> 272. A by-law passed in good faith under any Act shall not be quashed or open to review in whole or in part by any court because of the unreasonableness or supposed unreasonableness of the by-law.

30 In Nanaimo (City) v. Rascal Trucking Ltd. 2000 SCC 13, [2000] 1 S.C.R. 342, at para. 35, the Supreme Court of Canada said that courts should show deference to the lawful decisions of elected municipal officials:

> Municipal councillors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing intra vires decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the *intra vires* decision of municipalities be reviewed upon a deferential standard.

31 Westminister is challenging the figures that were confirmed by council. Whether council was correct or not is not for this court to determine. Indeed, Westminister has asserted that it is "not seeking to strike out or attack Condition 16 in any way" but does say that its issue is "with the City's authority to impose the quantum of the Impugned Charges." However, that is contradictory. I accept the first proposition but not the second.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

32 I agree with Guelph's submission that the *Planning Act* and the *Development Charges Act* create a statutory public process for the assessment of plans of subdivision and by-laws. Decisions are made by municipal councils under these Acts in the greater public interest.

33 As Guelph says:

> If stakeholders are permitted to use the courts to circumvent the public participation, approval and appeal schemes prescribed by the *Planning Act* and the *Development Charges Act*, then municipalities lose the ability to appropriately plan for their future. Financial and land use planning commitments disclosed to the public and approved by Council must be respected. Such commitments should not become the subject of litigation years later when a development proponent decides that they disagree.

34 Westminister submits that Guelph's argument that Westminster could have appealed the by-laws in 1999 and 2004 is meritless as it was not yet interested in the property until after any appeal rights were stale. However, Westminister does not respond to the submission that it had rights pursuant to the *Planning Act* before it entered into the 2011 subdivision agreement.

35 The amount to be paid to clear Condition No. 16, as determined by Guelph, was shared with Westminister in advance of the 2011 subdivision agreement.

36 The evidence of Westminister's engineer is that:

> The wording of Condition 16 indicates that the Plaintiff is to pay a "share" of these specified services but does not set out the quantum of that share. As such, the Plaintiff accepted Condition 16, on the understanding that the share would be calculated reasonably and appropriately, with regard to the relevant legal requirements. Westminister, in good faith, accepted the conditions required by the City.
>
> . . . the Plaintiff is challenging the quantum of the payments as set out in the Subdivision Agreement, on the basis that the quantum of these payments does not properly represent the share that the City could legally require the Plaintiff to contribute to these projects.
>
> Westminster is not seeking to strike out or attack Condition 16 in any way, and, as noted above, Condition 16 has been satisfied, and the Plan of Subdivision has been registered. Westminster is challenging the quantum the City required it to be pay [sic] in the Subdivision Agreement for "Stage III Services".

37 In answer to written questions for discovery, Westminister acknowledges that it had the figures in dispute in advance of the executed development agreement. Given that evidence, there was no need for Westminister to proceed on any assumptions or good faith; all of the necessary information was available for review and appeal in 2011. Westminister chose not to use its legislated rights of appeal. It cannot re-litigate that issue in this court.

38 Westminister submits that its claims as set out in its Statement of Claim "are all based upon the City lacking the authority to contract with Westminister to impose a quantum of Impugned Charges contained in the Subdivision Agreement." However, to be successful, that argument must set aside the by-laws that underlie the agreement. By failing to even challenge those by-laws, it is plain and obvious that Westminister cannot succeed on any of its claims.

39 Accordingly, this court has no jurisdiction to hear this claim and the claim is bound to fail. Guelph's motion is granted.

Costs

40 If costs cannot be agreed upon, Guelph shall provide its costs submissions within the next fifteen (15) days. Westminister shall provide its response within fifteen (15) days thereafter.

WESTLAW CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

41 Each submission shall be no more than three pages, not including any Bills of Costs or Offers to Settle. No reply submission will be accepted unless I request it. If I have not received any submissions within the time frames set out above, I will assume that the parties have resolved the issue and I make no order as to costs.

42 Neither party need include the authorities upon which they rely so long as they are found in CanLII and the relevant paragraph references are included.

43 Any costs submissions shall be forwarded to my office in Guelph by electronic transfer to *GuelphOffice.SCJ@ontario.ca* or by mail to Guelph Superior Courthouse, 74 Woolwich St., Guelph, N1H 3T9.

Motion granted.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.