

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Niebuhr et al. v. Vancouver (City) Board  
of Variance,***  
2006 BCSC 1425

Date: 20060921  
Docket: L053062  
Registry: Vancouver

Between:

**Richard Niebuhr Enterprises Ltd. dba Niebuhr Constructions and James  
Niebuhr Woodworks Ltd. dba Niebuhr Constructions**

Petitioners

And

**Vancouver (City) Board of Variance**

Respondent

Before: The Honourable Mr. Justice Goepel

## **Reasons for Judgment**

Counsel for Petitioners

J. Baker and N. Baker

Counsel for Respondent, Board of Variance

D.C. Creighton

Counsel for City of Vancouver

P. Scheer

Counsel for P. Street

In Person

Date and Place of Trial:

May 31, August 8, 9, 2006  
Vancouver, B.C.

**INTRODUCTION**

[1] The petitioners own adjoining properties in the City of Vancouver with the street addresses of 1770-1778 Napier Street and 1780 Napier Street/1121 Salisbury Drive (the “properties”). They applied to the City of Vancouver (the “City”) for development permits to construct two-storey/two family dwellings on each property. The City’s Director of Planning approved the applications subject to certain conditions that had to be fulfilled before the development permits would issue.

[2] Ms. Penelope Street and Ms. Sharon Kravitz reside at 1760 Napier Street. They appealed the decision of the Director of Planning to the Board of Variance (the “Board”). The Board allowed the appeal and set aside the Director of Planning’s decision to approve the development permit applications. The Board did not give reasons for its decision.

[3] The petitioners now apply pursuant to the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241 to quash the decision of the Board. They submit that the Board’s jurisdiction does not extend to third party appeals. Alternatively, they submit that the Board considered irrelevant matters and either lost jurisdiction or its decision was patently unreasonable. The City supports the petitioners. The petition is opposed by the Board and Ms. Street.

[4] For the reasons that follow, I have concluded that the Board did not have the jurisdiction to hear the appeal and its decision must be set aside. Having reached that conclusion I have not considered the petitioner’s alternate submissions.

**BACKGROUND**

[5] The petitioners purchased the properties in January 2005. Presently, there are two small single-family dwellings situated on the properties. They were built in or about 1907. They are approximately 1600 square feet in size, face towards Salisbury Drive, and are in a state of disrepair.

[6] On February 3, 2005 the petitioners submitted the development permit applications to the City for the construction of a two-storey/two family dwelling on each of the properties. The Director of Planning or his delegate reviews such applications and then either approves them, approves them subject to conditions, or rejects them.

[7] The properties are located in the RT-5 zoning district. Two family dwellings are a conditional approval use permitted in that district. Section 3 of the district schedule provides that conditional approval uses can be permitted upon consideration of the intent of the schedule and all policies and guidelines adopted by council and the submissions of any advisory group, property owner or tenant.

[8] On April 15, 2005 the City sent a letter to neighbouring property owners notifying them of the applications. The City received four written responses and a petition bearing in excess of 750 names of people opposed to the development. Opponents of the development either wanted the land turned into a public park or the preservation of the existing residences as heritage homes. They lobbied the City to purchase the properties. The City made an unsuccessful offer to purchase the properties prior to the Director of Planning issuing his decision.

[9] On July 7, 2005 the Director of Planning approved the development permits subject to certain conditions which have now been met. In approving the applications, the Director of Planning made three zoning decisions. He allowed the conditional two family use, he allowed an increase in the floor space ratio (FSR) and he relaxed the front yard setback requirements.

[10] On August 3, 2005 Ms. Street and Ms. Kravitz filed a notice of appeal with the Board. In their written submissions they urged that the City purchase the properties “to protect this unique and vibrant urban garden from development.” They submitted that if the project was to go ahead, the petitioners should be required to situate their project on the building footprints of the present homes in order to retain the existing green space.

[11] The appeal was heard at the Board meeting of August 24, 2005. The hearing lasted approximately four hours. Many individuals spoke. Most opposed the development. A transcript of the proceedings for the Board was filed as an exhibit.

[12] There was little discussion at the hearing concerning the proposed two family use, the increase of the FSR or the relaxed setbacks. Most of the speakers wanted the properties turned into a public park or to have the existing houses on the properties retained or restored in order to maintain the existing green space.

[13] At the conclusion of the meeting the Board voted three to one to allow the appeal thereby setting aside the Director of Planning’s decision to approve the development permits. The Board did not give reasons for its decision.

[14] This petition followed. The petitioners now seek to set aside the decision of the Board allowing the appeal and seek an order that the decision of the Director of Planning be reinstated.

**STATUTORY FRAMEWORK**

[15] The historical roots of the Board can be traced back to 1925 when the legislature enacted the ***Town Planning Act***, S.B.C. 1925, c. 55 which empowered both the City and other municipalities in British Columbia to enact zoning bylaws. Section 16(1) of the ***Town Planning Act*** created an appeal mechanism for persons dissatisfied with the decision of an official charged with the enforcement of a zoning bylaw, by persons seeking to obtain the benefit of an exception in a zoning bylaw and by persons claiming that due to special conditions the literal enforcement of a zoning bylaw would result in unnecessary hardship. Section 16(3) directed that that board should adhere to the spirit of the bylaw but could make such relaxations as special cases called for so that the interests of any individual were not unduly sacrificed for the benefit of the community.

[16] Appeals to the predecessor of the Board continued to be made under the ***Town Planning Act*** until the late 1950's. The present legislative scheme regime was established in 1959 with the enactment of the ***Vancouver Charter Amendment Act***, 1959, S.B.C. 1959, c. 107 which incorporated into the ***Vancouver Charter*** S.B.C. 1953, c. 55 all of the City's powers with respect to planning, development and zoning.

[17] The Board's powers are set out in s. 573 of the **Vancouver Charter**. Those powers are little changed since 1959. Section 573 presently reads:

(1) The Board shall hear and determine appeals

(a) by any person aggrieved by a decision on a question of zoning by any official charged with the enforcement of a zoning by-law;

(b) by any person who alleges that the enforcement of a zoning by-law with regard to siting, size, shape, or design of a building would cause him undue or unnecessary hardship arising out of peculiarities in the site or special circumstances connected with the development. In any such case the Board may, to the extent necessary to give effect to its determination, exempt the applicant from the applicable provisions of the zoning by-law;

(c) by any person who alleges that due to special circumstances or conditions the provisions of subsection (3) of section 568 will result in undue or unnecessary hardship to him;

(d) with respect to matters arising under subsections (4) and (5) of section 568;

(e) by any person aggrieved by a decision by any board or tribunal to whom Council has delegated power to relax the provisions of a zoning by-law;

(f) by any person who, by reason of Part XXIX [*Protection of Trees*], is

(i) unable to obtain a permit authorizing tree cutting or removal, or

(ii) unable to comply with the requirements of a by-law or permit under that Part.

(2) The Board shall not allow any appeal solely on the ground that if allowed the land or buildings in question can be put to a more profitable use nor unless the following conditions exist: —

(a) The undue or unnecessary hardship arises from circumstances applying to the applicant's property only; and

(b) The strict application of the provisions of the by-law would impose an unreasonable restraint or unnecessary hardship on the use of the property inconsistent with the general purpose and intent of the zoning by-law; and

(c) The allowance of the appeal will not disrupt the official development plan.

(2.1) The Board shall not allow an appeal that would apply to a property for which an authorization for alterations is required under Part XXVIII.

(3) The Board shall give notice to such owners of real property as the Board may deem to be affected by the appeal, and public notice of the hearing shall be given, if the matter is deemed by the Board to be of sufficient importance. For the purpose of determining the names of the owners deemed to be affected, reference shall be made to the records kept by the Assessor.

(4) The Board shall conduct its hearings of appeals under this section in public.

(5) The decision of a majority of the members of the Board present at a hearing shall constitute the decision of the Board, which shall be rendered in open meeting and shall be recorded in writing by the secretary. In the event of the members of the Board being equally divided, the appeal shall be disallowed.

(6) No appeal shall lie from a decision of the Board.

(7) In allowing an appeal, the Board may impose such restrictions, limitations, or conditions as may seem to it to be desirable and proper in the circumstances.

(8) Council may by by-law provide that failure to comply with any restrictions, limitations, or conditions imposed by the Board pursuant to subsection (7) shall constitute an offence against the by-law.

[18] The Board is given the jurisdiction under s. 573(1) to hear different types of appeals. The appeals can be grouped into three categories: (1) decision appeals, (2) variance appeals, and (3) other appeals. This appeal concerns a decision appeal brought to the Board under s. 573(1)(a). Pursuant to that section, the Board shall hear and determine appeals:

by any person aggrieved by a decision on a question of zoning by any official charged with the enforcement of a zoning bylaw.

[19] Appeals from decisions made by the Director of Planning are made under this provision. The Director of Planning is the “official charged” with the enforcement of the zoning bylaw. His “decision” is typically the exercise of his discretion, subject to the limitations in the zoning bylaw, to approve or refuse a development permit or impose conditions with respect to a development permit.

[20] Section 573(2) sets out the circumstances in which the Board can allow an appeal. The section has not been changed since it was first enacted in 1959.

[21] Section 573(3) requires the Board to give notice to such owners of real property as the Board may deem “to be affected” by the appeal.

[22] The petitioners submit that the Board’s jurisdiction does not extend to third party appeals and that Ms. Street and Ms. Kravitz cannot be persons aggrieved by the Director of Planning’s decision. The Board does not accept that their jurisdiction is so limited.

[23] The Board’s jurisdiction to hear third party appeals has not been the subject of judicial determination. The question was argued but not decided in **249 Cathedral Ventures Ltd. v. Vancouver (City) Board of Variance**, 2005 BCCA 428.

[24] The evidence indicates that as a matter of practice the Board has long entertained third party appeals. As noted in **249 Cathedral Ventures Ltd.**, a practice can have no bearing upon the meaning of the words passed into law by the legislature.

## **DISCUSSION**

[25] The Board is a statutory tribunal. Its jurisdiction to do anything must be found in its enabling statute. Nothing is presumed to be within the jurisdiction of an inferior tribunal: **Burnaby (District) v. Burnaby (District Board of Variance)** (1980), 26 B.C.L.R. 138 (C.A.). The parties agree that questions dealing with the Board’s jurisdiction are to be reviewed on a standard of correctness.

[26] The Board’s jurisdiction is a matter of interpretation of the **Vancouver Charter**. Interpretation of legislation is guided by the general rule of E.A. Driedger in **Construction of Statutes**, (2<sup>nd</sup> Ed., 1983) at 87 as adopted in **Rizzo and Rizzo Shoes Ltd. (Re)**, [1998] 1 S.C.R. 27 at 41, and **Bell Express Vu Ltd. Partnership v. Rex**, [2002] 2 S.C.R. 559 at 580:

Today there is only one principal or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously at the scheme of the Act, the object of the Act and the intention of Parliament.

[27] The scheme of the **Vancouver Charter** is found in Part XXVII – Planning and Development. Part XXVII gives the city the ability to regulate zoning and development by bylaw. It authorizes the appointment of a Director of Planning. It allows the City to delegate powers of discretion in zoning matters to city officials or a board of city officials. It allows the City to designate districts or zones in which there is no uniform regulations and in which any person wishing to carry out development must gain approval of council or its delegate as to the form of development.

[28] Section 572 requires the City to establish the Board. The Board is composed of five lay people who may not be employees of the City’s Advisory Planning Commission, nor may they be elected or appointed municipal officials. Section 573 sets out the Board’s power to hear and determine appeals.

[29] Fundamental to this appeal is whether “person aggrieved” in s. 573(1)(a) extends to third parties unhappy with a decision of the Director of Planning. The term has often been the subject of judicial comment. In **Attorney General of Gambia v. N’Jie**, [1961] 2 All E.R. 504 at 511, Lord Denning said:

The words “persons aggrieved” are of wide import and should not be subject to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interest.

[30] “Person aggrieved” must be considered in the context of the specific legislation and the purpose that legislation is designed to achieve: **British Columbia Development Corp. v. British Columbia (Ombudsman)**, [1984] 2 S.C.R. 447.

[31] In this case, the interpretation to be given to “person aggrieved” in s. 573(1)(a) requires consideration of the statute as a whole and, in particular, ss. 573(2) and (3). Section 573 requires notice to be given to such owners of real property as the Board may deem to be “affected” by the appeal. The **New Oxford Dictionary of English** defines “affected” as “influenced or touched by an external factor”. “Affected” clearly means something different than “aggrieved”.

[32] Section 573(2) sets out the circumstances in which the Board may allow an appeal. For ease of reference I will again set out its provisions:

(2) The Board shall not allow any appeal solely on the ground that if allowed the land or buildings in question can be put to a more profitable use nor unless the following conditions exist: —

- (a) The undue or unnecessary hardship arises from circumstances applying to the applicant's property only; and
- (b) The strict application of the provisions of the by-law would impose an unreasonable restraint or unnecessary hardship on the use of the property inconsistent with the general purpose and intent of the zoning by-law; and
- (c) The allowance of the appeal will not disrupt the official development plan.

[33] Section 573(2) has been the subject of two decisions. In *Vancouver (City) v. Pasparakis*, [1978] B.C.J. No. 792 (S.C.)(QL) the City sought a declaration confirming decisions of the Board to quash the Director of Planning's authorization of a permit permitting alterations to a one-family dwelling. The owners had continued with construction and the City, before imposing sanctions, wanted to verify the correctness of the Board's decision. The owners asserted that the Board did not have jurisdiction to quash the decision of the Director of Planning because it was not shown that any of the conditions cited in s. 573(2) had been satisfied. The owners contended that those conditions applied to all appeals brought under s. 573(1) and, citing Driedger on the *Construction of Statutes* at 79, they objected to the interpolation of any words in line 1 of s. 573(2) that would have the effect of restricting the appeal mentioned there, to an appeal under s. 573(1)(b).

[34] Verchere J. rejected that analysis. He said at ¶19 :

Without disagreeing with the rule or the proposed application of it on which Mr. Baker relied, it seems to me that on a reasonable view of the intendment of the Legislature, ss. (2) and the conditions therein recited must be deemed to apply to any and all appeals in which a departure from the applicable zoning by-law as well as the question of "a more profitable use", as those words are used in ss. (2), are involved. Accordingly, the word "nor" in line three of ss. (2), whose use in the context is difficult to understand, should not be read disjunctively. It should be read so as to enable the "appeal" referred to in line one thereof to be modified and explained by the conditions which follow it, and thus it becomes clear, without any words being added, that ss. (2) does not apply to all the types of appeal mentioned in ss. (1), but only to those to which the conditions can apply. Accordingly, it does not seem to me that the existence of the recited conditions was a condition precedent to the hearing of the appeals brought here and I find, therefore, that this ground of attack on the Board's jurisdiction must also fail.

[35] In *Matrick v. Kingsley Lo Architect Inc.* (1997), 32 B.C.L.R. (3d) 203 (S.C.), rev'd on other grounds [1998] B.C.J. No. 1404 (C.A.)(QL) Romilly J. came to the opposite conclusion. In *Matrick*, the Board had allowed an appeal by a homeowner to relax the strict application of the rear yard setback requirements. Before Romilly J. the homeowner argued that s. 573(2) only applied when the appeal involved a plea concerning the economic use of land or properties, and if that is not the case, then ss. (a) through (c) do not apply.

[36] Romilly J. disagreed. He stated the following at paragraphs 18-19 and 21:

In my view subsection 2 lists conditions that are applicable to any appeal considered by the Board. The subsection clearly states that no appeal shall be allowed on a “profitable use” argument alone, nor will any appeal be allowed without the Board turning its mind to and finding conditions (a) through (c).

Section 11 of By-law No. 3844, which establishes the Board’s procedures, confirms this view since it enumerates the conditions governing Board decisions as follows: “...the decision of the Board when given shall be based upon the evidence submitted and in accordance with the limitations imposed upon the Board by subsection (2) of Section 573 of the Charter.” Section 11 implies that the limitations apply generally to all appeals and not only to appeals involving pleas concerning the “profitable use” of the applicant’s property.

....

Section 573(1) establishes the Board’s jurisdiction in the sense that it may embark on the enumerated appeals listed in ss. (a) through (f). Section 573(2) establishes conditions that the Board must turn its mind to when considering an appeal. The Petitioners would be correct to submit that failure by the Board to turn its mind to the existence of these conditions would be a jurisdictional error since the Board would have declined to act in accord with its statutory duties, thereby losing its jurisdiction.

[37] **Pasparakis** and **Mattrick** cannot be reconciled. Section 573(2) either applies to all appeals as decided by Mr. Justice Romilly in **Mattrick**, or it only applies to some appeals as decided by Mr. Justice Verchere in **Pasparakis**.

[38] Subject to the exceptions set out in **Re Hansard Spruce Mills Limited**, [1954] 4 D.L.R. 590 (B.C.S.C.), a judge should follow a prior decision of the court because it would otherwise unsettle the law. In circumstances where there are conflicting decisions, the latter decision is to be preferred, if it is reached after full consideration of the earlier decision: **Jones v. New Westminster (City)** (1981), 29 B.C.L.R. 252 (S.C.), rev'd on other grounds (1983) 148 D.L.R. (3d) 279 (B.C.C.A.). That principle does not apply in this case because Mr. Justice Romilly was not referred to nor did he consider the **Pasparakis** decision. Where there are two conflicting decisions and the second decision is given in ignorance of the first, which is the situation in this case, a judge is free to choose between the two decisions and should not start with any preference for one over the other: **Coldchester Estates (Cardiff) v. Carlton Industries PLC**, [1984] 2 All E.R. 601 (Ch. Div.)

[39] That is the course I intend to follow. Having considered the reasons in both **Pasparakis** and **Mattrick**, I prefer the decision of Mr. Justice Romilly in **Mattrick**. If the Legislature intended to limit s. 573(2) in the manner suggested by Mr. Justice Verchere, it could have been so drafted. The language of s. 573(2) is clear. It refers to "any appeal". I agree with the conclusion of Mr. Justice Romilly that the conditions set out in s. 573(2) are applicable to all appeals considered by the Board. The Board can only allow an appeal if it finds the conditions set out in s. 573(2)(a) through (c) have been met.

[40] The issue for determination is whether third parties have the right to appeal a decision to the Board of Variance when they disagree with a decision of the Director of Planning as to how that property should be developed. Ms. Street and Ms. Kravitz, who live immediately adjoining the properties, are clearly affected parties and as such they are entitled to notice if the property owner appeals the decision to the Board: **Matrnick v. Kingsley Lo Architect Inc.** [1998] B.C.J. No. 1404 (C.A.)(QL). They are also entitled, pursuant to the zoning bylaw, to notice of the application before the Director of Planning, and the Director of Planning is obliged under the statutory scheme to take their concerns into account in deciding whether or not a particular development permit will be allowed and what conditions might be attached to it. They may also have standing under the **Judicial Review Procedure Act** to challenge a decision of the Director of Planning or the Board: **Regina v. Vancouver Zoning Board of Appeal; ex parte N.W. Point Grey Homeowners Assn.** (1967), 60 D.L.R. (2d) 331 (B.C.C.A.).

[41] What they do not have, however, in my opinion is the right to appeal to the Board a decision of the Director of Planning to issue a development permit. This conclusion flows from a consideration of the statute as a whole and in particular the provisions of s. 573(2). The Board can only allow an appeal if: (1) it finds undue and unnecessary hardship applying to the applicants property only; (2) that the strict application of the provisions of the bylaw would impose an unreasonable restraint or unnecessary hardship on the use of the property inconsistent with the general purpose and intent of the zoning bylaw; and (3) the allowance of the appeal would not disrupt the official development plan. These conditions reference the property

which is the subject of the application, not the property of a third party. The hardship is that of the party applying for the development permit, not that of a neighbour. It is the use of the applicant's property which is in issue, not that of a neighbour. This leads to the clear conclusion that third parties do not have the right to appeal to the Board.

[42] The legislature recognized that neighbouring homeowners could be impacted by decisions of the Board and requires that they be notified of pending applications so they could make their views known. The legislation however distinguishes between persons "aggrieved" and persons "affected". Such a distinction would not be necessary if neighbouring property owners had a right to appeal. Ms. Street and Ms. Kravitz are persons affected under s. 573(3); they are not persons aggrieved under s. 573(1)(a).

[43] This result is consistent with the scheme and objects of the enabling legislation. The legislation sets up a complex procedure which gives the Director of Planning broad discretionary powers to accept or reject projects and impose conditions on his approvals. The person making the decision is a trained professional planner. The Director of Planning's decisions are guided by the bylaws and he must consult with neighbouring property owners. The process can go on for several months. If the applicant does not like a decision there is a right of appeal to the Board. If the applicant can establish hardship and the other pre-conditions set out in s. 573(2) the Board may allow the appeal.

[44] The legislation does not however create a general right of appeal for third parties to challenge the decision of the Director of Planning. It contains no provisions to regulate such appeals. Such a right is incompatible with the legislative scheme which empowers the City to plan its own development. The legislature did not give the Board, a lay panel with no professional training, the power to veto developments approved by the Director of Planning. Such a result would not be consistent with the scheme and objects of the legislation.

[45] What the legislation does do is allow a property owner to challenge a decision which limits the use of his own property. This is consistent with the historic role of the Board and its predecessor established under the ***Town Planning Act***. The legislation allows for relaxations in special cases so that substantial justice is done and the rights of the individual property owner are not unduly or unnecessarily sacrificed for the benefit of the community.

[46] Accordingly, I find that a third party does not have the right to appeal a decision of the Director of Planning to the Board. Person aggrieved, as set out in s. 573(1)(a) does not include a third party unhappy with a decision of the Director of Planning. The Board did not have jurisdiction to hear the appeal and its decision is set aside.

[47] In the result, the petition is allowed and the decision of the Board is set aside. The decision of the Director of Planning dated July 7, 2005 approving Development Permits DE40157 and DE40158 is reinstated.

**COSTS**

[48] If the parties cannot agree on costs they are at liberty to file written submissions. Such submissions should be filed within 30 days of the date of these reasons. Any submissions in response should be filed within 15 days thereafter.

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R.B.T. GOEPEL J.