

SUPREME COURT OF YUKON

Citation: *City of Whitehorse v. Darragh*,
2008 YKSC 80

Date: 20081030
S.C. No. 08-A0053
Registry: Whitehorse

Between:

THE CITY OF WHITEHORSE

Petitioner

And

MARIANNE DARRAGH

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Lori Lavoie
Zeb Brown

Counsel for the City of Whitehorse
Counsel for Marianne Darragh

REASONS FOR JUDGMENT

INTRODUCTION

[1] The *Municipal Act*, R.S.Y. 2002, c. 154 (the “*Act*”), provides for a plebiscite or referendum bylaw which permits electors to initiate bylaws or resolutions. In this case, Marianne Darragh gave the City of Whitehorse (“the City”) notice of a petition for a referendum to amend the Official Community Plan (the “OCP”) and the Zoning Bylaw to create McLean Lake Park.

[2] The City applies for a declaration that the petition of Marianne Darragh is invalid as it is not within the jurisdiction of the City under the *Act*.

[3] The City says that the creation of a park is within its jurisdiction but objects to this petition as it seeks to amend both the OCP and the Zoning Bylaw. The City says that certain mandatory requirements of the *Act* for amending the OCP and bylaws cannot be met, with the result that the City would be acting outside its jurisdiction.

ISSUES

[4] There are two distinct issues to be addressed:

1. Is it within the jurisdiction of the City to amend the OCP by way of a referendum bylaw?
2. If Ms. Darragh is successful, should she be awarded special costs?

THE FACTS

[5] Marianne Darragh is a resident of Whitehorse and a qualified elector. She has resided near McLean Lake since 1980 and has supported efforts to protect it for years.

[6] The McLean Lake area has been the subject of some controversy between those who wish to protect it as a nature and recreation area and those who use the area as a gravel quarry.

[7] Historically, the area was designated as a game sanctuary in the Territorial Game Ordinance. However, that designation was lost in 1958. It has remained a popular fishing and recreational site.

[8] The McLean Lake road is an active quarry area. The OCP has designated the area as Industrial – Service, which includes quarrying, although quarrying is stated to be an interim use as the area will be redeveloped over time to other service industrial uses.

[9] There has been citizen opposition to the use of the McLean Lake area as a quarry and the proposed location of a concrete batch plant. The McLean Lake

Residents' Association has pursued two court actions opposing the development of the area: See *McLean Lake Residents' Association v. City of Whitehorse and Yukon Government (Department of Energy, Mines and Resources)*, 2007 YKSC 44 and *McLean Lake Residents' Association v. City of Whitehorse*, 2008 YKSC 46. In the latter case, the City's rezoning of the McLean Lake area to allow construction of a concrete batch plant was upheld at trial. Certain studies are required before the quarry proceeds.

[10] Ms. Darragh submitted a letter to the City on February 26, 2008, enclosing her proposed referendum question as follows:

Should the City of Whitehorse amend *Official Community Plan Bylaw 2002-01* by amending *Section 5.3 Park Reserve* with the addition of the following third paragraph: "The land within a boundary of 500 metres from the High Water Mark of McLean Lake shall be added as McLean Lake Park to ensure that the McLean Lake area is preserved as a nature park for protection of its natural environment, and recreational activities."

and

by adding a fourth policy to section 5.3: "The City of Whitehorse shall amend the Zoning Bylaw to create a 'McLean Lake Park Zone' with appropriate regulation to restrict the use of the land within a boundary of 500 metres from the High Water Mark of McLean Lake to recreational purposes and no other, and to protect its natural environment, and further the City shall pursue the transfer of the ownership of the subject lands from the Yukon Government to the City."?

[11] The Director of Administrative Services Division of the City advised that a legal review would be the first step in determining if the petition for a referendum could go forward. A series of e-mails and letters from lawyers followed about the timing of the legal review and whether Ms. Darragh could proceed.

[12] On March 6, 2008, counsel for Ms. Darragh advised the City as follows:

1. Ms. Darragh is entitled to proceed with the collection of signatures for her petition and does not have to wait for the legal review of the City.
2. The Notice of Petition only requires an acknowledgment of receipt from the City Clerk and does not require a legal review.
3. Ms. Darragh would wait until March 14, 2008, for input from the City. She would proceed to submit her Petition on March 14, 2008, and begin collecting signatures, a process that she had 90 days to complete.

[13] The City continued to oppose Ms. Darragh proceeding with her petition and advised by e-mail dated March 18, 2008, that:

... You are advised to cease collecting signatures on these questions until such time (sic) their validity per the legislation can be established.

[14] On March 20, 2008, the City issued a news release entitled NOTICE OF PETITION FOR A REFERENDUM FOR MCLEAN LAKE PARK MAY BE INVALID. The news release advised that if the petition question was outside the Council's jurisdiction, the City could apply to the court for a declaration that the petition was invalid. The City news release also included the legal history of the McLean Lake area. It advised that referendums are budgeted at a cost of \$14,000 and the public would have an opportunity to address the issue of a McLean Lake park in the regular OCP amendment process, starting in the Fall of 2008.

[15] On April 1, 2008, counsel for the City of Whitehorse replied to Ms. Darragh's counsel, setting out the jurisdictional concerns that are the subject matter of this case.

[16] On April 2, 2008, the City issued a news release entitled PETITION QUESTIONS FOR A MCLEAN LAKE PARK FOUND INVALID. After an extensive review of legal

concerns, the news release concluded:

It is the City of Whitehorse's opinion that legislated due consideration would be forfeited by the proposed amendment of the OCP and, as such, Council would be acting outside its jurisdiction; therefore, resulting in the creation of a bylaw which is invalid. In addition, the proposed bylaw amendment Question #2 would thwart Council's legislative responsibilities and overlook the legislative process to which Council is required to adhere. Finally, by attempting to force the City of Whitehorse to proceed with a land acquisition for a McLean Lake Park without due consideration and deliberation, Council would be prevented from satisfying its legislative responsibilities thus rendering any action by the City to acquire such lands invalid.

[17] On April 4, 2008, counsel for Ms. Darragh confirmed that she would continue collecting signatures and objected to "the City's demonstrated animus" toward her.

[18] On June 11, 2008, Ms. Darragh submitted her Petition of Whitehorse Electors to the City with a total of 2,654 signatures. Counsel for the City concluded that the Petition met all the requirements of Bylaw 2004-20 (the "Petition, Plebiscite and Referendum Bylaw"), with the exception of s. 7 on the ground that the Petition was outside Council's jurisdiction.

[19] Counsel advised that the City would be filing this action to seek a declaration that the Petition was invalid on the ground that it was outside the jurisdiction of the City.

THE LAW

[20] The Act provides for a referendum bylaw as follows:

Content of referendum and plebiscite bylaws

152(1) A plebiscite or referendum bylaw shall be for a distinct purpose and shall only be valid to the extent that it falls entirely within the jurisdiction of the municipality.

...

Petition for referendum

153(1) Eligible petitioners may petition council for a referendum

- (a) to initiate a new bylaw or resolution; or
- (b) on a new bylaw or resolution or the amending or repealing of an existing bylaw or resolution; or
- (c) on any matter within the jurisdiction of the council including capital projects; but
- (d) not on the operating budget bylaw, the capital budget bylaw or the general property taxation bylaw.

(2) A notice that a petition will be filed for a referendum must be submitted to the designated municipal officer.

(3) A petition for a referendum must be initiated, completed, and submitted to council within a period of 90 days from the date the notice of the petition is submitted to the designated municipal officer. (my emphasis)

Petition procedure bylaw for referendum

154(1) A council may by bylaw adopt rules concerning

- (a) the format of petitions;
- (b) determining the sufficiency of petitions;
- (c) counting petitions; and
- (d) any other matter necessary for a petition for a referendum.

...

Referendum

155(1) If a petition for a referendum is received from a number of eligible petitioners equivalent to at least 25% of the total number of electors of a municipality or 2000 eligible electors, whichever is less, or, if no list of electors has been prepared in the last three years, 15% of the total population of the municipality under section 6 of this Act, the council

shall introduce a bylaw in accordance with the request if (sic) the petitioners within eight weeks after the presentation of the petition, and shall then submit the bylaw to a referendum within ninety days. (my emphasis)

...

(4) If a proposed bylaw is approved by referendum by a majority of the persons voting whose ballots are not rejected, the bylaw shall immediately come into force or shall come into force at a time specified in the bylaw, without the requirement for the council to give third reading to the bylaw.

Procedure for plebiscites and referendums

158(1) A council may by bylaw establish rules of procedure for the conduct of plebiscites and referendums, but if no such bylaw is passed, the procedures established by this Part for a municipal election establishing polling places, giving notice of polling times, conduct of polls and counting and recounting votes, shall be followed so far as practicable.

...

[21] Pursuant to s. 158(1) of the *Act*, the City passed Bylaw 2004-20. There are two sections that apply in this case:

7. If the petition question is for a bylaw outside of Council's jurisdiction or for a bylaw that may be invalid on other grounds such as being discriminatory, the reason shall be provided to the petition proponent in writing. Should the proponent still wish to proceed, the City may apply to the Court for a declaration that the petition is invalid on the grounds that the bylaw it seeks would be invalid.

...

15. If a valid petition for a referendum is received as outlined in section 12 of this bylaw, Council shall give first and second reading to a bylaw in accordance with the request of the petitioners within eight weeks after the presentation of the petition, and shall then submit the bylaw to a referendum within ninety days.

[22] The City has been clear that it does not oppose citizen referendums in principle, although it might be difficult to convince Ms. Darragh of that assertion. In fact, in Bylaw 2006-10, the City received a petition and amended the OCP as follows:

Chapter 6 of Official Community Plan Bylaw 2002-01 is hereby amended by adding a new policy number 4 to section 6.4 as follows:

“When any amendment, including an amendment put forward during the Official Community Plan review process, proposes a new land use designation of an area currently designated Greenbelt, Environmental Protection, or Park Reserve on the Area Land Use Designation map, the proposed change shall be put to referendum. Council shall determine the timing of the referendum except, in an election year, the referendum may be held in conjunction with the municipal election.”

[23] This would suggest that the City has not objected to previous petitions seeking to amend the OCP.

ARGUMENT OF CITY OF WHITEHORSE

[24] The City submits that the Petition to create the Mclean Lake Park is outside its jurisdiction as it attempts to amend the OCP in a referendum procedure that does not comply with the statutory requirements that the City is obligated to follow according to the *Act*. In other words, the City submits that a referendum bylaw bypasses the legislative process set out in the *Act*, and is therefore invalid. The City also objects to the proposed OCP amendment, in that it purports to require the passage of a bylaw.

[25] The specific arguments are as follows:

1. The amendment of the OCP is governed by ss. 278 – 285 of the *Act*. The *Act* explicitly states that an amendment shall be made in accordance with the procedures for adopting an OCP (s. 285). In general, this means that

the City must give notice of the amendment (s. 280) and hold a public hearing before second reading of the bylaw (s. 281). It must submit the proposed amendment to the Minister for review and approval before third reading and adoption (s. 282). The City submits that the requirement of holding a public hearing before the second reading of an OCP amendment conflicts with s. 15 of Bylaw 2004-20 which requires that the City give first and second reading to the bylaw amendment within eight weeks after the presentation of the petition. In other words, the submission is that, given the tight time frame, it is not possible to have the public hearing before the second reading of the petition bylaw.

2. Similarly, because the petitioner is also requesting an amendment to the Zoning Bylaw, Council is required to give notice of its intention to amend this legislation by newspaper advertisement (s. 294) and hold a public hearing not earlier than seven days before the last date of publication (s. 296). Again, this requirement, the City argues, would make it impossible to have the petition bylaw undergo its second reading within the eight-week time frame. It is submitted that failure to follow these requirements would put the City outside its jurisdiction with respect to amendments.

ANALYSIS

Issue 1: Is it within the jurisdiction of the City to amend the OCP by way of a referendum bylaw?

[26] The OCP is a fundamental document for every municipality and its purpose is set out in s. 277 of the *Act*:

The purposes of this Part and the bylaws under this Part are to provide a means whereby official community plans and related matters may be prepared and adopted to

- (a) achieve the safe, healthy, and orderly development and use of land and patterns of human activities in municipalities;
- (b) maintain and improve the quality, compatibility, and use of the physical and natural environment in which the patterns of human activities are situated in municipalities; and
- (c) consider the use and development of land and other resources in adjacent areas without infringing on the rights of individuals, except to the extent that is necessary for the overall greater public interest.

[27] No development can take place that is contrary to an OCP and Council shall not carry out or enact any provision that is contrary to or at variance with an OCP. The effect of an OCP is found in s. 283 as follows:

- (1) Council shall not enact any provision or carry out any development contrary to or at variance with an official community plan.
- (2) No person shall carry out any development that is contrary to or at variance with an official community plan.
- (3) Despite subsection (2), council is not empowered to impair the rights and privileges to which an owner of land is otherwise lawfully entitled.

(4) The adoption of an official community plan shall not commit the council or any other person, association, organisation, or any department or agency of other governments to undertake any of the projects outlined in the official community plan.

(5) The adoption of an official community plan does not authorize council to proceed with the undertaking of any project except in accordance with the procedures and restrictions under this or any other relevant Act.

[28] The OCP itself is passed as a bylaw (Bylaw 2002-01), and the mechanism for carrying out its goals is through zoning bylaws. Sections 282(1), 288 and 289(2) of the Act provide:

282(1) Before third reading of the bylaw proposing the official community plan or amendment, council shall submit the proposed official community plan or amendment to the Minister and the Minister shall, within 45 days of receipt review the official community plan or amendment and

(a) approve it as submitted; or

(b) refer it back to council with recommendations for modifications, if the Minister determines that the proposed official community plan or amendment was not prepared in accordance with, or conflicts with, the provisions of this Act or any other Act.

...

288 When an official community plan is adopted or amended, the council shall within two years adopt or amend, if necessary, a zoning bylaw applicable to the land affected by the official community plan or amendment.

...

289 (2) The council of a municipality shall not pass a zoning bylaw or any amendment thereto that does not conform to the provisions of an existing official community plan. (my emphasis)

...

[29] Whitehorse passed a comprehensive Zoning Bylaw in 2006 (2006-01). The above statutory requirements indicate the imperative that a citizen be able to amend the OCP in order to amend the City's Zoning Bylaw. If an amendment to the OCP cannot be petitioned for, an elector will not be permitted to amend any consequential bylaws by referendum either. The result would be that a citizen would have to follow the OCP amending procedure and succeed before having the right to proceed to a bylaw referendum. That interpretation would permit the City to control the OCP amending process.

Principles of Interpretation

[30] There are a multitude of rules that assist courts in their interpretation of statutes. One of these rules of interpretation is coherence. According to Sullivan in *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis 2008) ("*Sullivan*"), at p. 325:

It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.

The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other.

[31] In order to achieve this coherence, there is a presumption of overlap which *Sullivan* describes at p. 326:

When two provisions are applicable to the same facts, the courts attempt to apply both. If the provisions are not in

conflict (and conflict for this purpose is narrowly defined), then it is presumed that both provisions are meant to apply in accordance with their terms. This is the presumption of overlap, examined below. The presumption of overlap is rebutted by evidence that one of the provisions is meant to be an exhaustive account of the applicable law.

[32] By applying this principle of interpretation, both the referendum bylaw and the OCP amendment provisions must be adhered to. Counsel for the City says that this is not possible because the OCP amendment procedure conflicts with s. 155 of the *Act* and s. 15 of Bylaw 2004–20. It is submitted that it is impossible to arrange a public hearing and still complete two readings of the bylaw within the contemplated eight-week time frame.

[33] Part of the answer to this apparent conflict is resolved by s. 264 of the *Act* which states:

If there is an inconsistency between a bylaw and this or any other Act, the bylaw is of no effect to the extent of the inconsistency.

[34] Section 155 of the *Act* simply states that the bylaw be introduced within eight weeks of the presentation of the petition and then that it be submitted to referendum within 90 days. Thus the 90-day period commences after the eight-week period ends. Section 15 of Bylaw 2004-20 requires that two readings occur within the eight-week time frame. Given s. 264 of the *Act*, s. 155 prevails so that the public hearing required by s. 281 may be held before the second reading.

[35] Apart from timing concerns, I have not been referred to any other conflict between the provisions of the *Act* that would make it impossible to have both a bylaw referendum and meet the requirements of the OCP amendment sections. Thus, the City should comply with the requirements of both the bylaw referendum and the OCP

amendment procedure. It would appear that this principle of coherence was contemplated in the passing of Bylaw 2006-10 which provides that certain OCP amendments take place by referendum, although this bylaw permits the City to set the referendum timing.

[36] Another principle of interpretation is that of implied exclusion. As stated in *Sullivan* at p. 244:

When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned.

[37] Section 153(1) says that electors may petition Council “on any matter within the jurisdiction of the council including capital projects” but excluding the operating budget bylaw, the capital budget bylaw or the general property taxation bylaw. There is no mention of the OCP or any expressed intention to exclude it from the bylaw referendum provisions. Therefore, it seems that OCPs are not meant to be excluded from the petition process.

[38] Finally, a purposive and contextual analysis must be a cornerstone of legislative interpretation. *Sullivan* sets out three propositions to describe a purposive analysis at p. 255:

- (1) All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.
- (2) Legislative purpose must be taken into account in every case and at every stage of interpretation, including initial determination of a text’s meaning.
- (3) In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while

interpretations that defeat or undermine legislative purpose should be avoided.

[39] The clear purpose of Division 16 of the *Act* is to provide for greater public participation in a modern local democracy. The purpose is two-fold: to give Council the opportunity to provide for a plebiscite to obtain the public's opinion (s. 150) and to expressly give electors the opportunity to petition Council for a referendum on those matters set out in s. 153(1). The burden on an elector is heavy because it takes a considerable amount of time and organization (in this case 160 hours) to obtain 2,000 signatures. The cost of a referendum may be a factor in setting such a high bar to proceed with a referendum. But whether a referendum is proceeded with is a decision to be taken by 2,000 electors, subject to the right of City Council to seek a court order that the referendum should not proceed.

[40] To conclude this exercise of statutory interpretation, I find that this petition is within the jurisdiction of the City Council in the *Act* and it should proceed to referendum. The City should comply with the OCP amendment requirements set out in ss. 278 – 285 of the *Act*, and with the bylaw requirements in Division 16.

[41] The following is a suggested procedure for applying the overlapping statutory provisions:

1. An elector need only give notice that a petition will be filed for a referendum by submitting it to the Director of Administrative Services (s. 153(2));
2. Once notice is submitted, the 90-day period for obtaining signatures begins (s. 153(3)).

3. Section 7 of the Bylaw 2004-20 permits the City to advise a proponent that it objects to the bylaw on grounds such as discrimination or being outside the jurisdiction of the City, but it cannot stop a proponent proceeding without obtaining a court declaration of invalidity.
4. While Bylaw 2004-20 does not specify the timing of an application for a declaration of invalidity, the City must bring its application in a timely manner so that it can comply with its statutory obligations once the petition has the required number of signatures in the 90-day period.
5. Once the petition has the required number of signatures, Council must give first reading to the amending bylaw within eight weeks of presentation of the signed petition (s. 155(1) of the *Act*).
6. Council must publish notice of amendments and the public hearing for two weeks, and then wait at least 21 days before holding a public hearing (ss. 280, 281 of the *Act*).
7. Council gives a second reading of the bylaw after the public hearing. Bylaw 2004-20 indicates that the second reading must be within eight weeks of the presentation of the petition (s. 15). Section 15 is inconsistent with s. 155 of the *Act* and of no effect via s. 264 of the *Act*, when applied to an OCP amendment referendum. Thus, the notification and public hearing, a five-week process to set up, can take place outside the first eight-week period but in the second 90-day period.
8. The referendum must be held within 90 days of the first reading of the bylaw (s. 155 of the *Act*).

9. As a third reading is not required, the bylaw should indicate that it comes into force on approval of the Minister (s. 155(4) of the *Act*). If approved in the referendum, the bylaw may then be submitted to the Minister for approval outside the 90-day period.

[42] The City also takes issue with the wording of the second part of the referendum question stating the City “shall amend the Zoning Bylaw to create a McLean Lake Park zone ...”. The City says that there is no authority in the *Act* to require that a zoning bylaw be amended to create a specific zone. That may be so, but s. 288 of the *Act* does require the City to adopt or amend a zoning bylaw applicable to the land affected in any OCP amendment within two years of the amendment. The second question of the referendum simply repeats this statutory obligation. In the same vein, the City is bound by its statutory obligations in drafting the proposed OCP or zoning bylaw amendments to ensure that statutory rights of landowners are addressed. In other words, the City remains responsible to ensure that the petition and any other statutory issues are respected in the referendum bylaw.

Issue 2: If Ms. Darragh is successful, should she be awarded special costs?

[43] There was unfortunately a considerable amount of confrontation between the City and Ms. Darragh at the outset of her petition about whether the subject of the park designation was within the jurisdiction of City Council. That, however, may be the by-product of a robust democracy. On the other hand, a citizen who is required to retain legal counsel in order to proceed with a petition that the City describes in a news release as “Found Invalid” may feel that the City has crossed the line between protecting taxpayers from the expense of a referendum and attempting to frustrate the

right of a citizen to participate in municipal democracy. If the City is of the opinion that a referendum bylaw is invalid, it should proceed immediately to court rather than wage a war by press release to attempt to frustrate the statutory right of its citizens.

[44] The law on special costs has been set out in *Brosseuk v. Aurora Mines Inc.*, 2008 YKSC 18, particularly with respect to pre-litigation conduct, which would include the City's news releases issued before the filing of the City's court application. Briefly stated, special costs may be awarded where the conduct of a party is "reprehensible" and warrants rebuke. Special costs means the party is liable for the hourly rate (or some percentage thereof) and disbursements that a lawyer invoices his or her own client.

[45] The purpose of the City in putting out the two news releases was arguably calculated to both dissuade Ms. Darragh from proceeding with her petition and discourage electors from signing the petition. While the news releases were not supportive of the City's professed desire to support citizen petitions, it was not conduct that could be considered reprehensible and warranting rebuke.

[46] However, the City has put Ms. Darragh to considerable legal expense during her pre-litigation petition process and in this court action. I see no reason why costs should not follow the event as provided in Rule 60(9). Because of the lack of precedent for such an application, I find the matter to be "of more than ordinary difficulty" or Scale C.

[47] I therefore order the City to pay Ms. Darragh's court costs on Scale C with Tariff Item 1A at the maximum of 10 units for the pre-litigation portion of her costs.

SUMMARY

[48] The application of the City for an order that Ms. Darragh's petition is invalid is dismissed with costs on Scale C.

VEALE J.