2001 BCSC 1626
British Columbia Supreme Court

Chernoff Developments Ltd. v. Kent (District)

2001 CarswellBC 2904, 2001 BCSC 1626, [2001] B.C.T.C. 1626, 109 A.C.W.S. (3d) 981, 25 M.P.L.R. (3d) 111

Chernoff Developments Ltd. (Petitioner) and District of Kent (Respondent)

Hood J.

Heard: February 7-9, 12, 2001
Judgment: November 29, 2001
Docket: New Westminster S0-60709

Counsel: *P. Selinger*, for Petitioner
R.E. Harding, for Respondent

Subject: Public; Municipal
Related Abridgment Classifications
Estoppel
II Estoppel in pais
II.3 Estoppel by conduct
II.3.e Miscellaneous
Municipal law
XVI Zoning
XVI.2 Zoning by-laws
XVI.2.c Amendment
XVI.2.c.iv Miscellaneous
Municipal law
XVI Zoning
XVI.6 Attacking validity of zoning by-laws
XVI.6.a Grounds
XVI.6.a.xi Ultra vires
Municipal law
XVI Zoning
XVI.6 Attacking validity of zoning by-laws
XVI.6.c Practice and procedure
XVI.6.c.i On quashing zoning by-law
XVI.6.c.i.D Miscellaneous

Headnote
Municipal law --- Zoning — Attacking validity of zoning by-laws — Grounds — Ultra vires
Petitioner was developer who bought four lots in downtown area with intention of developing them — Four lots contained three old single-family dwellings and various outbuildings — Without informing respondent district, developer consolidated all four lots into one lot and was therefore in breach of zoning by-law which provided that not more than one principle building could be sited on one lot — District brought proceedings against developer — Parties entered into settlement agreement after which developer applied for, but ultimately abandoned, applications to solve zoning problem by rezoning and then by plan of sub-division — Developer applied for judicial review of district's exercise of statutory powers, contending that district did not have authority to limit number of buildings on consolidated lot — Application dismissed — Section 903 of Local Government Act sets out district's statutory authority for zoning powers and expressly

or by implication empowers district to control number of principle buildings on single lot — Accordingly, zoning by-law in question was intra vires the district — Local Government Act, R.S.B.C. 1996, c. 323, s. 903.

Estoppel --- Estoppel in pais — Estoppel by conduct — Miscellaneous issues

Petitioner was developer who bought four lots in downtown area with intention of developing them — Four lots contained three old single-family dwellings and various outbuildings — Without informing respondent district, developer consolidated all four lots into one lot and was therefore in breach of zoning by-law which provided that not more than one principle building could be sited on one lot — District issued development permit to developer with regard to site unaware of consolidation — District brought proceedings against developer — Parties entered into settlement agreement after which developer applied for, but ultimately abandoned, applications to solve zoning problem by rezoning and then by plan of sub-division — Developer applied for judicial review of district's exercise of statutory powers, contending that district was estopped from enforcing by-law by its corporate act of issuing development permit on which developer had relied to its detriment — Application dismissed — Development permit was not issued at time when district knew about consolidation of lots — No evidence was adduced of any conduct by developer indicating any reliance by it and any prejudice or detriment suffered by it as result of issuance of permit — Accordingly, principle of conduct estoppel did not apply.

Municipal law --- Zoning — Attacking validity of zoning by-laws — Practice and procedure — On quashing zoning by-law — Miscellaneous issues

Petitioner was developer who bought four lots in downtown area with intention of developing them — Four lots contained three old single-family dwellings and various outbuildings — Without informing respondent district, developer consolidated all four lots into one lot and was therefore in breach of zoning by-law which provided that not more than one principle building could be sited on one lot — District issued development permit to developer with regard to site without being aware of consolidation — District brought proceedings against developer for declaration that developer was in breach of by-law — Parties entered into settlement agreement after which developer applied for but ultimately abandoned applications to solve zoning problem by rezoning and then by plan of sub-division — Developer applied for judicial review of district's exercise of statutory power in enacting and enforcing by-law — Application dismissed — Court should not exercise its discretion under s. 8(1) of Judicial Review Procedure Act in favour of developer due to delay in bringing proceedings — District made developer aware of provisions of by-law and problem it created for him as soon as district found out about consolidation — Developer had independent legal and consulting advice before consolidating four lots — Developer voluntarily applied for rezoning and for sub-dividing and did not assert that by-law was ultra vires in action bought by district — After settlement agreement arising out of that action, developer did not follow through on either rezoning or sub-dividing applications, either of which may have solved zoning problem — District did not induce developer to consolidate lots, which was act that caused all developer's problems and taking all circumstances into consideration, developer was author of own misfortune — Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, s. 8(1).

Municipal law --- Zoning — Zoning by-laws — Amendment — General

Petitioner was developer who bought four lots in downtown area with intention of developing them — Four lots contained three old single-family dwellings and various outbuildings — Without informing respondent district, developer consolidated all four lots into one lot and was therefore in breach of zoning by-law which provided that not more than one principle building could be sited on one lot — District issued development permit to developer with regard to site without being aware of consolidation — District brought proceedings against developer for declaration that developer was in breach of by-law — Parties entered into settlement agreement after which developer applied for but ultimately abandoned applications to solve zoning problem by rezoning and then by plan of sub-division — Developer applied for judicial review of district's exercise of statutory power in enacting and enforcing by-law and contended that by-law had been varied by issuance of development permit — Application dismissed — District had not issued development permit with intention of varying or supplementing zoning by-law — Development permit itself clearly showed that developer had not applied to to have by-law supplemented or varied.

Table of Authorities

Cases considered by *Hood J.*:

Burnaby (City) v. Pocrnic, 1999 CarswellBC 2543, 6 M.P.L.R. (3d) 250, 71 B.C.L.R. (3d) 211, 131 B.C.A.C. 63, 214 W.A.C. 63, 68 C.R.R. (2d) 283 (B.C. C.A.) — considered

Capital (Regional District) v. Smith, 1998 CarswellBC 2764, 49 M.P.L.R. (2d) 159, 115 B.C.A.C. 76, 189 W.A.C. 76, 168 D.L.R. (4th) 52, 61 B.C.L.R. (3d) 217 (B.C. C.A.) — referred to

Gladiuk Contracting Ltd. v. Richmond (City), 1998 CarswellBC 2297 (B.C. S.C.) — distinguished

Harwood Industries Ltd. v. Surrey (District), 6 M.P.L.R. (2d) 228, 60 B.C.L.R. (2d) 168, 1991 CarswellBC 249 (B.C. S.C. [In Chambers]) — distinguished

Langley (Township) v. Wood, 1999 CarswellBC 963, 2 M.P.L.R. (3d) 35, 173 D.L.R. (4th) 695, 126 B.C.A.C. 136, 206 W.A.C. 136, 67 B.C.L.R. (3d) 97, 1999 BCCA 260 (B.C. C.A.) — considered

Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd., [1980] 5 W.W.R. 14, 19 B.C.L.R. 59, 16 C.P.C. 1, 109 D.L.R. (3d) 729, 1980 CarswellBC 19 (B.C. C.A.) — referred to

Litwin Construction (1973) Ltd. v. Kiss, 29 B.C.L.R. (2d) 88, (sub nom. *Litwin Construction (1973) Ltd. v. Pan*) 52 D.L.R. (4th) 459, 1988 CarswellBC 276 (B.C. C.A.) — followed

Maple Ridge (District) v. Thornhill Aggregates Ltd., 162 D.L.R. (4th) 203, 109 B.C.A.C. 188, 177 W.A.C. 188, 1998 CarswellBC 1571, 47 M.P.L.R. (2d) 249, 54 B.C.L.R. (3d) 155, [1999] 3 W.W.R. 93 (B.C. C.A.) — referred to

Neilson v. Langley (District) (1982), 134 D.L.R. (3d) 550 (B.C. C.A.) — referred to

Nelson (City) v. Kranz, 3 M.P.L.R. (2d) 258, 1990 CarswellBC 533 (B.C. S.C.) — considered

R. v. Greenbaum, 14 M.P.L.R. (2d) 1, 79 C.C.C. (3d) 158, 100 D.L.R. (4th) 183, 149 N.R. 114, [1993] 1 S.C.R. 674, 19 C.R. (4th) 347, 61 O.A.C. 241, 10 Admin. L.R. (2d) 161, 1993 CarswellOnt 80, 1993 CarswellOnt 974 (S.C.C.) — considered

Sun Oil Co. v. Verdun (City) (1951), [1952] 1 S.C.R. 222, [1952] 1 D.L.R. 529, 1951 CarswellQue 38 (S.C.C.) — considered

Sundher v. Surrey (City), 30 M.P.L.R. (2d) 250, 1995 CarswellBC 925 (B.C. S.C.) — considered

Toronto (City) v. Polai (1972), [1973] S.C.R. 38, 28 D.L.R. (3d) 638, 1972 CarswellOnt 215, 1972 CarswellOnt 215F (S.C.C.) — referred to

Statutes considered:

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Generally — referred to

s. 8(1) — considered

Local Government Act, R.S.B.C. 1996, c. 323

Generally — considered

s. 281 — referred to

s. 282 — referred to

s. 872 "density" — considered

s. 903 — considered

s. 903(1) — considered

s. 903(1)(c) — considered

s. 903(1)(c)(i) — considered

s. 903(1)(c)(ii) — considered

s. 903(1)(c)(iii) — considered

s. 903(1)(c)(iv) — considered

s. 920 — considered

s. 920(2)(a) — referred to

s. 920(4) — considered

s. 920(5) — referred to

s. 920(8) — referred to

s. 920(9) — referred to

Municipal Act, R.S.B.C. 1979, c. 290

s. 225 — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

Generally — referred to

***Hood J.*:**

1 This is the case of an indecisive and inexperienced developer on the one hand, and perhaps, although to a lesser extent, an inexperienced District, at the material time, on the other. It is a case which, in my view, could have been settled, to the benefit of the parties, and of their small community, with some co-operation on both side. However, I was unable to persuade the parties in this regard during Submissions.

2 Notwithstanding written Submissions, oral Submissions, particularly those of Counsel's for the Petitioner, were extensive, detailed and far exceeded Counsel's time estimate. No stone was left unturned, and every possible argument was made, again particularly with regard to the Petitioner. While I have carefully considered my lengthy notes and the Submissions and issues raised during oral argument, I propose, in the main, to deal with the Submissions and issues made and raised in the written Submissions; although at time I will refer to some of the oral submissions. I will refer to the Petitioner and Chernoff interchangeably as "Chernoff".

3 The Petitioner's case is set out in general terms in Counsel's written Submission as follows:

> Introduction:
>
> This is an application for judicial review of the purported exercise of statutory powers by the Respondent district of Kent and staff of the Respondent. The Petitioner seeks declaratory and injunctive relief relating to the status of certain lands and premises located within the District of Kent owned by the Petitioner, legally described as Parcel 1, District Lot 19, Group 1, Yale Division, Yale District Plan LMP36995 (the "Lands").
>
> The dispute between the parties essentially relate to the number of buildings permitted to exist on a single parcel of land. The Respondent takes the position that only one building is permitted on the Lands owned by the Petitioner in Downtown Agassiz and purportedly relies on s.6.1.1. of the *District of Kent Zoning By-Law No. 780,* 1980 (the "Zoning By-Law"). It is the position of the Petitioner that the Respondent does not have the statutory authority to limit the number of buildings on the consolidated lot. Alternatively, if the Respondent does have the power, it is the position of the Petitioner that the Respondent District, by issuing Development Permit DP98-01 to the Petitioner effectively varied or supplemented the ongoing By-Law to permit multiple buildings on the Lands. In the further alternative, the Petitioner takes the position that in all the circumstances the Respondent District of Kent is estopped from enforcing s...1 of the Zoning By-Law in respect of the Lands. The Petitioner also submits that the enforcement of s.6.1.1 in the present circumstances is unfair and unjust and it should be entitled, at the very least, to occupy the three pre-existing buildings on the Lands.

THE FACTS

4 In late 1997 Chernoff bought four lots in downtown Agassiz for the purpose of developing them. They contained three ancient single-family dwellings, one or two garages and a small building on skids, on them. On September 29, 1997 Chernoff applied to the District for a Building Permit on the first building, and was soon in substantial breach of the District's Building By-Law #1116, 1997, both as regards the nature and extent of the work permitted, and the cost thereof. The Permit, like the others not yet referred to, was basically with regard to renovations of an existing building.

5 On November 24, 1997, Chernoff applied to the District for a Building Permit for renovations to the second building; and soon was in similar breach of the District's Building By-Law with respect to that Permit.

6 On February 23, 1998 Chernoff made application to the District for a Building Permit with respect to the third building. While the Application was incomplete, Chernoff performed construction and alterations to the third building and then occupied it, all contrary to the said Building By-Law.

7 On February 26, 1998, Chernoff made an Application to the District for a Building Permit with respect to the fourth building. While no Building Permit was issued, Chernoff performed construction and alterations on and to the building. In the end, in May 1998, a Stop Work Notice was given for the first, second and fourth Buildings, pursuant to the Building By-Law.

8 In February 1998, Chernoff was concerned about some potential encroachment problems involving one or more of the buildings, and the existing interior lot lines. In order to solve the problems Chernoff proceeded on February 13, 1998, on his own, and without the involvement, knowledge or approval of the District, to consolidate the four lots into one lot. And this is where Chernoff's problems began, problems which he has never corrected. By consolidating the four lots into one lot the provisions of the District's Zoning By-Law #780 were breached. Specifically, s.6.1.1. of the Zoning By-Law provides that not more than one principle building may be sited on one lot.

9 Thereafter, once the District's new Director of Development Services and Approving Officer, as of March 30, 1998, Mr. I. Vaughan, discovered that the consolidation had taken place in violation of the Zoning By-Law, the District maintained that Chernoff would have to legalize the lands by bringing them into accordance or conformity with the By-Law.

10 Although the District sought, *inter alia*, an Order compelling Chernoff to remove some of the buildings or portions of them, in the action not yet referred to, I am satisfied that the District never intended to have the 3 remodelled buildings removed; that its position, as I earlier indicated, has always been that the subject lands must be brought into compliance with its Zoning By-Law and, by implication, that this can be reasonably achieved in the circumstances created.

11 I will observe here that prior to the consolidation of the four lots, the use of the lands complied with s.6.1.1. of the By-Law. While there were two principal buildings, they were on separate lots. The other buildings were accessory buildings to the principal buildings, being two storage buildings, one of which was on skids, and a garage. This was the evidence given by Mr. Chernoff on cross-examination.

12 On June 5, 1998, the District commenced Action No. A981551 against Chernoff Developments Ltd. seeking, among other things, Declarations that Chernoff was in breach of the Building By-Law with respect to each of the four buildings, and of s.6.1.1. of the Zoning By-Law. On June 30, 1998, a defence, denying each and every allegation of fact set out in the Statement of Claim and putting the Plaintiff District to the strict proof thereof, was filed. Chernoff did not challenge the validity of s.6.1.1. in the action. He now raises it for the first time in these proceedings, which the District says that he cannot do, raising *issue estopple*.

13 The parties eventually settled their differences and a Consent Order dated November 16, 1999, was entered in the action. The Order confirms that the relief sought by the District with respect to the Building Permits was recovered

by consent. It is common ground that the material facts pleaded in the Statement of Claim with respect to the Building Permit issues, and the s.6.1.1. issue, were admitted.

14 The Order makes no reference to Chernoff's asserted breach of s.6.1.1. of the Zoning By-Law as a result of the consolidation of the four lots into one. I am told that that issue was in fact resolved or settled, on the basis that Chernoff would bring the lands into conformity with s.6.1.1. of the District's Zoning By-Law. And, in my view, there is some merit in the argument that the Settlement Agreement in the circumstances reflected the express, or at the least, tacit acceptance by Chernoff of the validity of s.6.1.1 and that the lands were in breach of it.

15 On July 14, 1998, pursuant to the Settlement Agreement, Chernoff brought application to have the lands re-zoned. The preparation of the new or amended Zoning By-Law was left, in the main, to the District. Thereafter, numerous meetings and discussions were held between the District and Chernoff's engineering agent, Probase Engineering Ltd., which eventually resulted in the District preparing and presenting a Multi-Use Central Commercial District Zoning By-Law to Council, to which apparently there was a positive response.

16 However, on July 21, 1999, one week later, the District was advised by Probase that Chernoff was no longer interested in pursuing a Re-Zoning Application; that instead he wished to make a Sub-division Application in order to resolve the outstanding s.6.1.1. zoning issue. While the Application was made, and initially proceeded with the usual meetings, discussions and exchanges of information, very little seems to have been done by Chernoff after February 2000; and on June 22, 2000, Chernoff commenced these proceedings.

17 I observe here that it appears that Chernoff withdrew both the application to re-zone and the application to sub-divide on his own. His evidence is that he was of the view that neither process would have enabled him to complete the heritage project. The District does not agree with his conclusion, and Counsel pointed out that there never was a meeting between the parties which would justify Chernoff's conclusions.

18 I observe also that it is obvious that Chernoff encountered some difficulties during the re-zoning and sub-dividing processes; that this is another disputed areas between the parties. Chernoff in effect says that the District took difficult positions to thwart the success of the processes and of the Project itself. The District denies this, and says that any difficulty encountered came about because of the fact that Chernoff consolidated the four lots into one. In this regard I have concluded that any difficulties faced by Chernoff in the re-zoning and sub-dividing processes, and in completing the Project, came about as the result of the consolidation of the lots, and of the work that Chernoff proceeded to do on the basis of a consolidated lot when he knew that the problems had not been resolved.

19 It appears that for some months prior to March 30, 1998, and during the initial and crucial period of time, the District did not have a Director of Development Services and Approving Officer, and the work which ordinarily would be done by such person was done by others. On March 30, 1998, Mr. Vaughan became the District's new Director of Development Services and Approving Officer.

20 On January 20, 1998, Chernoff applied for a Development Permit to permit the proposed development on two of the lots. The legal description of the two lots are contained in the Application, and they are also referred to by their street addresses. Under s.3.7 of the Application it is made clear that in applying for the Development Permit Chernoff was not seeking to vary or supplement the Zoning By-Law. On the same date, Chernoff brought application to sub-divide the four lots into two lots.

21 The District subsequently mailed out a Notice regarding Development Permit 98-01 to nearby residence and property owners. The Notice gave the legal description of all four lots, as well as their civic addresses. Attached to the Application was a Site Plan showing three existing buildings and two proposed buildings. The Notice provided that the Development Permit would be considered at Council's February 23, 1998, regular meeting. As of that date no one at the District had been informed about the consolidation. The Development Permit was not considered on February 23, 1998 because of the fact that Chernoff had changed the site plan again to build on four rather than two lots. The

application then had to be adjourned to March 23. And the District obviously learned of the consolidation some time during that month.

22 The second Notice was dated March 13, 1998. It refers to a Development Permit for the noted lands, and gives the legal description of the consolidated lot. It also gives the civic address of all four lots. And a similar Site Plan was attached to it. The District sent the Notice to Chernoff under cover of a letter dated March 13, 1998. The letter also refers to the application for the Development Permit for the owners of the consolidated lot, that is, the legal description of the consolidated lot is therein set out. Again, the four civic addresses are given.

23 Chernoff says in his Affidavit that on March 2, 1998, he received a letter dated February 24, 1998, from the District Building Inspector, R. Smales, in which reference is made to a number of issues, including the encroachment of the deck of the building at 7220 Pioneer Avenue on to the property at 7224 Pioneer. It seems clear that at that time Smales did not know about the consolidation. Mr. Chernoff says he met with the Planning Committee of the District on March 2, 1998, and that at that meeting "the issue of the consolidation of the pre-existing parcels into a single parcel was specifically discussed". The evidence is that Chernoff had already consolidated the four lots on February 13, 1998. And in response to Mr. Smales' letter dated February 24, 1998, Chernoff delivered a letter dated March 2, 1998, in which he states:

> The deck of the building at 7220 Pioneer Avenue is a non-issue as all the properties (i.e., 7216, 7220, 7224 and 7228) have been re-constructed as one lot;

and in which no reference to the March 2 meeting is made.

24 The Application for the Development Permit was considered by Council at their meeting on March 23, 1998, and Development Permit 98-01 was issued. There are two copies of Development Permit 98-01 before me. In each of them the lands affected are described as those shown on Schedule "A" attached thereto. In one copy the legal description of the four lots are set out on its face. In the other the legal description of the consolidated lot, and the civic address of the four pre-consolidation lots, are set out. Each has a Schedule "A1" and Schedule "A2" attached to it. The Schedule "A1"s are different, obviously reflecting more late proposed changes in the Plans. However, each designates the location of the three existing buildings and the two proposed buildings. The two Schedule "A2"s also differ, again suggesting proposed changes involving the buildings.

25 I observe here that in the form of the Development Permit there is an area entitled "By-Law Supplemented or Varied" which obviously is to be used to set out particulars of any By-Laws intended to be supplemented or varied by the Development Permit. In the subject Development Permit the area is marked "N/A", clearly evidencing the fact that the Permit was not intended to vary or supplement any By-Laws, including the By-Law in question.

26 There is also an area entitled "Conditions and Requirements of This Permit". Thereunder it is stated that the development must be commenced within six months of the date of issue of the Permit, which was March 23, 1998, that the development undertaken must be strictly in accordance with the Site Plan attached as Schedules "A1" and "A2", and that all construction undertaken must be in compliance with the Building Permits therein set out.

27 Mr. Vaughan says that after commencing work for the District on March 30, 1998, he soon became aware of the proposed development known as Heritage Square. He began to review the District's file pertaining to the development in early April, and then arranged for a personal meeting with Chernoff. The meeting took place on April 15, 1998, at Mr. Vaughan's office. He says that during the meeting Chernoff did not bring to his attention the fact that the four original lots had been consolidated into a single lot.

28 Mr. Vaughan says that as a result of the meeting he wrote Chernoff a letter dated April 17, 1998, in which he set out a number of concerns about non-compliance with the District's Zoning By-Law. As a result of his letter, Chernoff applied for an Amendment to D.P. 98-01 and for a Development Variance Permit. Mr. Vaughan says that the Development Permit Amendment Application significantly changed the proposed development. He then appeared before the District

Planning Committee on April 20, 1998, with Mr. Chernoff, and advised Council of the deficiencies with the proposed Development Plan.

29 By this time, that is, April 20, 1998, Mr. Vaughan still did not know about the consolidation of the lots. It is observed that Chernoff's application to amend the Development Permit is dated April 17, 1998. In the Application the property is described as that located at the four civic addresses. No reference is made to the consolidated lot, or to its legal description, and some information is given under the topic "Proposed Variation and/or Supplementation to Existing Regulations".

30 Mr. Vaughan says that after April 20, 1998, he continued to review Chernoff's proposed development plans, and it was at this time that he was informed by another staff member that D.P. 98-01 had been issued for a consolidated parcel of land. He says that upon becoming aware of this he reviewed the District's Zoning By-Law, specifically s.6.1.1. After consulting with the Fraser Valley Regional District Planning Department he wrote to Chernoff on April 28, 1998, advising him of the zoning problem, and invited Chernoff to resolve the problem by virtue of a Re-Zoning Application. I have already related what followed after that, including the fact that re-zoning and sub-dividing by Chernoff never took place.

31 Before turning to the Submissions, I will set out here certain portions of the Affidavits of the two Deponents. With regard to the breaching of the Building By-Laws, Chernoff says:

> 28. The estimated construction costs set out in the Building Permit Applications were true at the time they were made. However, as I began renovation of the existing structures, it became necessary to make much more extensive repairs to the structures. Accordingly, the cost of the repairs increased. Also, the Project involved overtime and became more extensive and elaborate than initially planned.

32 With regard to the breach of the provisions of s.6.1.1. of the Zoning By-Law, Chernoff says:

> Up to and including the time of the vote by the Respondent's Council to issue D.P. 98-01, no representative had indicated in any way that one or more of the existing or proposed buildings on the consolidated lot would not be permitted on the site. At the time that Council voted to issue the Development Permit there were four buildings in place, all of which had been located there for many years.

33 And in para. 50:

> As indicated below, I believe that the position taken by Mr. Vaughan in his letter of April 28, 1998, was solely motivated by ill will and bad faith on the part of Mr. Vaughan and the Respondent. The Respondent had been aware of the multiple buildings on the various lots and that my proposed development included multiple buildings on the individual lots for almost seven months before Mr. Vaughan took this position.

34 And at para. 52:

> As a result of the position taken by the Respondent, and the expense and problems that would be involved with fighting the District's legal actions, I took steps to re-zone the property to specifically allow all the buildings described in the original Development Permit Application.

35 And at para. 66 he continues with his view that the position of the Respondent as set out in Mr. Vaughan's April 28, 1998, Affidavit, and the Respondent's actions, were prompted by bad faith on the part of the Respondent, and he gives particulars which he suggests supports his reasoning.

36 Turning to Mr. Vaughan's affidavit, at para. 22 he says:

> During the entire time frame of the Petitioner's Re-Zoning Application it was represented by legal counsel, that being Mr. Bruce Davies, and an engineering consultant, that being Probase. At no point did the Petitioner, its legal

counsel or its consultant raise any concerns with the validity of the District's Zoning By-Law. It is also my position that the District was genuinely trying to assist the Petitioner in its Re-Zoning Application. The District did a great deal of work both internally, and with F.V.R.D. to prepare an entirely new draft Zoning District based upon site coverage densification ratios which would allow more than one building on one lot, subject to the necessary approval process. This draft Zone would have assisted the Petitioner with his development plans.

37 And at para. 40:

During the entire time frame of the Petitioner's Sub-Division Application it was represented by legal counsel and had an engineering consultant. At no time did the Petitioner, its legal counsel or its consultant raise any concerns with the validity of the District's Zoning By-Law. As Approving Officer, I genuinely processed the Petitioner's Sub-Division Application. I had to correspond with Probase on several occasions prior to receipt of a complete Application. I did a great deal of work both internally, and with outside referrals to provide the Petitioner its January 19, 2000 P.R.S.

38 And at paras. 42 to 45:

42. During the months of August through November 1999 the District was preparing for the trial of Action #A981551, wherein the District claimed that the Petitioner violated the District's Building By-Law, Development Cost Charge By-Law and its Zoning By-Law.

43. In November, 1999 the Petitioner and District entered into a Consent Order which resolved all of the outstanding By-Law violations except those related to the Zoning By-Law. ... The agreement between the District and the Petitioner at that time was to resolve these land-use issues through the Sub-Division Application referenced in paras. 24 to 38 above.

44. It must be noted that at no time before or during the discussions related to the Consent Order, or within the above mentioned litigation generally, did the Petitioner ever take issue with the validity of the District's Zoning By-Law. Had the Zoning By-Law been attacked, I do not believe that the Consent Order would have been agreed to by the District. It must be noted that the District was ready to proceed to trial in November 1999, and the Petitioner's Statement of Defence did not question the validity of the District's By-Law.

45. In response to paras. 50 and 66 through 71 in Mr. Chernoff's June 15, 2000, Affidavit, I deny without hesitation that I was motivated by any ill will or bad faith in my dealing with the Petitioner. I had only arrived in the District and did not know the Petitioner or Mr. Chernoff personally. I certainly was aware of Mr. Chernoff's vocal opposition to the District's positions on certain land-use matters, but I was not influenced by such matters.

39 Finally I turn to Mr. Chernoff's evidence when cross-examined on his Affidavit. At that time his evidence was as follows: His inexperience as a developer led to a number of confusing applications to the District on his part. For example, on January 19, 1998, he was proposing to the District's Planning Committee a seven-storey building. On January 20, 1998, the same day the Application for the Development Permit 98-01 was made, he also applied to sub-divide the four lots into two lots. His development plans evolved and changed both before and after D.P. 98-01 was issued. And it would seem that Mr. Harding's description of the Development Permit being applied for in the context of numerous changing and confusing applications is warranted.

40 Chernoff was in possession of the District's Zoning By-Law as of September 1997, and before he purchased the four lots. He says that at the time he believed that a Development Permit would rectify any zoning concerns. His evidence was "I thought that the end-all to everything is a Development Permit, and that automatically varies whatever has to be varied". It was his choice to remove the interior lot lines and to consolidate the four lots into one. The District did not impose this requirement on him, and in fact was not involved in the process to consolidate the lots. He had sought independent advice from his lawyers and consultants before consolidating the four lots into one. He says he had been advised that there would be no problems. He decided to consolidate the four lots at the same time that he made

application for D.P. 98-01. Neither he, nor any of his advisors, he says, recognized the inconsistency a consolidation would cause with S. 6.1.1. of the District's Zoning By-Law.

41 While a Development Permit Application and a Sub-Division Application were in process with the District, Chernoff did not advise the District that the four lots were consolidated into one. He never informed Mr. Vaughan of this despite several meetings with him. And I have already noted that in Chernoff's April 17, 1998 written Application to Vary the Development Permit, which was made after Chernoff met with Mr. Vaughan, and when Mr. Vaughan was not aware of the consolidation, the legal description of the consolidated lot is not set out as required. Only the four civic addresses of the four pre-consolidation lots are set out.

42 Chernoff settled Action No. 981551, and entered into the Consent Order, with legal advice. He never challenged the validity of the District's By-Laws in that action, although he filed a *pro forma* defence. He said that he did not challenge the Zoning By-Law "mainly because I could not afford it". Instead of challenging the By-Law, or defending the lawsuit, he voluntarily applied for a Re-Zoning. Later he abandoned the Re-Zoning Application in favour of a Sub-Division Application, which again was his decision.

43 After Mr. Vaughan issued his preliminary report of the sub-division (P.R.S.) Chernoff took few, if any, steps to discuss the Sub-Division Application with Mr. Vaughan. He understood that the P.R.S. had an expiry date and allowed it to expire. Instead he commenced the present suit.

SUBMISSIONS

Jurisdiction

44 At one point Mr. Harding, for the District, questioned the appropriateness of this case for a judicial review proceeding, but subsequently did not persist with the point. And I observe that at times the submissions of Mr. Selinger, for Chernoff, seemed more appropriate to an action for damages; that as well there were some factual issues or disputes, and perhaps even some credibility issues, which Counsel seemingly ignored, or barely touched upon, and which generally are not appropriate for a judicial review proceeding. One example is Mr. Chernoff's evidence as to why he did not proceed with the re-zoning or sub-dividing processes in order to avoid the s.6.1.1. problem created by the consolidation of the four lots. However, Mr. Selinger was persistent in his position that the issues between the parties could be resolved, and the relief sought obtained, in these proceedings. Neither party invoked the ***Rules of Court*** available to them, save for the District who cross-examined Mr. Chernoff on his affidavit, and perhaps reduced or clarified some of the grey areas. In the end, given Chernoff's persistence, the delay, and the cost to the parties, I decided to decide the issues within these proceedings as best I could, and without considering further or determining the issue.

45 Mr. Harding emphasises that Chernoff could not seek relief under the ***Local Government Act***, R.S.B.C. c. 323, 1996, because of delay, and the fact that he is out of time in accordance with the provisions of that ***Act***; that he is left to bring the Petition pursuant to the ***Judicial Review Procedure Act*****,** c. 241, 1996, which by s.8(1) makes it clear that any relief sought under the ***Act*** is discretionary. He says that in the circumstances of this case the Court should decline to exercise its statutory power in favour of Chernoff. Mr. Selinger says that the failure to exercise the power in favour of Chernoff would result in unfairness and injustice.

46 While it will be seen that in my opinion Chernoff cannot succeed in these proceedings, and for a number of reasons, I am also of the view that the Court should not exercise its s.8(1) discretion in favour of Chernoff in the whole of the circumstances of the case. There has been much delay in the bringing of these proceedings, and no doubt some prejudice on the part of the District. And in my view it is simply too late for Chernoff to attack the provision of the Zoning By-Law. The District made Chernoff aware of the provisions of s. 6.1.1., and the problems created by it, immediately Mr. Vaughan became aware of them in April 1998; and they became an issue in the Action commenced by the District on June 5, 1998.

47 Chernoff had independent legal and consulting advice before consolidating the four lots into one. Chernoff voluntarily applied to amend the Development Permit. He also voluntarily applied for re-zoning, and for sub-dividing, all after becoming aware of the 6.1.1. zoning problem.

48 Chernoff did not assert that the By-Law was *ultra vires*, or advance any position with regard to s. 6.1.1., in the Action. Instead Chernoff entered into a Settlement Agreement with the District, which included Chernoff dealing with the s. 6.1.1. problem by bringing on an Application to re-zone the lands so as to bring them into conformity with s.6.1.1. of the District's Zoning By-Law, and, later, by bringing on a Sub-Division Application. While both solutions were available to Chernoff, he did not follow through with either one of them.

49 There seems to be a dispute as to why Mr. Chernoff did not do so, which may be tied in to his allegation of bad faith on the part of the District, and Mr. Vaughan's response denying the allegation and suggesting that Chernoff never seriously considered either resolution; matters also not very suitable to these proceedings. In any event, I am not satisfied that either re-zoning or sub-dividing could not have been achieved reasonably in the circumstances created by the consolidation and any work done as a result of it.

50 Further, in my view Chernoff was the author of his own misfortune, in that without consulting the District, or any participation by it, he proceeded on his own to consolidate the four lots into one, thus putting the consolidated lot in contravention with s. 6.1.1. of the By-Law, and giving rise to the problems. It may be the case, as surmised by Mr. Selinger, that once Chernoff consolidated the lots, and those persons representing the District became aware of this, and before Mr. Vaughan came on the scene, neither party recognized the significance of the consolidation. However, assuming but not deciding that that is the case, it is clear that the District did not induce Mr. Chernoff to consolidate the lots.

51 Further, in my view there was no duty on the District to advise him of the law immediately they learned of the consolidation, although Mr. Vaughan did so. Finally, it will be seen that there is no evidence before me of conduct on the part of Chernoff, between the time of consolidation and the time of discovery by Mr. Vaughan, based on reliance on the District, which might give rise to equitable considerations, and I need not consider the matter further.

Is S. 6.1.1 of the Zoning By-Law *Ultra Vires*?

52 This is the first of the four primary alternative issues raised and argued by Mr. Selinger. He submitted that the Petitioner, and all other Municipalities within the Province of British Columbia, do not have the statutory authority to control the number of buildings on a parcel of land.

53 Section 6.1.1. of the Respondent's Zoning By-Law provides:

> 6.1. PRINCIPAL BUILDINGS PER LOT
>
> .1 Except as otherwise permitted in this by-law, not more than one principal building may be sited on one lot. (Emphasis in the original by-law).

I observe that while the section deals with the density of buildings, specifically principal buildings, on a lot, it is in fact dealing with the use of the land.

54 It is to be noted that s.6 is the first section under the topic "General Regulations", which are said to be applicable to all districts. The District with which we are concerned is Central Commercial District C-1, which is contained in Schedule B-400. The opening section of that Schedule commences as follows:

> 400.1 Statement of Zoning Intent

> This District provides for the full range of commercial, retail, office, cultural and entertainment needs in the town centre to serve the residents at the community level, in an intensive pedestrian oriented environment.
>
> 400.2 Maximum Density

55 It will be seen that in my view there being no maximum density specified under 400.2, one must look to the general regulation, that is to s.6.1.1, which says that not more than one principal building may be sited on one lot. And it is to be observed that there are specific provisions relating to maximum density, under that topic, in some of the other districts which are covered by the By-Law. For example, in one of the residential districts Schedule 300.2 provides:

> MAXIMUM DENSITY
>
> The density of dwelling units permitted in a single-dwelling residential district shall not be less than 12 units per hectare (5 units per acre) nor more than 15 units per hectare (6 units per acre).

56 Other definitions contained in the By-Law which may be of some assistance are:

> Building: Building includes a structure located on the ground, wholly or partly enclosed with walls and roofs, and used for the shelter or accommodation of persons, animals, chattels or things, or any combination thereof
>
> Lot: Lot means the smallest unit in which land is designated as a separate and distinct parcel on a legally recorded sub-division plan or description filed in the Land Registry.
>
> Principal Use: Principal use means the main purpose for which the land, buildings and structures within a single lot are normally used;
>
> Use: Use means the purpose or function to which land, buildings or structures are put;

I observe also that in s.872 of the ***Act*** the word "density" is defined as follows:

> "Density", 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 and structures located on the land or parcel, or in the area;

It is to be observed that the definition of the word "density" in relation to the land is not limited to the density of the use of the land, but includes density of use of any buildings and structures located on the land. The words used in the definition basically track those contained in s.903(1)(c)(ii) of the ***Act***, to which I will shortly turn.

57 Counsel rely on general principles set out in such cases as *R. v. Greenbaum*, [1993] 1 S.C.R. 674 (S.C.C.), *Sun Oil Co. v. Verdun (City)* (1951), [1952] 1 S.C.R. 222 (S.C.C.) and the decision of Romilly, J. of this Court in *Sundher v. Surrey (City)* (1995), 30 M.P.L.R. (2d) 250 (B.C. S.C.), which Judgment was upheld by the Court of Appeal; that the powers of a Municipality are to be taken from its enabling statute, either by express terms or by necessary implication from the express terms. They can exercise only those powers which are explicitly conferred upon them by the Provincial Statute. And a By-Law which exceeds a Municipality's jurisdiction ever so slightly must be declared *ultra vires*.

58 The intention of the legislation then is to be found in the wording used and in the object or purpose of the empowering Statute. And as to the interpretation of the By-Law itself, see the decision of the Court of Appeal in *Neilson v. Langley (District)* (1982), 134 D.L.R. (3d) 550 (B.C. C.A.) at pg. 554. A Zoning By-Law must be interpreted with a view to giving effect to the intention of the local Governments Council as expressed in the By-Law, upon a reasonable basis so as to accomplish that purpose.

59 The statutory authority for zoning powers are set out in s.903 of the ***Local Government Act*** which provides as follows:

903(1) A local government may, by by-law, do one or more of the following:

(a) ... .

(b) ... .

(c) Regulate within a zone

(i) the use of land, buildings and structures,

(ii) the density of the use of the land, buildings and structures,

(iii) the siting, size and dimensions of

(A) buildings and structures, and

(B) uses that are permitted on the land, and

(iv) the location of uses on the land and within buildings and structures;

60 Mr. Selinger submitted that the District was not empowered under s. 903 to regulate the number of buildings on a single lot, either expressly or by necessary implication. There was, he said, no need to control the number of principal buildings.

61 Mr. Selinger took me through a carefully prepared, detailed submission in support of his interpretative positions. It is dependent upon a narrow interpretation to be given individually to words used in the Section, such as "use", "density of use" and "siting". A building is not a use of land by itself, he says, and therefore subsection (1) does not grant the power to regulate the number of buildings. I do not agree.

62 Generally speaking, the purpose of a Zoning By-Law is to enable a local government to control what goes on on the zoned land, that is, its use and its development. And the construction of buildings on the land is a land use which is regulated, as are the location and use of the buildings. And in my view the density of the buildings, that is, the number of buildings permitted on a lot, as well as the nature of the buildings, would come under the umbrella of land use and development expressly, and if not then by implication.

63 Returning to the provisions of s.903, it is my opinion that the section empowers the District to regulate the number of buildings to be sited or located on a single lot, including the number of principal buildings thereon. The purpose of the By-Law, as I have said, is to regulate what occurs on the land. The section is quite broad in scope. It covers, within a zone, the use, and density of the use, of land, buildings and structures, the siting, size and dimensions of the buildings and structures and of the uses on the land, and the location of the uses on the land, and within the buildings and structures. While "uses" are generally defined by the activity permitted, such as residential or commercial use, in most cases the use can only be accomplished by the construction or placement of buildings on the land. And the regulation of the use must of necessity include the regulation of the buildings, including their number.

64 Section 6.1.1. of the Regulation is the first section under the topic "General Regulations", which apply to all districts. Only one principal building may be sited on one lot, unless otherwise permitted in the By-Law. The applicable District, Central Commercial District C-1 does not (otherwise) permit more than one principal building under the topic maximum density, while some districts, as I have already pointed out, do. In my view the empowerment for s.6.1.1. is contained expressly, and if not then by implication, in ss.(c)(i), the use of land, (ii), the density of that use, and (iv), the location of that use, and the effect of (iii) on the use may have the same result.

65 Finally, I do not agree that s.6.1.1 is void as being uncertain "in that there can be no principal building in a multi-building, mixed use development such as Heritage Square". Further, while there may be more than one use in a building, as contemplated by the By-Law, it was never a multi-building development, if by this it is meant that it was contemplated by the parties that there would be more than one principal building on the rather small lots. Prior to consolidation there was no more than one principle building on any of the lots.

66 I have concluded then that s.6.1.1. is *intra vires*; that the District is empowered to control the number of principle buildings on a single lot.

ASSUMING THAT THE DISTRICT WAS SO EMPOWERED, WAS S.6.1.1. VARIED BY THE ISSUANCE OF THE DEVELOPMENT PERMIT DP98-01?

67 Mr. Selinger said that this was the principal argument advance on behalf of Chernoff. There is no evidence before me that the District by resolution issued the Development Permit with the intention of varying or supplementing Zoning By-Law #780, 1980, under and by virtue of the provisions of s.920(2)(a) of the ***Act;*** or that this in fact occurred.

68 The evidence is to the contrary. First, the position is contrary to, or inconsistent with, Mr. Chernoff's evidence that at the material time he understood that a Development Permit was the "end-all to everything", as he put it; that it automatically varied whatever had to be varied and resolved any pre-existing problems.

69 Second, both the Application for the Development Permit, and the Permit itself, clearly show that Chernoff did not apply to have the subject By-Law supplemented or varied, and that none were granted.

70 Finally, s.920(4) provides that a Development Permit must not vary the use or density of the land from that permitted in the By-Law, except as authorized by ss.(5), which section has no application in the case at Bar. In my opinion the Development Permit does in fact vary the use or density of the land in question and s.920 has no application. And I do not find it necessary to deal with Counsel's further submissions on s.920 with particular regard to the District's Official Community Plan and ss.(8) and (9). Finally, as I have probably indicated earlier, in my view Chernoff did not acquire any rights under the Development Permit contrary to, or in violation of, the By-Law in question.

IS THE DISTRICT ESTOPPED FROM ENFORCING THE PROVISIONS OF S.6.1.1?

71 For my purposes, I will agree with Mr. Selinger, without deciding, that it is likely that at the time that the Development Permit was issued the parties did not consider or direct their minds to the potential impact of s.6.1.1. However, I do not agree with Mr. Selinger's submission that it is irrelevant whether the District knowingly issued the Development Permit, because "any knowledge was erased by the issuance of the Permit". For in my view it is quite relevant to the issue of conduct estoppel, to which I now turn, that the Development Permit was not issued knowingly, and that there is no evidence before me of any conduct by Chernoff, during the five week period after the Permit was issued and before the problem was discovered by Mr. Vaughan, indicating any reliance by Chernoff and any prejudice or detriment suffered by Chernoff, as a result of the Permit being issued. These are factors to be considered, although not necessary, if the principal of **conduct** ***estopple*** is applicable in the case at Bar.

72 Mr. Selinger argued that the District is *estopped* from enforcing s.6.1.1. His argument is advanced on the basis of what was in the Development Permit, that is, what Chernoff was authorized to do. He says that Chernoff should receive what was promised in the Permit, including the right to build five buildings on one lot. While Counsel emphasises the contents of Schedules "A1" and "A2" attached to the Permit, these Site Plans were used for numerous purposes and Schedule "A1" still shows the four separate lots.

73 Counsel argued at some length that Chernoff suffered substantial detriment from the "corporate act" of the District on March 23 when the Development Permit was issued. He did not refer to any conduct on the part of Chernoff, after the Permit was issued, demonstrating inducement or detriment. Rather he emphasised that the detriment arose early on

when Chernoff was working pursuant to the Building Permits and had numerous meetings with the Planning Committee in the fall of 1997 and in the early spring of 1998. He said that the District well knew during this time of Chernoff's plans to have multi buildings on the single lots. His final point was that in effect there was a duty on the District to advise Chernoff that s.6.1.1. would not allow more than one principal building on a single lot, and argued that had the duty been discharged Chernoff would not have had the problems which he eventually had to face.

74 I am not persuaded that Counsel has laid any factual basis for the application of the principal under discussion. Counsel's submission ignores the true factual scenario during the time in question, which really raises few if any equities in favour of Chernoff. The Building Permits were in fact issues long before Chernoff contemplated consolidating the lots, and at a time where there were no zoning issues. And the corrective work was done pursuant to the Building Permits by consent by Court Order.

75 It is clear that up to the time the Permit was issued, Chernoff still had not decided exactly what he wanted to do, and his plans were continually changing. Further, there was no clear plan presented to the District up to the time of consolidation, or shortly thereafter, suggesting more than one principal building on a single lot. In fact, as I have already stated, at that time the lands conformed with the provisions of s.6.1.1. of the By-Law. Even if they did not conform in some relatively minor aspect, I have no doubt that this could have been accommodated and that the project could have been completed had consolidation not taken place. There is in my view no evidence of the involvement of the District, of a causative corporate act, or of inducement or of detriment, factors which may be considered, although not necessary for the application of the principal. While Mr. Selinger tries to tie in, as detriment, the changing and costs of utilities and so on, it is clear to me that these factors flowed, as did all of Chernoff's problems, from his unilateral consolidation of the lots.

76 I turn now to the law. Mr. Selinger said that **conduct** ***estopple*** applies to a local Government where there has been a corporate act and the Petitioner has relied on the act to its detriment. He relies on the decision of Levine, J., as she then was, in *Gladiuk Contracting Ltd. v. Richmond (City)*, 1998 CarswellBC 2297 (B.C. S.C.) in which Her Ladyship relied on the decision of Braidwood, J., as he then was, in *Harwood Industries Ltd. v. Surrey (District)* (1991), 60 B.C.L.R. (2d) 168 (B.C. S.C. [In Chambers]), and applied the principles of ***estopple*** by **conduct** discussed in *Litwin Construction (1973) Ltd. v. Kiss* (1988), 29 B.C.L.R. (2d) 88 (B.C. C.A.). It will be seen that in my opinion both *Gladiuk* and *Harwood* are distinguishable on their facts.

77 In *Gladiuk* an official of the City took it upon himself to advise the Petitioner concerning the sub-division process. He informed the Petitioner that it had done everything necessary to complete the sub-division process, and that it could start construction. He later called the Petitioner concerning the requirement to submit final plans for approval by the Approving Officer before September 30, 1997, in order to be exempt from paying school site charges of approximately $100,000.00. It was then too late for the Petitioner to comply. Had the Petitioner been made aware earlier of the requirement to do so to be exempt from the school site charges, (rather than having been told that he had done everything necessary) the Petitioner would have obtained approval prior to September 30, 1997.

78 The Petitioner sought a Declaration that it was exempt from imposition of school site charges. Her Ladyship found that it would have been wholly inequitable for the City to succeed in the proceeding, and found that it was *estopped* from collecting the school site charges from the Petitioner.

79 After noting that in *Harwood* Braidwood, J. held that the principle of *estopple* could apply to Municipalities where there is unfairness or injustice requiring the exercise of judgment, Her Ladyship then cited and followed the following description of ***estopple*** by **conduct** discussed in *Litwin* at pg. 179:

> Of course, ***estopple*** by **conduct** has been a field of the law in which there has been considerable expansion over the years and it appears to me that it is essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding.

80 Braidwood, J. also followed *Litwin* in *Harwood*. In this case the Petitioner moved for a Declaration that a tied vote of Municipal Council had the effect of passing a By-Law pursuant to the provisions of s.225 of the ***Municipal Act***, and was successful. It was also found that the Municipality was *estopped* from raising the defence of notional bias, in order to preclude the operation of s.225, because the Municipality had encouraged the Petitioners to act to their detriment in pursuing their plans. Justice Braidwood found that it would be unconscious able for the Municipality to raise the defence of notional bias in order to preclude the operation of the Statute.

81 In my view, as I have already said, *Gladiuk* and *Harwood* are clearly distinguishable on their facts. In the case at Bar there has been no inducement, promises or encouragement on the part of the District resulting in Chernoff acting to its detriment, no conduct or behaviour on the part of the District giving rise to equities on the part of Chernoff, and leading to the conclusion that it would be highly inequitable that the District should be entitled to enforce s.6.1.1.; or putting it in *Litwin* terms, conduct in circumstances making it unfair or unjust for the District to enforce this section. In my opinion requiring compliance with the section is not a result contrary to a sound sense of the equities, rights and conducts of the parties.

82 The cases may also be distinguishable on the basis of the nature of the conduct said to be *estopped*, in that here the conduct which Chernoff seeks to *estop* is the enforcement of its By-Law by the District. And this brings me to Mr. Harding's argument on this issue.

83 Mr. Harding says that the cases just discussed are not applicable in the case at Bar; that a local Government cannot be *estopped* from enforcing its By-Law. It may be sued for damages, for example, for negligence or for bad faith, but it cannot be *estopped.* To restrain the District from enforcing s.6.1.1. would be to force it into non-compliance with the local ***Government Act***.

84 Counsel relies on the decision of the Court of Appeal in *Langley (Township) v. Wood* (1999), 2 M.P.L.R. (3d) 35 (B.C. C.A.). There an owner maintained property as a two-family dwelling, although the Building Permit stipulated that the house was to be used as a single family dwelling. The evidence was that the owner had the Township's informal consent to maintain the property as a two-family dwelling at the time that the Permit was issued. The Township successfully moved for an injunction restraining the use of the house as a two-family dwelling contrary to the Zoning By-Law, and an appeal was dismissed.

85 In the Court of Appeal Mr. Justice Cumming, speaking for the Court, had this to say on the issue at pg. 37:

> In response, the Township submits that it is entitled to rely on the provisions contained in the Zoning By-Laws, regardless of any such allegations against the Township, such as condonation or acquiescence on its part in permitting the Appellant to relocate the house on the lands.
>
> As a general rule, municipal rights, duties and powers, including the duty to carry out the provisions of a Statute, are of such public nature that they cannot be waived, lost or vitiated by mere acquiescence, *laches* or *estopple*.

And a number of authorities are cited to the effect that the doctrine of *estopple* can never interfere with the proper carrying out of the provisions of acts of Parliament; and that the appropriate remedy for a breach of a By-Law is statutory and not equitable. And reference is made to *Nelson (City) v. Kranz* (1990), 3 M.P.L.R. (2d) 258 (B.C. S.C.), a decision of this Court, where it is said at pg. 264:

> An injunction sought under s.751 of the ***Municipal Act*** is a purely statutory remedy. And not one based on equity. It is therefore no objection to the granting of the injunction that there has been a failure to enforce the By-Law for many years: See *Shaughnessy Heights Property Owners Association v. Northup* (1958), 12 D.L.R. (2d) 760 (B.C.S.C.). Nor can it be an objection that the city officials have permitted or even approved the breach. For the same reasons, the circumstances that the tenants are willing to condone or accept the Respondent's failure to comply with the By-Law for safety requirements cannot affect the right of the Petitioner to the injunction sought.

86 Mr. Justice Cummings also refers to s.281 and s.282 of the then ***Municipal Act***, which remain in the present ***Act*****,** in support of the proposition that the remedy is statutory and not equitable. He then concludes his decision by noting that the Court had no discretion to deny the Township an injunction once the breach is established, quoted with approval from the decision of Huddart, J., as she then was, in *Maple Ridge (District) v. Thornhill Aggregates Ltd.*

87 In response to *Langley*, Mr. Selinger handed up two copies of more recent cases of the Court of Appeal which he says clarify the law and affirm the Court's jurisdiction to restrain a local Government from enforcing its By-Law. He argued further that the District's Counsel overstates the principles set out in *Langley*.

88 The cases referred to are: *Capital (Regional District) v. Smith* (1998), 61 B.C.L.R. (3d) 217 (B.C. C.A.) and *Burnaby (City) v. Pocrnic* (1999), 71 B.C.L.R. (3d) 211 (B.C. C.A.). I have considered these cases, and some others on the subject matter, including the decisions in the Court of Appeal in *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 162 D.L.R. (4th) 203 (B.C. C.A.) and *Toronto (City) v. Polai* (1972), [1973] S.C.R. 38 (S.C.C.). The decisions in both *Maple Ridge (District)* and *Smith* came down in 1998, prior to *Langley*. The decision in *Burnaby* came down after *Langley*, but no reference is made to it in the Judgment given by Mr. Justice Esson.

89 In my view these cases say, in apparent conflict with *Langley*, that the Court has a discretion, albeit a limited one, even where the breach of the By-Law has been established. Perhaps what Justice Esson had to say in *Burnaby* at pg. 215 is representative of these decisions:

> Finally, Mr. Azevedo submitted that the trial judge may have been misled by judicial pronouncements in some cases of this kind to the effect that, once a breach is established, there is no discretion to refuse the Order. The better view I think is that there is a discretion, but, because the right to an injunction is created by Statute, and because the public interest must be weighed against any hardship which the Order may imposed on the Defendants, the scope of the discretion is narrow. That the discretion exists is illustrated by a recent decision of this Court: *Capital (Regional District) v. Smith* (1990), 160 D.L.R. (4th) 52 . . . .

90 It is, of course, for the Court of Appeal to reconcile *Langley* and the line of cases referred to, if need be. For my purposes, and assuming that I have a discretion, I see no basis in equity or in law to exercise it in favour of Chernoff, and I decline to do so.

91 I am told, and I accept, that the District does not want the subject buildings torn down or removed from the lands; that what it wants is for the owner of those lands to bring them into conformity with s.6.1.1. And I do not equate what is reasonably sought as being tantamount to an Order for removal.

92 This brings me to a brief discussion of Mr. Harding's primary position that Chernoff is issue *estopped* from attacking the validity of s.6.1.1. in these proceedings. He puts his position in his written submission as follows:

> 32. It is a hallmark of our judicial system that the Court required the parties to litigation to bring forward their whole case and will not permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the earlier contest.

93 Counsel says that Chernoff failed to raise by way of its Statement of Defence in Action No. A981551 that issue would be taken with the *vires* of the District's Zoning By-Law. And Chernoff is therefore *estopped* from doing so in (this) future litigation. He relies in the main on *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.* (1980), 19 B.C.L.R. 59 (B.C. C.A.) at pgs. 64-65.

94 I have already reviewed the evidence pertaining to this issue. Mr. Harding says that all of the material facts pleaded in the Statement of Claim were admitted by virtue of a Notice To Admit. He says that Chernoff had the chance in the earlier action to make the argument he now makes. Instead he entered into a settlement, and a Consent Order, that dealt with all issues between the parties.

95 Mr. Selinger said that the previous proceedings were adjourned *sine die*. While all the building problems were resolved, the s.6.1.1. zoning problem was left unresolved. The parties believed that the re-zoning application would resolve the s.6.1.1. problem, but there was no determination of it one way or the other. In effect the parties reserve their right to proceed on the s.6.1.1. issue at a later date if Chernoff did not bring them into conformity. The District had the right to proceed with the enforcement of s.6.1.1., and Chernoff was free to raise what defences were available to them.

96 It is to be seen then that the facts are in dispute as to what exactly was resolved between the parties on the s.6.1.1. issue. One would have thought that the terms of settlement would have been put to writing, and made clear to the Court. Further, there is no express reference in the Consent Judgment to the s.6.1.1. issue which demonstrates to me the extent to which it was considered and decided. In such circumstances I decline to consider the issue further, particularly since in my view in the circumstance of this case it is unnecessary that I do so.

97 The Petition is dismissed with costs.

Application dismissed