

The Unfettered Discretion to Downzone

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A Case Comment on *Pacific National Investments Ltd. v. Victoria (City)* [2003]
B.C.J. No. 537, 2003 BCCA 162

SUMMARY

Pacific National Investments Ltd. (“PNI”) acquired two lots on Victoria’s harbour in the mid-1980’s. At the time of acquisition, the city bylaws allowed three-storey buildings to be constructed on these lots. In 1993, the bylaw was revised by the city and limited the lots to a height of one storey. PNI received judgment from the British Columbia Supreme Court that the City of Victoria had been unjustly enriched due to PNI’s supply and installation of parks, boulevards, foreshore works, and roads. PNI had undertaken these works in its plans to develop the land. Further development on the land became uneconomical due to the downzoning.

Speaking for the Court of Appeal, Madame Justice Southin held that there was no basis for a claim by PNI for unjust enrichment. She found that there was no true correspondence between the enrichment (the works) and the deprivation (the downzoning of the lots). Furthermore, she noted that the power conferred upon by the City of Victoria by the Legislature provided a juristic reason for the enactment of the downsizing bylaw.

BACKGROUND

PNI initiated its legal action by arguing that an implied covenant of the City of Victoria not to downzone existed. This argument reached the Supreme Court of Canada, which held that no such implied term existed, and any implied term would have been *ultra vires* the municipal government because it would fetter the capacity of the Council of the City of Victoria to exercise its legislative powers. The matter was remitted to trial on the basis of an argument for unjust enrichment.

The trial judge held that the *Local Government Act* R.S.B.C. 1996, c. 323 does not immunize government from restitutionary claims, and noted that PNI was operating under the mistaken belief that the works that were supplied and installed were commensurate with the current lawful development of the lots. The operation was to the benefit of the City of Victoria, the deprivation was that PNI installed works that it



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would not have otherwise supplied, and no juristic reason for the enrichment was found.

RESTITUTION ARGUMENT

On appeal, Madam Justice Southin held:

“As the law stands at present the criteria for finding unjust enrichment are:

1. an enrichment;
2. a *corresponding* deprivation; and
3. absence of any juristic reason for the enrichment.”

Madam Justice Southin found that the enrichment enjoyed by the City of Victoria was expenditure of monies on the construction of works. PNI argued that the deprivation was the extra works given as consideration for benefits that PNI would have received under the agreements that it had entered into. Madam Justice Southin saw the deprivation as the downzoning of the two water lots. As such she found no true correspondence between the enrichment and the deprivation.

Further, the downzoning was held to be an act made within the powers conferred upon the City of Victoria by the Legislature. The bylaw was called “a complete answer to any and all claims arising out of it” and as such, is a juristic reason for the enrichment.

IMPLICATIONS

The *Local Government Act* RSBC 1996, c. 323 enables local governments to amend bylaws and rezone lands without paying compensation for the reduction of value in or any loss or damages to a person’s interest in land. Local governments make unfettered decisions on issues such as zoning. The transparency of local governments (through elections, public hearings, and decision-making by voting) provides justification for the local government to make unfettered decisions that may have adverse effects on the economic interests of property owners and developers.

As PNI’s arguments for implied covenant and restitutionary remedies both failed, it appears that developers must protect their interests by exercising caution when committing to long-term projects. Due to the ability of local governments to amend zoning requirements, property owners and developers should implement a strategic policy of phase-by-phase commitment to projects.