

**SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY**

AUG 03 2011

S-115185
No.

Vancouver Registry



THE SUPREME COURT OF BRITISH COLUMBIA

Re: The proposed decision of Howard Carley in his capacity of approving officer for the Village of Anmore to approve the subdivision of 2923 Fern Drive in Anmore, BC.

BETWEEN

DONNA WEBBER and RICK WEBBER

PETITIONERS

AND

**HOWARD CARLEY in his capacity as APPROVING OFFICER
FOR THE VILLAGE OF ANMORE**

RESPONDENT

PETITION TO THE COURT

THIS IS THE PETITION OF: Donna Webber and Rick Webber
2926 Fern Drive,
Anmore, BC

ON NOTICE TO: Howard Carley in his Capacity of Approving
Officer for the Village of Anmore
2697 Sunnyside Road
Anmore, BC

AND TO: Harold Weinberg and Linda Weinberg
2923 Fern Drive
Anmore, BC

AND TO: The Attorney General of British Columbia
Ministry of the Attorney General
Victoria, BC

This proceeding has been started by the Petitioners for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

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- (b) serve on the Petitioner
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the Petitioner,

- (a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or
- (d) if the time for response has been set by order of the court, within that time.

- (1) The address of the registry is:

The Courthouse
800 Smithe Street
Vancouver, BC

- (2) The ADDRESS FOR SERVICE of the Petitioners is:

BAKER & BAKER
Barristers & Solicitors
1708-808 Nelson Street
Vancouver BC V6Z 2H2
Tel: 604-642-0107

Fax number address for service (if any) of the Petitioner: 604-681-3504

E-mail address for service (if any) of the Petitioner: nbaker @bakerbaker.ca

- (3) The name and office address of the Petitioner's lawyer is: Nathalie Baker (as above)

Part 1: ORDERS SOUGHT

The Petitioners apply for:

- 1. A declaration that the Approving Officer's proposed exercise of his statutory power to approve the subdivision of 2923 Fern Drive on the conditions set out his letter dated January 9, 2008 is *ultra vires* the *Land Title Act*.
- 2. A declaration that the Approving Officer's proposed exercise of his statutory power to

approve the subdivision of 2923 Fern Drive on the conditions set out his letter dated January 9, 2008 was based on improper considerations, was made in bad faith and/or is discriminatory.

3. An order enjoining Howard Carley, approving officer for the Village of Anmore, from approving the subdivision of 2923 Fern Drive on the conditions out in his letter dated January 9, 2008.

The grounds upon which the application by the petitioners for the orders sought is brought are:

1. This is an application brought pursuant to the *Judicial Review Procedure Act*, RSBC 1996, c. 241. Ss. 2(2) provides that on an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for: (a) relief in the nature of mandamus, prohibition or certiorari; (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

2. The approving officer's proposed decision is *ultra vires* the *Land Title Act* [1996] ch. 250.

(a) The subdivision creates two lots, rather than a single lot, that do not abut a highway contrary to section 9 of the *Land Title Act Regulation* 334/79 (the "Regulation").

(i) Section 75(1)(a) of the *Land Title Act* provides that to the extent of the owner's control, there must be a sufficient highway to provide necessary and reasonable access to (i) all new parcels and (ii) through the land subdivided to land lying beyond or around the subdivided land.

(ii) Section 9 of the Regulation provides that an approving officer may grant relief from compliance with section 75 (1) (a) (i) of the Act if a subdivision creates a single parcel that does not abut a highway and the subdivider (a) proposes to grant, appurtenant to the new parcel, an easement of access to a highway or, where there is no established system of highways, a private road or way

(iii) The remainder lot abuts on a highway (Fern Drive) but neither Lot 2 nor 3 "abut" on Fern Drive within the meaning of section 9 of the Regulation.

(iv) A panhandle lot (a narrow strip of land providing access to a lot) does not "abut" a highway within the meaning of section 9 of the Regulation.

(b) The proposed subdivision is against the public interest.

(i) Section 85 of the *Land Title Act* provides that the Approving Officer may refuse a subdivision if it is against the public interest.

(ii) The proposed subdivision is contrary to a policy adopted by Council regarding subdivision by easement which provides that "Once a subdivision has been created, the remainder parcel will not be eligible for further subdivision by easement". The Weinberg Property has already been subdivided several times.

(iii) The Policy also states that "The Approving Officer is encouraged to explore with property owners other options for subdivision prior to approving a

subdivision by easement.” and “In considering an application for subdivision by easement, the Approving Officer is encouraged to assess the long term planning implications of creating a lot by easement, and to undertake the appropriate measures to protect the long term interest of the Village. A situation where subdivision by easement is particularly considered appropriate is where the parcel of land would have frontage on a future public road.”

(iv) The subdivision creates a hooked parcel. In *Norgard v. Anmore (Village) 2007 BCSC 1571* Howard Carley insisted that hooked lots, even one already existing at the time of subdivision application, are against the public interest and should be avoided. The Court held that while the creation of hooked parcels may engage consideration of the public interest in the *Norgard* case it did not because it was already in existence.

3. In making his proposed decision the Approving Officer considered irrelevant matters and failed to consider relevant matters.

(a) the circumstances strongly suggest that the Approving Officer's proposed decision to approve the subdivision on the terms set out in his letter dated January 9, 2008 must have taken into consideration the fact that it was the Mayor's subdivision that he was reviewing and proposing to approve.

(i) When processing other subdivision applications the Approving Officer notified adjacent land owners of the applications but failed to do so with respect to the Weinbergs' subdivision.

(ii) The approving officer is prepared to create a “hooked parcel” in this case but took the position that hooks were against the public interest in another subdivision application.

(iii) In response to several FOI requests submitted by the Petitioners in 2010 and 2011 the approving officer advised the Petitioners that there was “no further activity on this file” when in fact the Weinbergs' subdivision was being processed and reviewed by various Village departments.

(b) The Approving Officer failed to notify and/or hear from adjacent land owners.

(i) Section 86 of the *Land Title Act* authorizes the Approving Officer to hear from “all persons who, in the approving officer's opinion, are affected by the subdivision”.

(ii) The legislature clearly intended for the interests of immediate neighbors to be taken into account by the Approving Officer. *Dubuc v. Saanich (District) 22 M.P.L.R. (2d) 47*

(iii) The Petitioners and other affected land owners were entitled to notice of the subdivision application and/or Approving Officer's decision pursuant to the doctrine of reasonable expectations.

4. In the further alternative the Approving Officer's proposed decision was made in bad faith and/or is discriminatory.

(a) The Approving Officer has treated the subdividers of lot 2923 differently than other subdividers for the improper motive of favouring the Mayor (Dr. Weinberg was the Mayor of Anmore when Mr. Carley issued the PLR for his subdivision) to Petitioners detriment.

(i) Adjacent land owners were not notified of the subdivision application or issuance of the PLR.

(ii) Documents were not disclosed to the Petitioner pursuant to Freedom of Information and Privacy Act Requests and the Approving Officer misled the Petitioners into believing that "no activity" was taking place with respect to the subdivision when in fact it was being processed and reviewed by the Approving Officer and other departments at the Village of Anmore. Had the Petitioners received the requested documents and known that the subdivision was in fact going ahead the Petitioners would have more time to try and have their concerns dealt with.

(iii) In an unrelated subdivision application the Approving Officer deposed that "hooked" parcels were to be avoided and were not desirable such that he would not approve a subdivision where there was a pre-existing hook unless the subdivider dedicated or sold the hook. In the Weinbergs' case the Approving Officer proposes to allow the creation of a "hooked" parcel.

(iv) The Approving Officer proposes to allow a subdivision that is contrary to a Council policy relating to subdivisions by easement.

Part 2: FACTUAL BASIS

1. The Petitioners, Donna and Rick Webber, are the registered owners of the property located at 2926 Fern Drive, Anmore, BC.

2. The Respondent, Howard Carley, is the approving officer for the Village of Anmore which was incorporated under the Community Charter and has an address for service at 2697 Sunnyside Road Anmore, BC.

3. The Approving Officer has the statutory power to grant or refuse an application for the subdivision of land pursuant to Part 7, Division 4 of the *Land Title Act*, RSBC [1996] c. 250 and Part 26, Division 11 of the *Local Government Act*, RSBC [1996] c. 323.

4. In or about July 2007 Harold and Linda Weinberg ("the Weinbergs"), the owners of the property located at 2923 Fern Drive (the "Property"), applied to the Village of Anmore to subdivide the Property into 3 lots (the "2007 Subdivision Application"). In August 2007, the 2007 Subdivision Application was amended to reduce the number of lots to 2.

5. The Property is located directly adjacent to the Petitioners' Property and had already been subdivided several times prior to submitting the 2007 Subdivision Application. The most recent subdivision of the Property took place in 2004.

6. At the time of the application, Harold Weinberg was the Mayor of the Village of Anmore.

7. In or about September 2007 the Petitioners learned of the Weinbergs' subdivision

application and immediately contacted Village staff to request more information. After reviewing the proposal Donna Webber attended the Village Hall to her express her concerns to the Respondent about the proposed siting of the driveway to the newly created lots at the common property line between the Petitioners' property and the Weinberg Property.

8. The Weinbergs withdrew their First Subdivision Application and on December 2, 2007 submitted a new application to subdivide the Property into 3 lots (the remainder and Lots 2 & 3). The Weinbergs still proposed to locate the "shared driveway" to the newly created lots on the common property line.

9. On January 9, 2008 the Approving Officer issued a preliminary layout review (PLR) for the proposed subdivision. ANNEXED AS SCHEDULE "1" to this Petition is a copy of the PLR issued by the Approving Officer on January 9, 2008.

10. Section 5 of the PLR authorizes the Weinbergs to construct a 4.5 m wide shared driveway from Fern Drive to the eastern extent of Lot 2 with Lot 2 gaining access by way of easement across Lot 3. The remainder lot would have access from and be bisected by Fern Drive. The residual land on the east side of Fern Drive would remain part of the remainder parcel by way of a "hooked lot". ANNEXED AS SCHEDULE "2" to this Petition is a copy of the proposed plan of subdivision.

11. The Driveway access to Lot 2 and 3 will be by way of a 7.5 metre wide panhandle and is to be sited directly adjacent to the Petitioners' Property.

12. In or about March 2008 the Petitioners contacted the Respondent to inquire as to the status of the First Subdivision Application and learned for the first time that a new application had been submitted and that Mr. Carley had issued the PLR back in January.

13. By letter dated May 6, 2008, counsel for the Petitioners wrote to Mr. Carley reiterating their concerns about the location of the proposed "shared driveway". ANNEXED AS SCHEDULE "3" to this Petition is a copy of Ms. Baker's letter to Mr. Carley dated May 6, 2008 and Mr. Carley response dated May 20, 2008.

14. In or about June 2008 the Petitioners learned that Gary Norgard was having difficulty obtaining subdivision approval from the Approving Officer because Mr. Carley had imposed several preconditions to subdivision approval relating to access to their proposed bare land strata.

15. In July of 2008 Ms. Webber swore an affidavit regarding the Weinbergs' proposed subdivision in support of the Petition between Sharon and Gary Norgard and the Approving Officer. In particular she gave evidence about the proposed standards for the "shared driveway" and deposed that, unlike in the Norgard's case where the neighboring landowners were notified of the issuance of his PLR, the Petitioners were not notified or kept informed about the Weinbergs' subdivision.

16. Following the decision in *Norgard v. Carley*, 2008 BCSC 1236 nothing further appeared to take place with respect to the Weinberg subdivision.

17. In or about November 2009 Dr. Weinberg resigned as the Mayor of Anmore.

18. Between July 2008 and June 2011 the Petitioner, Donna Webber, submitted 10 Freedom of Information and Protection of Privacy Act Requests ("FOI Request") to the Village regarding the Weinberg Subdivision and the extension of Fern Drive through the Weinberg property. ANNEXED AS SCHEDULE "4" to this Petition is the Petitioners' FOI Requests submitted to

the Village on December 8, 2009, March 16, 2010, July 7, 2010 and December 9, 2010.

19. The Respondent answered Ms. Webber's FOI requests and provided her with copies of documents which were limited to PLR extension requests by Mrs. Weinberg, Mr. Carley letters granting the extensions and a letter from the Weinbergs advising the Village that a third party had authority to complete the provisions of the PLR. In his cover letters Mr. Carley advised the Petitioners there has been "no further activity with this file". ANNEXED AS SCHEDULE "5" to this Petition is the Respondent's answers to the Petitioner's FOI requests.

20. On April 6, 2011 the Petitioners submitted a further FOI requests. By letter dated April 7, 2011 the Approving Officer answered Ms. Webber FOI request and forwarded a set of proposed engineering plans. ANNEXED AS SCHEDULE "6" to this Petition is the Petitioner's FOI request date April 6, 2011 and the Respondent's answer to her request dated April 7, 2011.

21. On May 10, 2011 the Petitioner emailed Mr. Carley to find out the status of the proposed engineering plans. The Petitioner received a automatic response in reply advising that Mr. Carley was away until June 1, 2011. ANNEXED AS SCHEDULE "7" to this Petition is a copy of Ms. Webber's email dated May 10, 2011.

22. On June 16, 2011, having not received a response to her email dated May 10, 2011, the Petitioner resent her email to the Respondent. On June 21, 2011 the Respondent emailed Ms. Webber that the Village had approved the engineering plans on June 10, 2011.

23. On June 23, 2011 the Petitioners submitted a further FOI request. By letter dated June 24, 2011 the Approving Officer answered Ms. Webber request and forwarded two documents in response to her request: 1) a letter from Ms. Weinberg requesting a further extension of the PLR and 2) a letter from the Respondent granting the request. In his covering letter Mr. Carley states "There has been no further activity on this file." ANNEXED AS SCHEDULE "8" to this Petition is the Petitioner's FOI request dated June 23, 2011 and the Respondent's answer dated June 24, 2011.

24. On June 28, 2011 tree cutters arrived at the Weinberg property and a large part of the Property was cleared and other works and activities started taking place.

25. Ms. Webber was unable to get answers from Village staff as to what was going on with the Weinbergs' subdivision. On July 12, 2011 she attended the Village Hall to review the subdivision file and to see a copy of the tree cutting permit. No copy of the tree cutting permit was available. Moreover, she discovered numerous emails to and from various Village departments over the last year relating to subdivision engineering plans. Many of the emails were copied or sent to Mr. Carley directly but were never disclosed pursuant to her FOI requests. ANNEXED AS SCHEDULE "9" to this Petition are some of the emails Ms. Webber copied from the Weinberg Subdivision file on July 12, 2011.

26. By letter dated July 15, 2011 counsel for the Petitioners requested an explanation as to the actual status of the subdivision and requesting that Ms. Webber's FOI request be processed immediately. ANNEXED AS SCHEDULE "10" to this Petition is a copy of the letter dated July 15, 2011.

27. Section 75 of the *Land Title Act* sets out the requirements for subdivision. Section 75(1) (a) provides that to the extent of the owner's control, there must be a sufficient highway to

provide necessary and reasonable access to (i) all new parcels and (ii) through the land subdivided to land lying beyond or around the subdivided land.

28. Section 76 of the *Land Title Act* provides that the Approving Officer may grant relief from compliance with section 75 (a) in circumstances prescribed by the Lieutenant Governor in Council. Land Title Act Regulation 334/79 section 9 provides:

9 An approving officer may grant relief from compliance with section 75 (1) (a) (i) of the Act if a subdivision creates a single parcel that does not abut a highway and the subdivider

(a) proposes to grant, appurtenant to the new parcel, an easement of access to a highway or, where there is no established system of highways, a private road or way, and

(b) submits to the approving officer a subdivision plan that shows the new parcel and outlines in a manner that complies with the rules made by the Association of British Columbia Land Surveyors or, in the case of an electronic plan, that complies with section 168.721 of the Land Title Act (i) the easement area, or (ii) the private road or way.

29. Section 85(3) *Land Title Act* provides that the Approving Officer may reject a subdivision plan if the Approving Officer considers it against the public interest.

30. Section 86 of the *Land Title Act* sets out what the Approving Officer may consider in deciding whether or not to approve a subdivision. Section 86(1)(b) authorizes the Approving Officer to *hear from all persons who, in the approving officer's opinion, are affected by the subdivision* and 86(1)(c)(i) provides that the approving officer may refuse the subdivision if *the anticipated development of the subdivision would injuriously affect the established amenities of adjoining or reasonably adjacent properties.*

31. Section 87 of the *Land Title Act* provides:

87 Without limiting section 85 (3), the approving officer may refuse to approve a subdivision plan if the approving officer considers that the subdivision does not conform to the following:

(a) all applicable provisions of the Local Government Act;

(b) all applicable municipal, regional district and improvement district bylaws regulating the subdivision of land and zoning;

(c) if the land affected is within the trust area under the Islands Trust Act, all applicable local trust committee bylaws regulating the subdivision of land and zoning.

32. In or about March 24, 1997 the Village of Anmore adopted a policy regarding the issue of subdivision by easement. ANNEXED AS SCHEDULE "11" is a copy of Council's policy with respect to subdivisions by easement.

Part 3:LEGAL BASIS

Rules or Enactments Relied on:


1. The *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 2 41.
2. Rule 2-1(2)(b), 14, 16, 21-3, 22, of the Supreme Court Civil Rules.
3. The *Local Government Act*, RSBC 1996 c. 232,
4. The *Land Title Act* RSBC 1996 c. 250 s. 75, 76, 86, 87
5. The inherent jurisdiction of the Court.

Part 4:MATERIAL TO BE RELIED ON

1. Affidavit # 1 of Donna Webber sworn August ____, 2011, and
2. Affidavit #1 of Gary Norgard sworn August ____. 2011.

The Petitioners estimate that the hearing of the petition will take 1 day.

Date at Vancouver, British Columbia on August 3, 2011


Nathalie Baker
Solicitor for the Petitioners

To be completed by the court only:

Order made

in the terms requested in paragraphs 1-3 of Part 1 of this Petition.

with the following variations and additional terms:

Date [day/month/year]

Signature of Judge Master