YOUNG ANDERSON
BARRISTERS & SOLICITORS

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NEWSLETTER

Municipal Zoning Restrictions Apply to Moorage and Public Interest Special Costs Awards Limited

The August 2013 ruling of the BC Supreme Court that a local government's zoning power can extend to the regulation of long-term moorage was recently affirmed by the BC Court of Appeal's judgment in District of West Kelowna v. Newcomb*.*

Newcomb, a houseboat owner, had argued that the District's W1 Water Use (Recreational) zone restrictions on moorage were unconstitutional as being, in pith and substance, a matter falling within the federal head of power over navigation and shipping. The lower court judge concluded that zoning regulations prohibiting long-term moorage related to property and civil rights or matters of a merely local or private nature, both heads of jurisdiction assigned to the provinces under the *Constitution Act*, 1867. However, the lower court judge read the bylaw down under the doctrine of interjurisdictional immunity, as the prohibition of temporary moorage trenched on the protected "core" of the federal navigation and shipping power. As "read down" by the lower court, the W1 provisions thus allowed for temporary moorage directly incidental and related to active navigational use of vessels, but not long-term storage or moorage.

The District was satisfied with this ruling but Newcomb sought to overturn the finding that the subject matter of the W1 zone regulations came within a provincial head of power by arguing that the judge below did not appreciate the true motives behind the bylaw. However, the Court of Appeal found, by reference to the W1 zone's purpose statement – being to provide recreational opportunities, preserve the natural qualities of Okanagan Lake, and to provide for orderly development of boat docks – and its substantive provisions, that the lower court judge had correctly applied the principles of constitutional law.

Significantly, the finding that temporary moorage was incidental to active navigational use, and thus part of the protected core of navigation and shipping, did not mean that its subject matter, or pith and substance, could not also be within provincial jurisdiction. The constitutional jurisprudence recognizes that it is permissible for a valid provincial statute to affect matters within an exclusive federal head of jurisdiction, including the use of navigable waters.

Public Interest Litigant Costs at the Court of Appeal

The issue of public interest litigant costs was also considered in the *Newcomb* case. Newcomb had sought to avoid having costs awarded against him by arguing that he

was pursuing public interest litigation in challenging the constitutionality of the W1 zone.

The normal rule is that the successful party is awarded costs. However, a number of cases have carved out a possible exception to this rule where the litigation involves an issue with importance to a broader class than the direct parties to the litigation. Successful public interest litigants have been awarded special costs that approach their actual legal expenditures, while unsuccessful parties have escaped costs being awarded against them. Costs awards are discretionary, but the following factors have been identified to guide the court's discretion in determining whether a case qualifies as public interest litigation:

a) the case involves issues of importance extending beyond the parties' immediate interests;

b) the person has no personal, proprietary, or pecuniary interest in the outcome of the proceeding, or if they have such an interest, it clearly does not justify the proceeding economically;

c) the public body has a clearly superior capacity to bear the costs of the proceeding; and

d) the individual has not engaged in vexatious, frivolous, or abusive conduct.

Victoria v. Adams

had simply set the bar too low

for an award of special costs

in favour of

successful public interest litigants.

The Court of Appeal agreed with the lower court that Newcomb did not meet the test for public interest litigant status. Newcomb had a pecuniary interest in the outcome as he was currently without long-term moorage and, if successful, he could have avoided the expense of obtaining marina space for his vessel. The group affected by the case, of which he was part, was smaller than as characterized by Newcomb.

Although the public interest litigant argument was rejected, the Court of Appeal reversed the lower court's cost ruling in favour of the District due to Newcomb's partial but "significant" success in defending the action by having the bylaw read down to permit some short-term moorage.

A number of recent decisions have tended to favour local governments where the court rejected public interest costs arguments, including *Orchiston v. Formosa* (2014), an unsuccessful application to disqualify Powell River council members over loans contrary to *Community Charter*, and *Suman v. Invermere* (2014), an unsuccessful petition to quash resolutions authorizing cull of urban deer. The most notable case going against a local government was *Victoria v. Adams* (2011), where the Court of Appeal ordered special costs against the City on a successful challenge to restrictions on the erection of temporary shelters.

MAY 8 - SAVE THE DATE

BYLAW DRAFTING, PLANNING & LAND USE MANAGEMENT
ANNOUNCING THE FIRST IN OUR SERIES OF FREE DAY-LONG SEMINARS – NANAIMO, BC

Young, Anderson will be offering a free day-long seminar for our Vancouver Island clients on May 8, 2015 at the VICC in Nanaimo.

The seminar will cover bylaw drafting in the morning, and planning and land use management topics in the afternoon. The morning session focusing on drafting issues in the preparation of bylaws and amendments will be of interest to corporate officers and administrators, planning staff, and other civic staff involved in bylaw drafting. The afternoon will be dedicated to in-depth presentations on current planning law topics. The seminar has been designed so that participants can attend a half-day only if they wish. The seminar will qualify for Planning Institute of B.C. CPD credits.

Presenters will include **Alyssa Bradley**, **Bill Buholzer**, **Guy Patterson** and possibly a surprise guest presenter.

Further dates for seminars on the mainland will be announced shortly.

If you are interested in attending the Nanaimo seminar please contact Kristine at thimsen@younganderson.ca for registration details.

The Supreme Court of Canada's recent decision on physician-assisted death, *Carter v. A.G. Canada* (2015), also tackled the issue of public interest litigation costs and firmly rejected the test from *Victoria v. Adams* based on consideration of the four factors outlined above. The Court cautioned against the courts seeking "on their own to bring an alternative and extensive legal aid system into being." *Victoria v. Adams* had simply set the bar too low for an award of special costs in favour of successful public interest litigants. Special costs should be available only in "exceptional" cases. The SCC went on to find that *Carter* was one of those truly exceptional cases.

The SCC modified the four factors to make them more stringent, including by requiring that the litigant go beyond showing it has no personal pecuniary interest that would justify the proceedings on economic grounds, "to show that it would not have been possible to effectively pursue the litigation in question with private funding." Although the Court's primary focus was on the test for awarding special costs to successful litigants, in tightening up the factors that previously applied to all public interest litigant costs cases, the SCC's comments in *Carter* are also likely to reduce the prospects of successful local governments losing their entitlement to costs on public interest litigant considerations.

Barry Williamson

CPR on Track in Arbutus Corridor

In a judgment from 2006, the Supreme Court of Canada decided that the City of Vancouver's down-zoning of the CPR right of way through the West Side of Vancouver, from RS-1 single family to railway, cyclist and nature paths only, was not a sterilization of the land, since the CPR could still run a railway over the land; they just could not subdivide the land and use the land for single family dwellings.

In *City of Vancouver v. Canadian Pacific Railway and Attorney General for Canada* [2015 BCSC 76], released in January of this year, the City sought an injunction restraining the CPR from using the lands for railway purposes. Since the original SCC decision, individuals had begun using the "unused" railway right of way for pedestrian and cycling paths and community gardens. The CPR did not enforce against such trespassers.

The CPR now sought to evict the trespassers and utilize the rail line for railway purposes, including coupling and uncoupling trains and storing box cars and other rails cars on the tracks. In order to clear the right of way and repair any aged tracks, the CPR began to bar trespassers and evict community gardeners.

The City has been negotiating to buy the CPR property for a number of years, but the parties are far apart on price. In advancing its injunction claim, the City took the position that the CPR's removal of the trespassing community gardens was contrary to the Official Development Plan, as removal of the community gardens required a development permit because it constituted "construction", "engineering", or other operations on land, pursuant to the definition of "development" in the *Vancouver Charter*.

The BC Supreme Court stated the obvious, that the CPR's plans to clear the tracks and right of way to the extent necessary for safe rail operations was not work contrary to the Official Development Plan.

The upshot of the proceedings was that the CPR could make ready the tracks and the right of way for rail use. The CPR gave an undertaking to the Court not to operate trains until Transport Canada had inspected the rail line and determined that it complies with the *Railway Safety Act*. The CPR is thus free to evict trespassers and utilize the rails for various rail purposes, including, but not limited to, running trains, and storing trains and loaded cars as a normal part of its rail operations.

Ray Young, Q.C.

A Subdivision By Any Other Name

A recent decision from the British Columbia Court of Appeal relating to the subdivision and development of land addressed the interpretation of three statutory provisions: sections 943, 929 and 879 of the Local Government Act.

Bradshaw v. Victoria (City), 2015 BCCA 4, is notable for the clarity by which it confirms existing precedent rather than its creation of new law. The case centered on the effect of an application for subdivision that had been submitted, but not yet approved or deposited, before an official community plan amendment was adopted. The applicant objected to the fact that he had to obtain a development permit as a result of the OCP amendment, which placed the property within a development permit area. In affirming the trial judge's finding that the property was subject to the development permit requirement, the Court of Appeal discussed the interpretation of the following sections of the *Local Government Act*:

Section 943 applies only to bylaws related to the subdivision of land, and not to development or building permits that might be necessary to develop the land once subdivision is complete.

1. Section 943

Section 943 of the *Local Government Act* says that if, after an application for a subdivision of land within a municipality has been submitted and the applicable subdivision fee has been paid, a local government adopts a bylaw under Part 26 that would otherwise be applicable to that subdivision, the bylaw has no effect with respect to that subdivision for a period of 12 months after it was adopted unless the applicant agrees in writing that it should have effect.

The Court of Appeal questioned the chambers judge's conclusion that the applicant did not benefit from section 943 because the applicant had paid only a processing fee and not the final approval fees, development cost charges, deposits, or cash in lieu of parkland demanded by the municipality. Groberman JA observed that section 943 was intended to provide developers with some certainty prior to spending a good deal of time and money and commented that: "the chambers judge's interpretation in this case is unlikely to be workable, because the total amount of fees ultimately payable to a municipality in respect of a subdivision will not be known at the outset of the process."

However, the appeal judge agreed that section 943 applies only to bylaws related to the subdivision of land, and not to development or building permits that might be necessary to develop the land once subdivision is complete. Section 872 of the *Local Government Act* adopts the definition of "subdivision" in section 1 of

the *Land Title Act*, which reads: "subdivision means the division of land into 2 or more parcels, whether by plan, apt descriptive words or otherwise." This narrow definition could not be extended to exempt an in-stream subdivision from the requirements of a new OCP provision.

2. Section 929

The developer also attempted to rely on section 929 of the *Local Government Act*, which permits a local government to withhold a building permit for up to 30 days upon passing a resolution identifying a conflict between the development proposed in the building permit application and a proposed OCP provision. The trial court found, and the Court of Appeal agreed, that this section deals only with situations in which a person who has made an application for a building permit has a *prima facie* right to the immediate issuance of the permit. In this case, there was no such right because the lots to which the building permits would attach did not yet exist.

3. Section 879

Finally, the developer attempted to argue that the new OCP was adopted without adequate consultation under section 879 of the *Local Government Act*. The Court of Appeal found that, although this section makes consultation mandatory, it gives the local government broad discretion in determining the nature and extent of consultation. The Court confirmed that a court's review of the adequacy of such consultation should be deferential, in accordance with a reasonableness standard rather than a correctness standard, since municipal councils are elected bodies undertaking legislative functions. On the evidence, the City's consultation in this case was found to be reasonable.

This case does not break new ground in terms of established law, but provides helpful clarification, especially regarding the question of what local government actions may be restrained under section 943 by virtue of falling under the umbrella of "subdivision".

Elizabeth Anderson & Michael Moll


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Approving Officers Entitled to Considerable Deference

In The Tuwanek Ratepayers Association v. District of Sechelt and Ray Parfitt Approving Officer, *the Ratepayers Association sought to set aside a preliminary approval of a bare land subdivision.*

The Court noted at the beginning of the judgment that the Approving Officer's interpretation of his statutory authority under the *Land Title Act* and/or the Bare Land Strata Regulations had to be correct. If the Approving Officer was correct in interpreting the Provincial statutes and regulations on which his authority was founded, then the ultimate decision to approve or not approve a particular subdivision on its merits was a discretion that only had to produce an outcome that fell within reasonable bounds. The Court noted the Approving Officer was entitled to considerable deference on the merits, and the Court ultimately concluded that Sechelt's Approving Officer had acted reasonably and within his jurisdiction.

The Court also considered whether an Official Community Plan Bylaw is a bylaw regulating the subdivision of land and zoning within the meaning of section 87 of the *Land Title Act*. In *Tuwanek*, the minimum parcel size permitted by Sechelt's zoning bylaw was 0.66 hectares, while the OCP provided for a minimum of 2 hectares. With regard to the OCP, the Court expressly held that, for the purposes of section 87 of the *Land Title Act*, an OCP is not "a bylaw regulating the subdivision of land". The Court characterized the OCP as a policy document having a "guidance role" for council, and not a regulatory instrument.

The Ratepayers Association's petition was ultimately dismissed.

Ray Young, Q.C.

Congratulations Alyssa!

We are pleased to announce that **Alyssa Bradley** has joined the partnership at Young Anderson.

Ex-employee's breach of confidentiality triggers requirement for re-payment of settlement funds

Confidentiality requirements are often included as part of the settlement of employment disputes. However, a question arises about whether there is any recourse if an ex-employee discloses details of the settlement in contravention of a confidentiality clause. A recent case from Ontario confirms that there is.

The case arose out of a labour arbitrator's decision that Jan Wong, a former reporter for The Globe and Mail, had breached the confidentiality provisions in the Memorandum of Agreement that had settled grievances regarding her employment. As a result of this breach, Ms. Wong was required to re-pay settlement funds in the amount of $209,912.00 to her former employer.

In the Memorandum of Agreement, Ms. Wong had agreed to a non-disparaging clause along with a confidentiality clause. The confidentiality clause expressly stated that if she breached her confidentiality obligations, she would be required to pay back certain settlement funds.

Ms. Wong wrote a book and the Arbitrator found that the following 4 phrases from her book breached the confidentiality provisions in the Memorandum of Agreement:

- ...I can't disclose the amount of money I received
- I'd just been paid a pile of money to go away...
- Two weeks later a big fat check landed in my account.
- Even with a vastly swollen bank account...

Ms. Wong argued that the requirement to re-pay was unconscionable. The Ontario Superior Court did not agree:

> "The deal under the MOA was clear. The Globe and Mail was to pay the applicant a large lump sum and the applicant was to stay quiet about the payment. It was an entirely reasonable enforcement mechanism, if the applicant failed to meet her main obligations under the MOA – confidentiality – that The Globe and Mail would be relieved of its main obligation under the MOA – the second lump sum payment."

The Court also disagreed with Ms. Wong's argument that she did not breach the MOA because she believed she could speak about

the terms of the settlement so long as she did not reveal the actual amounts paid. Accordingly, the decision of the Arbitrator that Ms. Wong had to re-pay the above amount was upheld.

If local government employers are concerned about confidentiality in relation to the settlement of employment disputes, we highly recommend that they add a re-payment obligation in any confidentiality provisions included in their settlement agreements. This case from Ontario confirms that, where expressly stated, ex-employees will be required to repay settlement funds if they breach their confidentiality obligations.

The Court also disagreed with Ms. Wong's argument that she did not breach the MOA because she believed she could speak about the terms of the settlement so long as she did not reveal the actual amounts paid.

Carolyn MacEachern

Official Mark or Trademark? How about both?

Local governments looking to protect their emblems, crests, slogans, and logos, have two options for protection: official mark or trademark.

While trademarks may be registered or used by anyone, official marks are a unique feature of Canadian trademark law and provide a special type of protection that is only available to public authorities. Subparagraph 9(1)(n)(iii) of the Canadian *Trademarks Act* provides that no person shall adopt in connection with a business, as a trademark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for, any badge, crest, emblem or mark adopted and used by any public authority in Canada as an official mark for wares or services, in respect of which the Registrar has given public notice of its adoption and use.

Official marks are not registered or owned in the same way that trademarks are registered and owned. In order to protect an official mark, the public authority must simply request that public notice be given of its use and adoption. The public authority does not have to show that the official mark is distinctive of any goods or services – unlike trademarks, which must be distinctive, official marks can be completely generic – but the public authority will have to show that it is using the mark, on its own and distinct from any other user (e.g. on its website or on printed materials). Once public notice of an official mark is published in the Canadian Trademarks Journal, the official mark becomes a prohibited mark under the

Act and cannot be adopted by anyone else in connection with a business, as a trademark or otherwise. It is the filing of the notice that operates to prevent others from using that crest, logo, or symbol. Official marks are valid forever without the need for renewal, whereas the registration of a trademark is valid for 15 years. Notice of an official mark usually takes between 2 and 3 months to complete, while trademark registration can take up to a year, and the cost of filing a notice of an official mark is typically 1/3 of the cost of registering a trademark.

While official marks offer a considerable level of protection to public authorities who wish to prevent others from using their logos and emblems, the scope of protection provided by an official mark is somewhat narrower than that afforded by a regular trademark. Official marks only provide protection against the use of marks that are physically identical or confusingly similar to the official mark, and the Courts have applied that threshold rather narrowly. Trademarks, in contrast, provide arguably better protection as they will be compared to marks that may be less physically similar but that are being used in a manner that is confusingly similar. With a trademark, even if someone else's mark is not physically identical to the local government's mark, the local government may be able to challenge the other mark if the circumstances in which it is being used make it confusingly similar to the local government's mark. Further, while an official mark will allow a local government to stop someone from using an identical or confusingly similar crest, logo, or symbol, a registered trademark allows a local government to not only stop the infringing use but also sue for damages for infringement and require the destruction of any infringing goods.

For local governments, it is generally advisable to file a notice of official mark with respect to any logo, word, slogan, or symbol used to represent the local government. However, in those cases where a local government is concerned that use of its mark by another party could cause the local government financial loss or damage (e.g. use by a competing service provider), the local government may wish to consider trademark registration in addition to official mark status so that it can take advantage of increased protection and greater enforcement options.

Official marks are a unique feature

of Canadian trademark law

and provide a special type of protection

that is only available

to public authorities.

Joanna Track

Welcome to the Bar

Guy Patterson will be called to the bar in March and will continue with Young Anderson as an associate. His planning background is an asset to both the firm and clients. Congratulations Guy!

Your local government is more musical than you realize: SOCAN and Re:Sound Tariffs

Local governments own and lease many places where live and pre-recorded music is played for public enjoyment, such as halls, convention centres, theatres, skating rinks, sports venues, and fitness and recreational facilities. Parades, fairs, and exhibition events also feature live and pre-recorded music.

Copyright is a property right granted by law to authors, composers, performers, and other creators. To play a song in public, you need the copyright owner's consent. You may think that paying a DJ or a band, or paying for a CD or music track, is sufficient for any piece of music to be played in a public place, but this is not the case. The intellectual property holders in each piece of music played have a potential claim against a local government for music that has been publicly played, whether live or pre-recorded, without permission from every rights-holder with respect to that piece of music. Without such prior authorization, a local government is potentially liable for a claim in damages for infringement of copyright.

It would be impossible to negotiate with each composer, artist, music company, and music publisher for each song that your local government plays in any given year.

It would be impossible to negotiate with each composer, artist, music company, and music publisher for each song that your local government plays in any given year, especially given the network of assignments of copyright that exist internationally. Canada has entered into international conventions and enacted statutes to deal with copyright through collective administration for music performance rights, among other types of intellectual property. The federal government, under the *Copyright Act*, established royalties to provide fair compensation to composers, performers, and record labels for the use of music and sound recordings. The Copyright Board of Canada is the regulatory body for royalties for the use of works protected by copyright, and it has mandated two organizations to be receivers of those royalties, who in turn distribute those royalties to the copyright holders.

SOCAN (Society of Composers, Authors and Music Publishers of Canada) administers the performing rights in musical works on behalf of Canadian composers, authors and publishers, as well as affiliated international groups that represent foreign composers and publishers. Re:Sound (Re:Sound Music Licensing Company) is the not-for-profit music licensing company that administers performance rights of musicians and record companies in their sound recordings within Canada. SOCAN licenses both live and recorded music, while Re:Sound licenses only recorded music.

Both SOCAN and Re:Sound are certified by the Copyright Board of Canada to collect royalties through a system of tariffs for various types of music performance, which SOCAN and Re:Sound then distribute to music creators in Canada and around the world.

Tariffs are certified each year by the Copyright Board of Canada by publication in the Canada Gazette. Various music use patterns are broken into different tariff categories, and the calculation of the actual fees paid for that tariff can vary as set out in the tariff, for example based on a per seat, per event, percentage of gross revenue, or fixed amount calculation.

It is important to remember that tariffs are not taxes. Taxes are collected by the government and spent for government purposes. Tariffs are royalties, paid for the use of intellectual property, collected by not-for-profit collectives and then distributed to individual rights holders. SOCAN and Re:Sound tariffs are separate and distinct performance rights license fees. Paying one collective does not exempt a local government from paying the other if the tariff is applicable.

For some activities and building uses, such as use of pre-recorded music in a sports venue, tariffs to both organizations are payable, whereas for other activities, such as live musical performance, only a tariff to SOCAN is payable (on the expectation that the performer is being paid directly). Re:Sound's tariffs have generally been set lower than SOCAN's tariffs by the Copyright Board of Canada.

When dealing with this subject, local governments may wish to take the position that all other people using music in public spaces (from community hall user groups to parade permit holders) are responsible for paying applicable copyright tariffs before they begin use of those public spaces. For example, for licenses and leases of public spaces such as theatres, halls, and sports venues, local governments could include as a standard clause in the license agreement that the licensee will pay all associated fees to SOCAN and Re:Sound for the rights to have entertainers perform either in person or by means of recorded music. Each local government will need to decide whether it is administratively more cumbersome to spend the time to ensure each licensee actually obtains the required copyright permission, or whether the local government should pay the tariffs itself as part of the service of providing the public space.

Finally, similar copyright collective societies in Canada collect royalties for other forms of intellectual property, such as films, audio-visual media, screenplays, books and other print media and the visual arts. If you find that your local government is displaying, distributing or using these types of intellectual property in a public way, visit the Copyright Board of Canada website to find contact information about these other copyright collective societies.

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to take the position that all other people

using music in public spaces... are responsible

for paying applicable copyright tariffs...

Copyright Board of Canada: www.cb-cda.gc.ca

SOCAN: www.socan.ca

Re:Sound: www.resound.ca

Christina Reed

Flood Hazard Area Land Use Management: Remember Section 910?

As if unusual precipitation events, king tides, and tsunami warnings were not already focusing local governments' attention on flood hazard management issues, the Province's recent proposals to revise the 2004 Flood Hazard Area Land Use Management Guidelines may have reminded many that local governments have had sole jurisdiction over land use management in relation to flood hazards for more than 10 years. These climate change-related proposals have prompted some local governments to reflect on just where their responsibilities lie with respect to this important and potentially litigious issue.

The story thus far: in 2003, s. 910 of the *Local Government Act* was amended to remove the authority of the Minister of Environment to designate flood plains and thereby trigger the general prohibitions in s. 910 on constructing buildings below a designated flood construction level (FCL) and siting buildings within designated setbacks from watercourses. Also removed was the authority of the Minister to handle applications for exemptions from these restrictions. Concurrently, approving officers exercising discretion under s. 86(1)(d) of the *Land Title Act* were put in sole charge of subdivision approvals in flood-prone areas. Approving officers were also given authority to modify or discharge statutory covenants previously granted to the Provincial government in relation to subdivision approvals in flood-prone areas.

Instead, the s. 910 amendments required local governments to "consider" Provincial guidelines regarding flood hazard management when adopting s. 910 bylaws, and prohibited them from granting exemptions from such bylaws when the exemption is inconsistent with such guidelines, unless a professional engineer has certified that the land can be safely used if the exemption is granted.

On its face, an obligation to "consider" Provincial guidelines when enacting s. 910 regulations doesn't seriously constrain local governments in the range of flood plain regulations that they might enact in relation to any particular water body. Case law on statutory requirements to "consider" something suggests a requirement that is substantially less onerous than a requirement to "comply with" or to "conform to" something.

Below the surface of things, however, failure to toe the line with respect to the guidelines has consequences, grounded in the Compensation and Disaster Financial Assistance Regulation (CDFAR) enacted under the *Emergency Program Act* and a related Provincial government administrative policy. Sections 15 and 30 of the Act prohibit the Province from providing financial assistance in respect of a building in a designated flood plain area that is damaged in a flood, if the building was not "properly flood protected". The Provincial government's interpretation of this regulation, contained in a 2006 Ministry of Environment policy document, means (in relation to buildings constructed in a flood plain designated by a local government since the amendment of s. 910 in 2003), that the building in question must "meet the flood protection requirements described in the provincial guidelines" that are mentioned in s. 910. Thus, while a local government must only "consider" such guidelines when designating a flood plain, there are consequences if it designates a flood plain in a manner that does not meet the guidelines.

While one might take issue with the Ministry's interpretation of these sections of the Regulation as expressed in its policy, the reality is that all compensation and financial assistance provided by the Province under the *Emergency Program Act* is entirely discretionary. The Province is entitled to refuse to provide assistance to property owners who have constructed their buildings in known floodplains, even if in doing so they have met, or exceeded, the flood protection requirements described in the guidelines.

The existence of the Regulation and the related MOE policy raise the question of why a local government would not, in designating a flood plain under s. 910, simply ensure that their bylaw complies with the Provincial guidelines, to avoid the financial consequences just described. The answer may be found in the guidelines. The May 2004 Flood Hazard Area Land Use Management Guidelines[1] set out standards for floodproofing of buildings and structures that are premised, in the case of areas that are protected by dykes, on the failure of the dykes in the event of a flood that has a statistical probability of occurring once every 200 years. The floodproofing requirements include minimum floor elevations (FCLs) for habitable areas that are somewhat above the level floodwaters will reach during the 200-year flood after the failure of the dykes, as well as minimum building setbacks from watercourses. All of that is probably reasonable for "greenfield" development, where a historical standard for the elevation of buildings has not been established. For existing built-up areas, however, the Guidelines generally require local governments to insist on a ground floor level of new buildings up to 8 feet higher than the floor levels of adjacent homes that have their ground floors at grade. (Where the building is not protected by a standard dyke, new buildings might have to be constructed at an even higher elevation, depending on the actual FCL associated with the relevant flood event.)

Given the geography of British Columbia, the majority of our communities have been established in valleys, and the historic central areas of these communities are generally immediately adjacent to a river or lake. In many of these communities, efforts are ongoing to preserve and restore significant buildings and to promote the revitalization of these areas in the face of pressures from suburban retailers and subdivision developers. Few local governments are willing to impose a development pattern that involves a full storey differential between the entry levels of adjacent premises. Even a floodplain bylaw that requires a modest elevation of ground floor levels above the FCL would, unfortunately, seem to disqualify potential claimants from receiving disaster financial assistance from the Province, if the elevation is less than the Provincial guidelines describe. The only way to avoid the consequences of the CDFAR is not to adopt a bylaw under s. 910 that designates a floodplain; these bylaws are, after all, not mandatory.

Adopting a floodplain bylaw under s. 910 that meets the standards described in the current Provincial Guidelines, let alone the more onerous guidelines that have been proposed, will produce discordant development in many existing neighbourhoods

As regards subdivision approvals, while there is no reference to the Provincial Guidelines in Part 7 of the *Land Title Act* or in the Bare Land Strata Regulations, the Guidelines correctly state that approving officers exercising authority under those enactments have authority to require an applicant to provide a report certified by a professional engineer or geoscientist that the land may be used safely

[1] http://www.env.gov.bc.ca/wsd/public_safety/flood/pdfs_word/guidelines-2011.pdf.

for the use intended. In preparing such a report, the professional will likely make reference to the Provincial Guidelines, and to an APEGBC publication "Professional Practice Guidelines – Legislated Flood Assessments in a Changing Climate in B.C.", a June 2012 document that anticipates some of the amendments to the Provincial Guidelines that are discussed below.[2] The amendments to the Provincial Guidelines specify that all lots created by subdivision should have "viable building sites on natural ground that comply with the Year 2100 FCL and setback guidelines" and that approving officers should require, in respect of redevelopment at the end of the lifespan of buildings constructed in accordance with those standards, that a covenant be granted requiring that any redevelopment meet the FCL and setback requirements in force at the time of redevelopment (which the authors are thereby suggesting could be even higher than those contained in the amendments).

In 2013 the Ministry of Environment published proposed amendments to the Provincial Guidelines to address climate change phenomena and sea level rise.[3] The amendments would, in general terms, raise flood construction levels in areas adjacent to the sea and watercourses that are subject to the influence of tides by approximately 1 metre. Building setbacks would be adjusted to require siting at least 15 metres from the future estimated natural boundary of the sea in the year 2100, rather than the current natural boundary (this could be a very minor increase in the setback or a major increase, depending on shoreline topography). For existing development, the year 2100 FCL requirements would apply, but increased setbacks would not be required if they would sterilize the lot and a qualified professional has "recommended" that they be reduced.

Adopting a floodplain bylaw under s. 910 that meets the standards described in the current Provincial Guidelines, let alone the more onerous guidelines that have been proposed, will produce discordant development in many existing neighbourhoods. The proposed amendments make it even more unlikely that a local government will exercise its discretion to adopt such a bylaw.

So what can local governments do if they're reluctant to exercise their s. 910 powers? There are a number of other tools that local governments can use to address flood hazards:

1. Section 877(1)(d) of the *Local Government Act* requires local governments to include in their OCPs restrictions on the use of land that is subject to hazardous conditions. Land use regulations permitting development in floodplain areas would potentially be inconsistent with such OCP provisions, and therefore invalid. Approving officers would be entitled to rely on such statements and map designations in rejecting subdivision applications for flood-prone areas, or requiring subdivision designs that provide a building envelope on each new parcel that is safe from the flood hazard that could exist during the lifetime of a building constructed on the parcel.

2. Local governments may designate development permit areas and establish guidelines for the protection of development from hazardous conditions such as flooding, under s. 919.1(1)(b), and in considering permit applications for such areas may require the preparation of reports certified by a professional engineer to assist in identifying appropriate permit

[2] https://www.apeg.bc.ca/getmedia/18e44281-fb4b-410a-96e9-cb3ea74683c3/APEGBC-Legislated-Flood-Assessments.pdf.aspx. The document notes (at p. 127) that "sea level rise on the BC coast may be as much as 1 m by the end of the century".

[3] http://www.env.gov.bc.ca/wsd/public_safety/flood/pdfs_word/amendment_to_S35_36_FHALUMG13-05-07.pdf.

conditions. These are the only development permit areas in which permit conditions and requirements may vary permitted uses or densities under the zoning bylaw in order to address health, safety or the protection of property from damage. Because the application of particular DP guidelines to particular properties is a matter of discretion, this approach offers the possibility of a much more nuanced application of floodproofing standards to built-up areas, where the desirability of increased FCLs can be balanced against civic design and neighbourliness objectives.

3. Finally, building officials may exercise independent powers under s. 56 of the *Community Charter* to require professional persons to address flood hazards when building permit applications are made in flood-prone areas.

In none of these activities are local governments bound to meet the flood protection requirements described in the Flood Hazard Area Land Use Management Guidelines, either in their present form or once amended to address climate change impacts, though local governments may find the guidelines a useful source of information when exercising these powers. The CDFAR doesn't prohibit the provision of disaster financial assistance to persons who have constructed their buildings in accordance with any requirements imposed with these land use management tools, though of course, since all such assistance is wholly discretionary on the part of the Province, neither does it guarantee that such assistance will be provided in the event of a disaster that damages or destroys these buildings.

Bill Buholzer ✍

JOB WELL DONE!

The firm bids a fond farewell to **Pat Kendall**, who retired at the end of 2014. In recognition of Pat's 26 years of practice (and her multi-course homemade lunches), here's a short excerpt from the poem Ray Young recited at Pat's retirement lunch:

Among the associates she's number one
And will always be so until she is done.
Her lunches are known to have cleared out the floor
And her dinners are legends and part of firm lore.

Pat will be missed and today possibly kissed,
Even though her absence from the kitchen will secretly be bliss.
Her precedents survive as the firm's lasting treasure,
A trove we will value as a sign of her measure.

This limerick is from all of us you've advised and taught,
To tell you that it has really not been for naught.
In fact your presence will never disappear
Because we all know your spirit will always be here.

My Friend, My Foe: Michigan Court Antics and the Case for Canadian Politeness

People sometimes complain that as lawyers we are too polite to judges and other lawyers when circumstances appear to indicate that a less respectful approach might be justified. We refer to opposing counsel as "my friend," regardless of our personal feelings for him or her, and even "my learned *friend", whatever intellectual weakness he or she might be exhibiting. In British Columbia that politeness is typical amongst judges as well, who usually speak only in the most respectful terms about the reasoning and judgment of their colleagues. Apparently a similar ethic is not embraced in Michigan. I recently ran across an entertaining example of their approach.*

In 2006, a seven member panel of the Michigan Supreme Court was called upon to determine whether a Michigan District Court judge had violated certain canons of Michigan's Code of Judicial Conduct by accepting football tickets from defence counsel in open court, following a plea appearance by that counsel who was himself a former judge. Amongst the canons at issue was a requirement of the Code that judges "avoid all impropriety and appearance of impropriety." The majority held that while Judge Haley had violated a more specific canon of the Code dealing with the acceptance of gifts, he had not violated the impropriety canon. This didn't sit well with one of the dissenting judges, Judge Weaver, who proceeded to accuse the majority of purposely misinterpreting the impropriety canon in order to cover up prior acts of impropriety in which she suggested the majority had themselves engaged, namely refusing to recuse themselves in a number of prior cases involving a local lawyer (and talk show host), one Geoffrey Fieger, who was a vigorous and vocal opponent of the majority judges. In the Haley case, Judge Weaver said this about four of her Supreme Court colleagues:

These lawyers and judges in Michigan

make a pretty good case for the more polite...

communication ethic that is usually

observed by

British Columbia lawyers and judges

> "The timing of the majority's new approach to JTC cases, and its vigorous rejection of the appearance of impropriety standard of Canon 2(A), is noteworthy. Canon 2(A) states in pertinent part:

> *Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety.* [emphasis added]

> Members of the majority have recently been accused of their own appearances of impropriety for their participation in various cases. They have attempted to characterize these accusations as politically and philosophically motivated, but it is alarming that now the majority's apparent solution to their predicament is to rewrite how rules that govern the conduct of judges will be applied."

The majority responded with this:

> "Rather than engage the members of this Court on the legal issues relevant to this case, Justice WEAVER has abandoned any pretense of persuasion or an appeal to reason and delivered herself of an unwarranted and intentionally vile personal diatribe whose sole purpose is to denounce and injure her colleagues in the majority. Her opinion here is a prologue to the more venomous allegations Justice WEAVER makes in *Grievance Administrator v. Fieger*. As we have responded to such allegations in *Grievance Administrator v. Fieger*, we decline to dignify Justice WEAVER'S splenetic opinion here by responding further to it."

After looking up "splenetic" (bad-tempered), I had to see Judge Weaver's "more venomous allegations" in the *Fieger* case. It only gets better.

As will be seen, Mr. Fieger didn't like the majority judges about whom Judge Weaver was speaking. But they were not the only judges he didn't like. In 1997, the Michigan Court of Appeals overturned a $15 million verdict Mr. Fieger had secured from a jury in a medical malpractice case. Three days later, Mr. Fieger was on the attack on his talk show, declaring war on three of the Court of Appeal judges, referring to them by name, calling them "three jackass Court of Appeal judges", comparing them to Hitler, Goebbels, and Eva Braun, and suggesting that they ought to be sodomized by various implements and body parts.

These comments landed Mr. Fieger in hot water with a body called the Attorney Grievance Commission, who filed a formal complaint against Mr. Fieger to the Attorney Disciplinary Board, which in turn found that Mr. Fieger's comments violated Michigan's Rules of Professional Conduct, but that no sanction could be imposed because the rules themselves violated the First Amendment. That brought the case *(Grievance Administrator v. Fieger)* to appeal before the Michigan Supreme Court and Judge Weaver and her colleagues, including the four judges about whom she later complained in the *Hayley* case.

In the *Fieger* case, Judge Weaver writes a vigorous judgment attacking the participation of those four judges, Judges Taylor, Young, Corrigan and Markman, alleging that all of them should have recused themselves because of an appearance of bias against Mr. Fieger, arising as a result of their past dealings with him.

Six months before Mr. Fieger's disciplinary case came before the Supreme Court, Judge Corrigan's campaign committee had mailed a fund-raising letter saying, "We cannot lower our guard should the Fiegers of the trial bar raise and spend large amounts of money in

hopes of altering the election by an 11th hour sneak attack." Judges Taylor, Young and Markman had also referred to Mr. Fieger by name in various election speeches. They had also published a joint campaign ad in which they referred to one of their opponents, a Judge Robinson, as having published vicious, false and silly charges. They went on to say it was "no wonder Geoffrey Fieger, Jesse Jackson and the trial lawyers support Robinson." Judge Markman was also currently an actual defendant in a case filed against him by Mr. Fieger.

The harsh comments ran the other way as well. Mr. Fieger had publicly called Judge Taylor "amazingly stupid," had commented that he must never have actually practiced law and had complained that in the voting booth he had the advantage of being described as an "incumbent judge" when voters should have been informed instead that he was a "failed Republican nominee for Attorney General who never had a job in his life." He complained about the inability to get a fair hearing before Judge Taylor, suggesting that "This guy has a political agenda" and "I knew in advance what he was going to do." Mr. Fieger had also been the subject of a formal complaint initiated as a result of comments he had made about Judge Corrigan.

Despite this history (only a small part of which I have noted), none of the four judges recused themselves when Mr. Fieger's disciplinary case arrived before them, proceeding instead to find that Mr. Fieger had violated the Michigan Rules of Professional Conduct, relying primarily on their view that to recuse themselves from hearing cases involving Mr. Fieger would invite a judge's opponents to instigate public attacks and lawsuits in order to force the disqualification of their opponents. They also had an interesting response to Judge Weaver's demand for their recusal:

> "With her dissent, Justice WEAVER completes a transformation begun five years ago, when all six of her colleagues voted not to renew her tenure as Chief Justice of this Court. This transformation is based neither on principle nor on 'independent' views, but is rooted in personal resentment. This transformation culminates today in irresponsible and false charges that four of her colleagues are 'biased and prejudiced' against attorney Geoffrey Fieger and therefore must be disqualified from hearing his cases – a call that Justice WEAVER, who has received Mr. Fieger's political support, seems to believe that she is uniquely privileged to make."

Despite this history...

none of the four judges

recused themselves when Mr. Fieger's

disciplinary case arrived before them.

These lawyers and judges in Michigan make a pretty good case for the more polite (though sometimes artificial) communication ethic that is usually observed by British Columbia lawyers and judges.

Gregg Cockrill

Look for your Lawyers

Ray Young was in Atlanta, Georgia for 4 weeks in February to co-teach a law course at Georgia State University Faculty of Law.

Gregg Cockrill will be presenting a session entitled "First Nations" at the Regional District CAO Forum being held in Victoria from March 24-25.

Carolyn MacEachern will be presenting a session entitled "Freedom of Information" on the final day of the North Central Local Government Management Association 2015 AGM and Conference being held in Prince George from April 7-9.

Ray Young, **Reece Harding** & **Gregg Cockrill** will be presenting a session entitled "First Nations" and Bill Buholzer will be presenting a session entitled "Professional Ethics" at the 2015 PIBC Annual Conference – Beyond Borders being held in Seattle from April 16-17.

Francesca Marzari will be presenting a session with Linda Adams entitled "Shipping and Navigation" at the Pacific Business & Law Institute Program on The Role of Local Governments in Canadian Federalism, being held in Vancouver on May 20. Young Anderson's clients are eligible for a 15% discount on registration for the course, so please contact us if you're interested in attending.

Reece Harding will be presenting a session entitled "Tips in the PILT World" at the GFOA Conference in Penticton from May 27-29.

Christina Reed will be presenting a session entitled "Development Cost Charges" at the GFOA Conference in Penticton from May 27-29.

Christina Reed and **Elizabeth Anderson** will be presenting a session entitled "Reserve Funds & Tax Sales" at the GFOA Conference in Penticton from May 27-29.

Look for us at the Local Government Management Association Conference being held in Prince George from June 16-18. **Bill Buholzer** will be speaking at the Approving Officer's Seminar on June 16 and will be moderator for a session entitled "Auditor General" on June 17. **Sukh Manhas** will be presenting a session entitled "Have you Been Defamed?" and **Francesca Marzari** and **Alyssa Bradley** will be presenting a session entitled "The Tough Issue of Homelessness". Our lawyers will be around the Conference and otherwise available for meetings upon request.

Reece Harding will be teaching an "Introduction to Local Government Law and Bylaw Drafting" at the Municipal Administration Training Institute (MATI) on August 11, 2015 at the University of Victoria.