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NEWSLETTER

Is Your New "Home Office" a Zoning Contravention?

Among the various, wide-ranging and profound societal impacts of the COVID-19 pandemic, at least two might be of some interest to local government planners. First, at least temporarily, the pandemic seems to have reduced what previously appeared to be an insatiable demand for short-term accommodation within buildings that were not designed, intended and zoned for that use. (As an aside, it's unlikely the pandemic will similarly attenuate another seemingly insatiable demand that has also created work for planners: that for cannabis retail.) With everyone being asked, if not ordered, to stay close to home, and, with a few notable exceptions, most people complying, one can only assume the frustrations plaguing local governments attempting to regulate short-term rentals might have abated in the last year. After all, even if it wasn't likely to lead to public shaming, who really wants to go and stay at someone else's house these days anyway?

Of course, the other side of the stay-at-home coin is about where everyone is working, not where they are going (or not going) for vacation. Working from home was, long before the pandemic, becoming more and more feasible thanks to changing technology and the changing nature of work itself. But WFH is now strongly encouraged, if not mandatory, for anyone who can reasonably do their job without leaving the house. It also seems likely that people trying to create new employment opportunities thanks to shifts in how the world works will be more inclined to reinvent their livelihoods without getting too close, at least physically, to their customers or co-workers. Perhaps we can call this group the ones who are now, or soon will be, working "at" home rather than working "from" home.

The working-from-home cohort (whose membership now includes no shortage of local government staffers) has not, at least to date, raised any significant land use regulation concerns, even if they might be operating outside a strict interpretation of what is authorized to occur on land or in a building zoned exclusively for residential uses. Assuming it might be a zoning contravention to work from home, the lack of consternation over scofflaws of this variety is probably explained not only by the heretofore small number of people making a habit of it, but also by the fact that any land use impacts associated with it are almost imperceptible. Do my neighbours really care if I practice law from my home office instead of my downtown office? Seems unlikely. Do they even know? Probably not. And if the neighbours don't know or care, my local government probably won't be rushing to craft its regulatory response either. It might even be grateful for the reduced demand on the local road network and unexpected progress toward meeting the targets for the reduction of greenhouse gas emissions it was obliged to include in its official community plan, under

section 473(3) of the *Local Government Act*.

At the same time, as the judges of our province's superior courts can attest, working from home, or at home, can easily shift from innocuous to acrimonious. The long list of cases tends to pit individuals' livelihoods against neighbourhood livability, and can test even the most carefully-drafted zoning schemes. In a 1997 case (*Kamloops (City) v. Charchuk* (1997), B.C.A.C. 298), the BC Court of Appeal, although less emphatically than the trial judge, decided the City of Kamloops' home-based business scheme could have been more carefully drafted. After receiving complaints from residents of an "otherwise quiet rural road", the City brought an action to enforce its zoning bylaw against a home-based meat cutting business, which was "particularly active during hunting season". The Court noted the business was "evidently very clean and well maintained", and never referred to it as an abattoir or slaughterhouse, the poster-children for uses incompatible with a residentially-zoned neighbourhood. Apparently, the only real complaint had to do with increased traffic from hunters dropping off animal carcasses and returning to pick up the meat once processed.

The bylaw provisions the City sought to enforce in *Charchuk* were typical of home business regulations in many current zoning bylaws: following a general statement of purpose to "permit the establishment of small scale businesses within residential dwellings provided they have no negative impacts on other residents within the zone", the regulations allowed "home occupations in conjunction with a principal residential use", subject to a list of nine conditions, some of which the Court of Appeal couldn't resist pointing out were "rather inelegantly" drafted. One of those conditions stated: "no sale of goods or provision of services is permitted on the premises". The defendants said that condition was "contradictory or nonsensical ... since by definition almost every business is engaged either in selling some goods or providing some service or both." The City argued the provision was simply trying to restrict businesses that relied on customers attending at the business premises, as a means of minimizing the neighbourhood impacts of home-based businesses.

The Court didn't accept the City's argument, and concluded the condition was invalid, or null and void, because it simply wasn't possible to operate a business that didn't involve any sale of goods or provision of services on the premises. In a zoning bylaw, one hand can't take away what the other giveth.

In other cases, local governments have been successful in enforcing against a range of uses purporting to operate as home-based businesses, or home occupations, including

automotive repair, storage of recreational vehicles, sawmills, vacation rentals, the headquarters of a general contracting service, a dog-breeding business, and a hair salon (although in the last example the court was "tempted" to find it unreasonable for a local government to prohibit hairdressing as a home occupation).

As the pandemic drags on, it seems inevitable that working from home, or working at home, is here to stay. Our understanding of what constitutes a residential use of land, and what qualifies as accessory or customarily incidental to a residential use, will no doubt continue to shift. It remains to be seen whether zoning schemes for home businesses will, as a result, require fine-tuning or even major overhauls, but if there are any drafting tips to be drawn from the cases, they might include the following:

- If a zoning bylaw allows home businesses, it should not include provisions that individually or together make it impossible to actually operate any home business;
- If home businesses are required to be "accessory" or "secondary", make sure any definitions provided for those terms are consistent with the goals of the home business scheme;
- Consider specifically excluding certain types of businesses rather than only relying solely on descriptive criteria or qualifying measures;
- Although subjective measures like "generally consistent with the residential character", or "not causing a nuisance", or "not resulting in excess traffic" have been successfully relied on, it's helpful to keep provisions as specific and unambiguous as possible;
- Be sure to consider a home business or home occupation scheme in the context of the bylaw as a whole, to avoid potential inconsistencies or conflicts; and
- The test for vagueness is whether a bylaw provision provides "an adequate basis for legal debate", but doesn't that test itself sound a bit vague?

Finally, but perhaps most fundamentally, don't limit your imagination to zoning provisions alone. Consider landscape and screening rules, parking regulations, sign regulations, and other sources of authority such as temporary use permits, noise and nuisance regulation, and business regulations. However, before you get too carried away, take a minute to ponder the following characteristically inimitable musings from Justice Southin, formerly of our Court of Appeal:

> If a City or District Council can, under the guise of prohibiting a "use", say that a man may not park the truck by which he earns his living on his own land, what is to prevent it saying that a man who makes his living playing the clarinet may not practise on his own land or, indeed, may not bring his clarinet home because he might practise and disturb his sensitive neighbours? Why may it not say that no householder shall have a party in his or her back yard (back yard parties can be rather noisy) or grow potatoes in his or her front yard (front yards are supposed to be pretty and potatoes are not)?
>
> ...
>
> I am sorry for the appellant and his fellow truck drivers who must find making a living tough enough without the restrictions imposed by this bylaw but succour this Court, on the submissions made to us, cannot give them (*Sundher v. Surrey (City)* (1997), 94 B.C.A.C. 34).

Guy Patterson

Municipal Employers Should be Cautious if Considering Mandatory Vaccine Policies

On January 22, 2021 the BC government announced its COVID-19 immunization plan. Except for individuals included in Phases 1 and 2, British Columbians will receive vaccines according to age. The only employee groups included in the high-risk Phase 1 and 2 stages are staff in long-term care facilities (Phase 1) and community home support and nursing services for seniors (Phase 2), as well as hospital health care workers who care for COVID-19 patients (Phase 1) and hospital staff, community GPs and medical specialists (Phase 2).

Employers who do not operate in the health care sector will not have their employees vaccinated by occupation. This leaves these employers to determine whether their employees are at risk to contract or spread COVID-19 at work such that they will encourage, or even require, employees to be vaccinated once they are eligible and the vaccine is available to them. The question remains: if employers decide their employees are at risk of contracting or spreading COVID at work, can they then mandate the vaccine as a condition of employment? Put another way: can you discipline or terminate employees who refuse to have a COVID vaccine?

Vaccines are not masks. Wearing a mask at work, while controversial to some groups, is a minimal imposition. There is a real difference, in terms of personal autonomy, between requiring employees to put on a mask they can take off at the end of a shift, and requiring them to receive a vaccine, which has long-term effects on one's immune system. In one Ontario case on mandatory flu vaccines, the arbitrator characterized mandatory vaccines as forced medical treatment, and reviewed several cases that have characterized this as an assault (*St Peter's Health System v. CUPE* (2002), 106 L.A.C. (4th) 170).

Mandatory vaccines have been the subject of litigation in the past and the record of success for employers is mixed. In BC, when flu vaccine campaigns failed to increase voluntary vaccination rates among health care workers, health authorities implemented a "vaccinate or mask" policy. The policy, which operated during flu season, required employees to report their vaccine status and, if not vaccinated, wear a mask at work. During declared flu outbreaks, unvaccinated staff could either take an antiviral medication or stay home without pay. The Health Sciences' Association challenged this policy as contrary to the *Charter* and their collective agreement. A great deal of expert evidence was led during this hearing, including from Dr. Bonnie Henry (for the employer). Arbitrator Diebolt QC upheld the policy (*Health Employers Association of British Columbia v. Health Sciences Association*, [2013] B.C.C.A.A.A. No. 138). He concluded that the employer's evidence showed that health care worker immunization reduced transmission of influenza to patients; that influenza was a serious and sometimes fatal disease; that the employer had tried many other measures to promote voluntary vaccination, without success; and that the use of masks would both promote patient safety and accommodate workers who objected to vaccination. Because

employees were given a choice whether to vaccinate or mask, and during an outbreak, to vaccinate or stay home, their *Charter* rights under section 7 were not infringed. No one was forced to accept the vaccine.

It is of note that the Health Sciences Association agreed that managers were entitled to be informed of employees' vaccination status, in order to transfer employees during an outbreak. While immunization information is private medical information and must be handled with the appropriate privacy restrictions, it seems unlikely an arbitrator would find employers could not ask employees for their vaccination status during this pandemic, if there was a risk of transmission at work.

The Diebolt Award was not followed in Ontario. In 2015, Ontario nurses filed a grievance challenging a vaccinate or mask policy at Sault Hospital. The arbitrator in that case upheld the grievance and struck down the policy (*Sault Area Hospital v. Ontario Hospital Association*, [2015] O.L.A.A. No. 339). Arbitrator Hayes found there was insufficient evidence that influenza could be transmitted by asymptomatic employees; that masks reduced transmission; or that the vaccine was effective. Arbitrator Hayes stated that he read the Diebolt Award and noted the experts in that case were infection control experts, not epidemiologists. He also said: "The Diebolt Award does not disclose that the experts in that case were pressed in detail with each of the scientific and medical investigations, studies, and literature upon which their opinions were based as both counsel did here comprehensively with skill and determination." It seems the Ontario case viewed the science very differently and, hence, came to a different conclusion.

While many hospitals in Ontario discontinued their vaccinate or mask policies after the Hayes Award, not all did. In 2018, nurses challenged a vaccinate or mask policy at St Michael's Hospital in Toronto (*St Michael's Hospital v. Ontario Nurses' Associatio*n, 2018 CanLII 82519). The hearing reviewed much of the same evidence reviewed in the Hayes Award and the arbitrator came to the same conclusion. Arbitrator Kaplan took no issue with the seriousness of influenza; he referred to it as a "serious and life-threatening illness". However, he concluded that the science did not support the use of masks to reduce transmission. He also found there was insufficient evidence of asymptomatic transmission, and that the science showed the flu vaccine was only about 60% effective. Of the Diebolt Award, he said: "the decision in that case deserves respect. But it was a different case with a completely different evidentiary focus. It is not a result that can be followed."

In addition, given the outcome of the cases above, employers who decide to impose mandatory vaccines should be ready to show why vaccination is necessary in their particular workplace and what alternatives to mandatory vaccines have been considered and tried.

Following the Ontario cases, the British Columbia Nurses Union, the Provincial Health Officer and the Health Employers Association of BC negotiated an end to the mandatory vaccine policy in BC. BC health care workers can no longer be disciplined for failing to follow the vaccinate or mask policy. On December 6, 2019, Dr. Henry issued a statement that included the following: "There is still an

expectation that health-care providers will be immunized or use masks appropriately, but we will rely on the professionalism of all health-care workers to take appropriate measures to protect themselves and the patients we care for from influenza." This statement was issued only weeks before the first COVID case in BC.

It would be easiest for employers if the provincial government issued clear directives on the question of vaccination, but we are all now familiar with their reluctance to impose mandatory measures, except where absolutely necessary. We can expect COVID vaccines will not become mandatory for health care workers or other government employees unless there is clear evidence that a mandatory vaccination policy is necessary to reduce COVID transmission and save lives. It will take time for that evidence to crystallize. Vaccines are not available to most people, and likely will not be for months. The science around COVID transmission and vaccine efficacy is still new. By the time we are in the fortunate situation of having more vaccines than people willing to accept them, that science should be clearer and able to withstand legal scrutiny. If it is clear that the vaccine is far more effective than masks and social distancing in the workplace, it will be much easier for employers to implement mandatory vaccination policies. But in some jobs, masks and social distancing may be adequate protection for employees who refuse vaccination, and in those cases it will be difficult for employers to force the issue.

There is no doubt that any vaccine policy will have to provide for exceptions on human rights grounds. Individuals who have medical conditions that prevent them from being vaccinated, or who have religious objections to vaccinations, will have to be considered for accommodation. In addition, given the outcome of the cases above, employers who decide to impose mandatory vaccines should be ready to show why vaccination is necessary in their particular workplace and what alternatives to mandatory vaccines have been considered and tried.

The influenza cases upheld the imposition of unpaid leave for unvaccinated health care workers during an outbreak. We are currently in one long outbreak. It is easy, now, to argue that employers should be able to use any means at hand to protect employees, clients and the public. The question of whether vaccinations can be made mandatory will be contextual and will change over time. If employers wanted to make vaccination mandatory today, when transmission rates are still high and our world still largely shut down, they would likely have an easy argument - but it would be entirely academic for non-health care employers because almost none of their staff would have access. In the future, when the pandemic has (hopefully) receded, vaccines are plentiful and immunization rates are high, it will be more difficult to force reluctant employees to accept the vaccine because other measures may suffice. In the interim - where COVID is still a threat but vaccination is possible - the toll that COVID has taken on our society, as compared to influenza, may push the law in the direction of allowing for mandatory vaccine policies if vaccination rates do not increase enough. If the vaccine proves to be effective and adverse reactions stay low, mandatory vaccination could be supported if there is no other way to push widespread adoption.

Pam Costanzo ✍

Can Campaign Contributions Create a Conflict of Interest?

*Back in 1998, the Council of the City of Nanaimo disqualified one of its councillors from holding office due to a conflict of interest by reason of having voted in favour of projects by a developer that also contributed to his election campaign. The councillor was ultimately successful in overturning his disqualification (*King v. Nanaimo (City), *2001 BCCA 610). In the Court of Appeal, Mr. Justice Esson established a stringent test to make out a case of conflict of interest based on campaign contributions from a person or corporation with a matter before council. The mere fact that a developer makes a campaign contribution to a council member will not, "in and of itself", establish that the council member has either a direct or indirect pecuniary interest in a "matter" involving the contributor. A sufficient link between a "matter" before council and a council member's pecuniary interest to make out a conflict would exist if it could be shown that a council member agreed to vote in favour of a contributor's projects in return for a campaign contribution. But again, the appeal court was clear that the mere fact of an applicant having made a campaign contribution was not sufficient.*

Fast forward to today. In the recent case of *Allan v. Froese*, 2021 BCSC 28, the petitioners sought to have Langley Township's mayor and two members of council removed from office for failing to disclose pecuniary interests in matters before council. The pecuniary interests allegedly arose out of campaign contributions by individuals connected to development companies with various projects before council. Acknowledging that the *King* decision established that campaign contributions do not, of themselves, constitute a pecuniary interest, the petitioners argued they did not have to prove the developers' campaign contributions in fact influenced the votes of the mayor and council members or that they were provided to secure favourable votes. They contended such a high threshold would be almost impossible to meet.

The petitioners in *Allan v. Froese* maintained that the requisite link between pecuniary interest and "matter" that was missing in *King* could be found in the pattern and temporal proximity of the campaign contributions and the respondent council members' voting behaviour in approving various projects of the contributors. They argued that a reasonably well-informed person would conclude that the council members had a pecuniary interest in matters before council by reason of the receipt of campaign contributions close in time to the votes in question. The judge relied on previous conflict of interest cases, notably *Fairbrass v. Hansma*, 2010 BCCA 319, as establishing that a court must have evidence of a pecuniary interest; a court cannot fill an evidentiary gap by speculation or inferences drawn "out of thin air". Further, the onus of proving the presence of a pecuniary interest rests with the petitioner in a conflict-of-interest case. There was no evidence that Langley's mayor or councillors had offered or suggested they would vote in favour of the developer's projects in exchange for campaign contributions. Accordingly, the petition was dismissed.

The judge was on more controversial ground in stating that the perspective of the "reasonably well-informed person", often referred to in conflict-of-interest analysis, did not come into

play until after a court has made a finding that the council member has a pecuniary interest. While admittedly no BC decision has ruled definitively on the issue, the Court of Appeal in *Schlenker v. Torgrimson*, 2013 BCCA 9 suggested in the course of determining that local trustees were in conflict in voting in favour of grants to societies in which they were directors, that the views of electors should inform the court's assessment of whether a conflict of interest exists:

> I think a reasonably well-informed elector on Salt Spring Island would conclude that the respondents' interest as directors would influence their decision to authorize and pay for contracts with their Societies.

The judge in *Allen v. Froese* suggested that the above statement from *Schlenker* did not form part of the court's analysis of whether the local trustees had a pecuniary conflict, but was made only after the court determined that a pecuniary interest had been established. However, that does not appear to be a correct reading of what the appeal court said in *Schlenker*. The reference to the views of the "reasonably well-informed elector" was part of the court's analysis of whether the local trustees were in conflict. Further, it is consistent with how other courts have considered the well-informed elector test as an integral part of the analysis in deciding whether there is a conflict of interest.

In the final analysis, it was unnecessary for the court to grapple with the question of whether the test for establishing the presence of a conflict of interest at the municipal level is a multi-part test and where the perspective of the "reasonably well-informed elector" is to be considered. The *King* decision clearly established that there must be evidence, such as a promise, explicit or implicit, to deliver a vote in exchange for a campaign contribution, before the requisite link if made between vote and "matter". The court's dismissal of the petition in *Allan v. Froese* could have rested simply on the application of the Court of Appeal's previous guidance.

The court also took note of the fact that the respondent council members had disclosed the campaign contributions in accordance with the requirements of the *Local Elections Campaign Financing Act* as well as comments in previous cases recognizing there is nothing untoward with contributions being made by supporters of candidates who take a position which they support. Of course, the reasonably well-informed elector would also be knowledgeable of those real-world facts of municipal politics.

Barry Williamson

Go with the Flow – Regulating Development Near Water

When it comes to regulation of development near water, it can be helpful for local governments to consider the distinction between:

1. *regulating to protect riparian areas from development; and*
2. *regulating to protect developments from flooding.*

Riparian areas border on streams, lakes, or wetlands, and are typically identified as having high ecological, economic and aesthetic value. The shorthand for all of this is "fish habitat". With respect to the protection of development,

it is clear that floods in developed areas can have significant and dire consequences. Local governments tend to be interested in both fish and floods, and have been given some overlapping and some distinct and separate tools, as well as marching orders, for these jobs.

1. Protecting Riparian Areas from Development

Most local governments are "directed" to protect riparian areas. Section 12 of the *Riparian Areas Protection Act* ("*RAPA*") authorizes the Lieutenant Governor in Council to establish, by regulation, directives respecting the protection and enhancement of riparian areas. Under section 12(4), if a directive applies, each local government must either (1) include in its zoning and land use bylaws riparian area protection provisions in accordance with the directive, or (2) ensure that its bylaws and permits under Part 14 of the *Local Government Act* (the "*LGA*") provide a level of protection that, in the opinion of the local government, is comparable to or exceeds that established by the directive.

The *Riparian Area Protection Regulation* is the latest "directive" under section 12 of *RAPA*, prohibiting certain local governments from approving a "riparian development", meaning a residential, commercial or industrial development, that is proposed to occur in a "riparian assessment area" (generally, land within 30 metres of a stream or other waterbody) except in limited circumstances.

RAPA seems to anticipate local governments either using zoning regulations, or establishing development permit areas, to protect riparian areas from development. Under sections 488(1)(a) and (i) of the *LGA*, an official community plan ("OCP") may designate development permit areas for the purpose of protecting the natural environment, its ecosystems and biological diversity or to establish objectives to promote water conservation. Once a development permit area has been established, land within the area cannot be subdivided, altered, or developed unless the owner obtains a development permit. For every development permit area designation, the OCP must describe the special conditions or objectives that justify the designation, and the OCP (or a zoning bylaw) must specify guidelines by which the conditions or objectives will be addressed. The OCP (or zoning bylaw) may specify conditions under which a development permit would not be required, but where a permit is required the local government is obligated to exercise its power to issue the permit and to impose conditions in accordance with the applicable guidelines. Thus, guidelines should inform the applicant of the criteria that must be met in order to obtain a development permit.

2. Protecting Developments from Flooding

The regulation of development to provide protections from flooding may also be done through the establishment of a development permit area, or through setbacks set out in a zoning bylaw. In addition, and contrary to regulating to protect riparian areas, the regulation of development near water can be done by the designation of a flood plain area, by bylaw, under section 524 of the *LGA*.

a. *Designating a Development Permit Area*

First, an OCP may designate development permit areas for the purpose of protecting development from hazardous conditions (section 488(1)(b) of the *LGA*). With respect to flood protection, the special conditions to justify the designation could be that the area is in the flood plain of X, and the objective of the designation could be to limit the potential property damage and personal injury that could result from a flood. If a local government wishes to require areas subject to flooding to remain free of development, there should be a guideline in the OCP indicating the extent of the flood-prone area and specifying the types of development that may be excluded from that area.

Development permits may: vary or supplement a bylaw under Division 11 [*Subdivision and Development: Requirements and Related Matters*] and Part 14 of the *LGA*; contain conditions for the sequencing and timing of construction; or, require areas of land that may be subject to flooding to remain free of development except in accordance with any conditions contained in the permit (sections 490(1) and 491(2) of the *LGA*). The conditions that may be imposed on a development permit are limited, but unlike in other development permit areas, development permits for areas designated under section 488(1)(b) can include conditions that vary the use or density of land (but only as it relates to health, safety or protection of property from damage; s. 491(3)). Before issuing a development permit for land within the designated area, a local government may require the applicant to provide a report at the applicant's expense and certified by a professional engineer to assist the local government in determining what conditions or requirements it will impose.

b. *Designating an Area as a Flood Plain*

Section 524 of the *LGA* permits a local government to, by bylaw, designate land as a flood plain if the local government believes that flooding may occur on the land. Pursuant to section 524(3) of the *LGA*, if an area of land is designated as a flood plain, a local government may, by bylaw, specify the flood level for the flood plain and specify setbacks in relation to a broad range of factors including different areas of a flood plain, zones or uses within a zone, standards of works and services, or types of buildings, structures, and types of machinery and equipment within them. Once an area is designated, mandatory statutory restrictions on construction apply; most buildings must be constructed above the specified flood level, and any landfill or structural support required to elevate a building above the flood level must comply with the specific setback from the water.

Local governments are required to consider guidelines established by the Minister of Environment and to comply with any applicable provincial regulations, in making bylaws under section 524. Once an area is designated as a flood plain, a local government cannot issue development permits, development variance permits, or heritage alterations permits that vary the flood plain specifications, nor can a board of variance order a variance from the flood plain specification. In certain circumstances, however, a local government may exempt a person from the construction restrictions where it considers it advisable and either considers the exemption to be consistent with provincial guidelines or has received a report from a qualified professional certifying that the land may be safely used (section 524(7) of the *LGA*). A local government may require, as a condition for such an exemption, that the property owner enter into a covenant under section 219 of the *Land Title Act*. It is important to note that these section 524 exemptions are distinct and separate from development variance permits.

While a local government can use a flood plain designation and a hazard area development permit designation in conjunction, it is not necessary and likely redundant, as a development permit would be subject to (and could not vary) the flood plain specifications. It is more straightforward to enact a section 524 bylaw, rather than amend an OCP, but local governments may prefer a development permit area designation where aesthetic or other environmental considerations are also in play. Both of these methods are also designated as unrestricted matters in the *Building Act General Regulation* (sections 2(c.1) and 2.4), so the general rule in section 5 of the *Building Act*, depriving local building regulations of their legal effect, would not apply to either.

Amy O'Connor & Sarah Strukoff

BC Court of Appeal Orders Removal of Soil Erosion - Preventing Structures

The BC Court of Appeal recently released Reasons for Judgment in Fonseca v. Gabriola Island Local Trust Committee, *2021 BCCA 27, confirming the powers of local governments to regulate the placement of structures intended to protect land from erosion by the sea and other water bodies.*

The issue came before the courts as a result of the Gabriola Island Local Trust Committee seeking an injunction requiring the Fonsecas to remove seawalls and other structures that they had constructed at the boundary of their property with the sea. In defence to the injunction application, the Fonsecas argued that local government land use powers are inapplicable to structures, such as seawalls, that are erected for the purpose of protecting land from erosion. The Fonsecas argued, and the BC Supreme Court accepted, that soil erosion structures do not fall within the scope of local government land use powers as the common law riparian rights of property owners to protect their land from erosion had not been abrogated by the *Local Government Act*.

The Court of Appeal concluded that the lower court had committed two errors in its judgment. The lower court failed to apply the appropriate statutory interpretation principles. In addition, the lower court treated the riparian right to protect one's property from the inroads of the sea as a positive or special right, different from other property rights, and having a privileged status making local government land use powers inapplicable to them in the absence of clear legislation stating otherwise.

In the end, the Court of Appeal held that the Local Trust Committee had the authority to enact its land use regulations restricting the siting of seawalls to 30 metres from the boundary of the sea, including where those seawalls were constructed at the boundary of the sea for erosion protection. The Court of Appeal ordered the removal of the seawalls.

Sukh Manhas

Caselaw Update: Childcare Obligations and Claims of Discrimination on the Basis of Family Status

*The case law on discrimination on the basis of family status due to child care obligations continues to evolve in BC. The BC Human Rights Tribunal recently issued another decision involving a claim of discrimination on the basis of family status in relation to childcare (*Harvey v. Gibraltar Mines Ltd. (No. 2), *2020 BCHRT 193).*

In 2019, the BC Court of Appeal confirmed that general childcare duties will not fall within the scope of "family status" under the *Human Rights Code*. This means that employers in BC are not required to accommodate employees who have regular child-care obligations. The Tribunal in *Harvey* accepted that the BC Court of Appeal had found that a parent must establish they experienced a substantial interference with a parental or family duty or obligation in order to make a successful claim of discrimination under the *Code*. However, it is clear from the *Harvey* decision that the Tribunal will carefully consider whether there is evidence of factors that take a parent's complaint out of the ordinary circumstances facing parents juggling the demands of their employment and the care of their children. The Tribunal also confirmed that there does not need to be a change in a term or condition of employment in order to make a claim of discrimination on the basis of child care issues under the *Code*.

In this case, two employees, who were parents, worked the same 12-hour shift at their employer. Working these same 12 hours shifts made finding childcare difficult for them and they requested an accommodation. The employer and these employees were not able to come to a mutually agreeable solution and the complainant filed a complaint with the Tribunal. The employer then filed an application to dismiss this complaint.

The complainant alleged the following:

- She made all possible efforts to find adequate childcare and was not successful;
- The hours of the only daycare at which she could obtain a spot for her child were not long enough to allow her or her husband to pick up and drop off their child; and
- She or her husband had to take vacation time or family leave to care for their child or take their child to daycare.

The Tribunal determined that these facts, if proven, may establish a substantial interference with a parental obligation. The Tribunal noted that both parents worked the same 12-hour shifts and lived in a part of the province where childcare options may be much more limited than in a larger urban area. The Tribunal accepted the complainant's evidence of the efforts she made to find adequate childcare. The employer also submitted evidence of its efforts to accommodate the complainant. However, the Tribunal found that it could not conclude at this preliminary stage whether the employer had met its duty to accommodate. Therefore, the Tribunal denied the employer's application to dismiss this complaint.

It is important to note this case was a preliminary decision only and no decision has been made by the Tribunal about whether the childcare challenges faced by the complainant in this case constitute discrimination under the *Code*. It will be interesting to see how the Tribunal approaches its analysis if this complaint proceeds to a full hearing. This decision continues to highlight the need for local government employers to ensure they have sufficient information about the childcare challenges at issue and the employee's efforts to secure adequate childcare before making a decision about whether to accept or deny an accommodation request.

Carolyn MacEachern

The OCP Consistency Rule: What Is It and Are You Being Reasonable?

Section 478 of the Local Government Act *contains the "OCP consistency rule". It provides that after the adoption of an Official Community Plan ["OCP"], all bylaws enacted and works undertaken by a council or board must be "consistent with" the relevant plan. There are a number of cases that have addressed the question of whether a particular zoning bylaw is consistent with an OCP and some important principles have emerged from these cases.*

In *Rogers v. Saanich (District)* (1983), 22 M.P.L.R.1 (B.C.S.C.), the BC Supreme Court held that an OCP is a policy document which is not to be given the same level of scrutiny "as would-be acts of Parliament". This was reinforced by the Court in *Residents and Ratepayers of Central Saanich Society v. Central Saanich (District)*, 2011 BCCA 484 in which Madam Justice Newbury said with respect to an OCP "that it cannot and should not be construed with the scrutiny accorded to a statute". Therefore, the caselaw suggests that an OCP is to be interpreted with more flexibility than a statute.

The Court noted municipal councilors are elected, required to balance many competing interests, and are more aware of the exigencies within their communities than courts, all suggesting that their decisions should be reviewed with deference.

In *Saanich*, the Court held that when considering the question of consistency between an OCP and a bylaw, it was reviewable on a standard of reasonableness. The Court noted municipal councilors are elected, required to balance many competing interests, and are more aware of the exigencies within their communities than courts, all suggesting that their decisions should be reviewed with deference. In this case, the Court found that the bylaw in question furthered many of the OCP goals and ensured that the majority of the property involved in the development would remain farmland. As such, the council's decision that the bylaw was consistent with the OCP was found by the Court to be a reasonable one.

When judged on a standard of reasonableness, consistency was considered "holistically", and in conjunction with other considerations that may have factored into the making of the decision by the council for the municipality. The Court in *Greater Vancouver (Regional District) v. Langley (Township)*, 2014 BCCA 511 summarized the consistency analysis as follows:

> Therefore, I determine that "consistent" as used in the [*Local Government Act*] is not an exacting standard and it must take into account the wide variety of factors that are identified in what is fundamentally a policy document meant to guide planning decisions.

The most recent decision on OCP consistency is *O'Shea/Oceanmount Community Assn. v. Gibsons (Town)*, 2020 BCSC 698. In *O'Shea*, the petitioner community association challenged a zoning bylaw enacted by the Town, which would authorize an 87-unit development of single-level suites and two-storey townhouses on a 1.93 hectare parcel of land that had previously been zoned for single-family residential.

In *O'Shea*, the OCP provided for a density of 0.6 to 0.75 floor space ratio and "generally" 20 to 25 units per hectare for the applicable Low Density Residential designation. The petitioner argued that the bylaw at issue was not consistent with the OCP since the bylaw specified 0.6 to 0.75 as the allowable floor space ratio, but was silent on the number of units per hectare as a density measure and would have had the practical effect of allowing for roughly 45 units per hectare. However, the property was also within a development permit area for intensive residential, the guidelines for which anticipated development on cluster lots at a density of approximately 16 housing units per acre (40 units/ha.). The petitioner urged the Court not to apply the reasonableness standard but instead to apply a correctness standard to the OCP consistency analysis (based on the decision in *Minister of Citizenship and Immigration v. Vavilov*, 2019 SCC 65)).

The Court declined to apply a correctness standard and applied a reasonableness standard to the OCP consistency analysis. In the result, the Court upheld the bylaw, finding that the petitioner was relying on an "overly rigid" reading of the OCP which would result in reading "generally" as the word "always":

> To the extent that the parties agree that the power to pass a zoning bylaw is lawfully delegated to the Town, this case does not involve a true jurisdictional inquiry. Rather, the question here is, when looking at the two lawfully adopted documents, whether the Amending Bylaw is consistent with the OCP for the purposes of s. 478(2) of the LGA. The Town is owed significant deference in this inquiry.

O'Shea affirmed the application of the reasonableness standard to the OCP consistency analysis set out in previous case law (*Rogers, Saanich* and *Fort Langley*). These cases illustrate the deference a court will give to a council in determining whether a zoning bylaw amendment is consistent with the OCP. As such, if the decision is reasonable it will be upheld and inconsistency with an OCP is only established if there is a clear or specific contradiction between the OCP and the bylaw in question.

Kathleen Higgins

Municipal Corruption: A *Criminal Code* Offence

The recent case of Bergevin v. R., *2020 QCCA 658 (leave to the Supreme Court of Canada refused), serves as a good reminder of section 123 of the* Criminal Code *that criminalizes municipal corruption. That section contains two separate offences, which cover matters such as bribery and blackmail in a municipal context. Section 123 (1) provides that a person commits an offence if they directly or indirectly give, offer or agree to give or offer to a municipal official or to anyone for the benefit of a municipal official a loan, reward, advantage or benefit of any kind as consideration for the official:*

(a) to abstain from voting at a meeting of the municipal council or a committee of the council;

(b) to vote in favour of or against a measure, motion or resolution;

(c) to aid in procuring or preventing the adoption of a measure, motion or resolution; or

(d) to perform or fail to perform an official act.

It is also an offence under section 123 (1) for a municipal official to demand, accept or offer or agree to accept a similar benefit for these same purposes.

Section 123 (2) creates a further offence to influence or attempt to influence a municipal official to do anything in paragraphs (1)(a) to (d) by

(a) suppression of the truth, in the case of a person who is under a duty to disclose the truth;

(b) threats or deceit; or

(c) any unlawful means.

A municipal official is defined as a municipal council member or a person who holds a municipal office.

A person who intentionally attempts to commit municipal corruption is also guilty of an offence.

The *Bergevin* case related to an offence under section 123(1) committed in 2013. The appellant, Mr. Bergevin, gave Mr. Lafrance $31,000, which was then delivered anonymously to the then-mayor. The delivery was made with the expectation that, based on previous discussions between Mr. Lafrance and the mayor, Mr. Lafrance would be appointed the Director of Economic Development. Once appointed, Mr. Lafrance would presumably be in a position to give favourable treatment to Mr. Bergevin's excavation business. Unbeknownst to the two "donors", the mayor had previously contacted Quebec's Permanent Anti-Corruption Unit and the conversations between Mr. Lafrance and the mayor were being recorded.

Mr. Lafrance died before the trial, but Mr. Bergevin was convicted. Mr. Bergevin appealed on the basis that he had only loaned the money to Mr. Lafrance, it was speculative whether Mr. Bergevin would benefit from Mr. Lafrance's actions, and the mayor did not in fact accept the money. The Quebec Court of Appeal found that acceptance by the official is not an essential element of the offence. The court also noted that *mens rea* of the offence does not require an intent to benefit from the act of offering something to influence a municipal official. The Court of Appeal found that Mr. Bergevin intended to aid Mr. Lafrance in the commission of the offence of municipal corruption and he could not have been unaware Mr. Lafrance was committing the offence.

As the *Bergevin* case illustrates, the essential element of an offence under section 123(1) is offering or accepting a "benefit" in consideration for a municipal official's act or omission. In *R. v. Hinchey*, [1996] 3 SCR 1128, the Supreme Court of Canada held that in order to impose criminal liability, a "benefit" must amount to a "material or tangible gain" when the following factors are considered:

- relationship between the parties;
- history of reciprocal arrangements between the parties; and
- size or scope of the benefit.

In *R. v. Pilarinos*, 2002 BCSC 1267, the BC Supreme Court expanded these factors to include the following considerations:

- the manner in which the gift was bestowed;
- the official's function in government;
- the nature of the giver's dealings with the government;
- the connection, if any, with the giver's dealings and the official's job; and
- the state of mind of the receiver and the giver.

The decision in *R v. ACS Public Sector Solutions Inc.*, 2007 ABPC 315, reminds us that providing even a single ticket to a sports event could amount to a "benefit" within the meaning of the *Criminal Code* bribery provisions. There the ticket was given to a municipal official in a position to recommend whether the defendant company's contract should be renewed by the municipality. However, the company had been incorrectly charged under section 121 of the *Criminal Code*, relating to bribery of "government" officials; government being defined as federal and provincial but not municipal governments.

Clients should note that the "benefit" considered in section 123 of the *Criminal Code* is not technically a gift, because the benefit is not offered gratuitously. Section 105 of the *Community Charter* nevertheless significantly limits the circumstances under which a council member can accept a gift or personal benefit that relates to the performance of their duties. Section 106 of the *Community Charter* also imposes a $250 limit on the value of a permissible gift, or value of the sum of gifts received from one source over the year, that may be accepted by a council member without disclosure.

Alexandra Greenberg

Supreme Court of Canada Reconfirms the Duty of Good Faith is Distinct from the Obligation to Provide Reasonable Notice of Dismissal

The Supreme Court of Canada's recent decision in Matthews v. Ocean Nutrition Canada Ltd., *2020 SCC 26 addresses two distinct types of contractual breaches that can arise in a wrongful dismissal action: (1) breach of the requirement to provide reasonable notice of dismissal and (2) breach of the duty to exercise good faith in the manner of dismissal. The Court also addressed the calculation of damages for the former breach, including when a dismissed employee will be entitled to payment under a bonus plan. The Court reinstated the trial judge's award of more than 1 million dollars in damages for payment under a bonus plan.*

The case involved a wrongful dismissal action by a senior executive of Ocean Nutrition Canada Limited. He alleged that he had been constructively dismissed and sought damages, including payment under the employer's bonus plan. Under the bonus plan, the sale of the company would trigger payment to eligible employees. In 2007, a new Chief Operating Officer hired by the employer began to marginalize the plaintiff and limit his responsibilities. The Chief Operating Officer also lied to the plaintiff about the plaintiff's prospects with the employer. Despite the senior management's treatment of him, the plaintiff stayed on with the employer for a number of years, anticipating that the company would soon be sold and that he would receive payment under the bonus plan. However, he eventually left the employer in June 2011. About

13 months later, the employer was sold, and payments were made under the bonus plan. As the plaintiff was not employed by the employer at the time of the sale, the employer denied him payment under the plan.

The plaintiff filed a wrongful dismissal action against the employer, alleging that he was constructively dismissed, and that the employer had breached its duty of good faith. He sought damages for lost wages, and payment under the bonus plan. He did not seek damages for mental distress. At trial, the judge held that the employer had constructively dismissed the plaintiff. It was a breach of the employment contract and constructive dismissal for the employer to unilaterally reduce his responsibilities in a substantial manner. It was also constructive dismissal for the employer to engage in a course of conduct aimed at pushing the plaintiff out of the company.

The trial judge awarded the plaintiff a 15-month period of reasonable notice. The trial judge also awarded him lost earnings, and damages equal to the payment he would have received under the bonus plan, as he would still have been a full-time employee of the employer at the time of the payout if he had not been constructively dismissed, and the terms of the bonus plan did not unambiguously remove his right to such payment. The Court of Appeal of Nova Scotia unanimously upheld the trial judge's decision that the plaintiff had been constructively dismissed and was entitled to a 15-month reasonable notice period. However, the Court of Appeal overturned the award of damages for the lost bonus plan payment.

On appeal to the Supreme Court of Canada, the plaintiff argued that he should have received damages equal to the payment under the bonus plan for the employer's allegedly bad faith conduct. The parties agreed that the plaintiff had been constructively dismissed, and that a 15-month reasonable notice period was appropriate.

In deciding the case, the Supreme Court of Canada identified two separate types of contractual breaches that can occur in a dismissal:

- Breach of the duty to provide reasonable notice of dismissal; and
- Breach of the duty to exercise good faith in the manner of dismissal.

In respect of the first type of breach, the Court held that an employer has the right to dismiss an employee without cause, subject to the duty to provide reasonable notice. The contractual breach that arises from a failure to provide reasonable notice leads to an award of damages in lieu of notice. That breach does not turn on whether or not the employer acted honestly or in good faith. The Court also held that damages for constructive dismissal could include compensation for the income, benefits, and bonuses the employee would have received had the employer given them reasonable notice of dismissal.

The breach of the duty of good faith, on the other hand, arises from an employer's callous or insensitive manner of dismissal. A dismissed employee can allege mistreatment, i.e., employer conduct that is unfair or in bad faith such as untruthful, misleading, or unduly insensitive conduct in the manner of dismissal. The period of conduct to be examined is not limited to the moment of termination itself. It can include the period leading up to the dismissal.

An award of damages for an employer's breach of the duty to act in good faith does not lead to an extension of the reasonable notice period. Instead, damages that are foreseeable, such as damages for mental distress, may be awarded. Punitive damages may also be awarded in egregious cases.

The Supreme Court of Canada held that the *Matthews* case could be decided based on the principles relating to damages for failure to

provide reasonable notice, since the plaintiff did not seek mental distress damages for the employer's bad faith conduct. As the plaintiff was constructively dismissed without notice, he was entitled to damages representing the salary, including bonuses, he would have earned during the 15-month notice period.

The Supreme Court of Canada also held that in determining whether damages for breach of an implied term to provide reasonable notice includes bonus payments, the Court should ask the following two questions:

- Whether, but for the termination, the employee would have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period; and
- If so, whether the terms of the employment contract or bonus plan unambiguously take away or limit that common law right.

The Court reinstated the trial judge's decision that the plaintiff was entitled to payment under the bonus plan finding that the plaintiff was *prima facie* entitled to the bonus payment, as entitlement to payment was triggered within the 15-month reasonable notice period awarded by the Court. But for the constructive dismissal of the plaintiff, he would have received the bonus payment during that period. The Supreme Court of Canada also held that, contrary to the finding of the Court of Appeal of Nova Scotia, the bonus plan did not take away his common law right to payment.

With respect to the duty of good faith, the Supreme Court of Canada confirmed the trial judge's view that the employer's treatment of the plaintiff constituted dishonest conduct. The trial judge had found that the employer's senior manager had undertaken a four-year campaign, characterized by lies and dishonesty, to push the plaintiff out of its operations. The Supreme Court of Canada also held that if the matter had been raised before the trial judge, the trial judge would have had grounds to tie the dishonest conduct that occurred over the four-year period to the manner of dismissal. That is because in circumstances of constructive dismissal, the manner of dismissal is examined not only at the very end of the employment relationship, but also the employer's conduct leading to the employee's decision to end their employment.

The Supreme Court of Canada declined to make a declaration that the termination of the plaintiff's employment was unfair and carried out in bad faith, as he did not seek damages for that breach. However, the Court commented that a proper acknowledgement that the employer's conduct was contrary to the requirement of good faith could "transcend" a request for damages and could be meaningful for an employee in a way that reasonable notice damages could not (para. 87). The Court again confirmed that a person's employment is an essential component of their sense of identity, self-worth, and emotional well-being. The Court observed from the trial judge's findings that the employer had mistreated and lied to the plaintiff about the security of his future with the employer in the years leading up to his constructive dismissal in a manner that made his job intolerable.

The Supreme Court of Canada unanimously set aside the decision of the Court of Appeal and restored the trial judge's decision.

This case reiterates the importance of employers treating employees fairly in the termination of their employment. The failure to do so can lead to damages for lack of reasonable notice, and potentially mental distress damages and punitive damages for bad faith conduct in the period leading up to the dismissal. We recommend that if a local government is contemplating dismissing an employee, that the local government seek legal advice early in the process.

Michelle Blendell

Too Little, Too Late: An Interim Application Regarding Property Clean-Up Orders

The recent decision of Miller v. Qualicum Beach (Town), *2020 BCSC 1412 provides an example of an owner trying, although not trying hard enough, to obtain an injunction stopping a municipality from taking action in default of a remedial action requirement imposed under section 72 of the* Community Charter *and a clean-up order made under a property standards bylaw. The owner claimed that the municipality should be enjoined from doing any demolition or removal work because the owner was in the United States and, due to COVID-19 related restrictions, he could not attend the property to do the work himself.*

The court found that this claim did not meet the requisite test for an interim injunction. There was no serious question to be tried, because the owner was not challenging the orders themselves. There was no risk of irreparable harm, because any loss arising from the removal and selling of any items from the property in this case was a financial loss that could be compensated if the owner could make a successful damages claim after the removal. The balance of convenience also favoured removal rather than further lengthening the time for compliance.

Whether claiming an interim injunction before municipal removal work begins or seeking damages afterward, a claimant must allege a reason why the local government is not authorized to take action in default. Local governments should also note that in the *Miller* case, the court was critical of the owner's failure to seek reconsideration of the orders at issue. This emphasizes the importance of including provisions allowing for internal reconsideration or review of orders made under property standards bylaws. Not only does reconsideration provide a local government with an opportunity to "catch itself" if it does issue a problematic order, but it may insulate the local government from a claim if a person subject to an order completely ignores the order until action in default is imminent.

Michael Moll

Miscellaneous Statutes: Did You Know?

Did you know that the Milk Industry Act *prohibits the sale and supply of milk that is not produced and pasteurized in accordance with that Act and that under section 9 a municipal council may appoint an inspector authorized to enforce that prohibition? The powers of an inspector include the power to stop any vehicle transporting dairy products and to remove samples of the dairy products found.*

Joe Scafe

Look For Your Lawyers

Bill Buholzer is teaching a course on planning law for the Master of Community Planning program at Vancouver Island University beginning in January 2021.

Reece Harding, together with the Mayor and CAO of the District of Squamish, will be facilitating a workshop on "The New Normal - Building Constructive Council/Board Relations" at the Local Government Leadership Academy Forum being held virtually on February 3-4.

On March 5, the Pacific Business & Law Institute's Local Government 2021 webinar includes a session presented by **Kathleen Higgins** on "Aboriginal Title and Rights Claims Over Municipal Property".

The virtual CAO Forum on March 10 will include a presentation by **Carolyn MacEachern** on "Labour Relations during Uncertain Times".

Carolyn MacEachern will also be presenting a session entitled "Human Rights Complaints – A Guide to Navigating the Human Rights Tribunal and Avoiding Complaints" at the Municipal Insurance Association of BC 2021 Conference being held on-line on March 30-31, 2021.

Bill Buholzer and **Guy Patterson** will be presenting a Planning and Zoning Refresher course at the SFU City Program Course (virtual) on May 19, 2021.

We are excited to welcome **Timothy Luk** as new associate at Young, Anderson. Timothy has both a law degree and a Master's in Community and Regional Planning from the University of British Columbia. Timothy was first called to the bar in Alberta in 2012 and has previously worked as in-house counsel for a major national insurer. In addition to having significant litigation experience, Timothy also maintains a general solicitor's practice, with a focus on land use planning. We are confident that Timothy's legal experience and training as a planner gives him the insight to provide meaningful advice and guidance to our clients.

The Planning Institute of British Columbia's Annual Conference being held this year in Whitehorse, YT will feature a number of speakers from Young, Anderson. On June 15, **Guy Patterson** and **Nick Falzon** will be presenting on Consultation and the Duty to Consult. On June 16 and 17, **Bill Buholzer** and Coralee Breen will be presenting a session titled "Floodplain Bylaws in BC – the Agony and the Agony" and **Reece Harding**, Lisa Spitale and Emilie Adin will speak on "Residential Rental Tenure Zoning & Renoviction Bylaws: The New Westminster Experience".

STAY CONNECTED

COVID-19 – COVID-19 LEGAL UPDATES Go to **www.younganderson.ca** to access all the latest information that Young, Anderson has posted in relation to COVID-19.

If you are keen to receive client bulletins and updates to the firm blog by e-mail, go to **www.younganderson.ca** and click on the "**STAY CONNECTED**" button at the top of the webpage.