CASELAW UPDATE

NOVEMBER 29, 2013

Francesca Marzari & Maria Kim

CASELAW UPDATE

I. INTRODUCTION

Local government law is diverse and the cases that touch on local government issues are no different. The past few years have seen many challenges to zoning and planning bylaws, cases considering liability for nuisance and negligence, an important decision regarding the line between prohibition and regulation in the context of ministerial approvals, and cases across the country concerning conflict of interest of local elected officials. Some of these are addressed in their own seminar papers (including conflict of interest). Some of this diversity is captured here.

II. PLANNING CASES

A. OCP Consistency Requirements

In the last few years there have been a number of cases that consider or challenge bylaws on the basis that they are not consistent with the OCP. Section 884(2) of the *Local Government Act* states that all bylaws enacted after the adoption of an official community plan (OCP) must be "consistent" with the relevant plan.

The leading case in BC is now ***Residents and Ratepayers of Central Saanich Society v. Central Saanich (District)***, 2011 BCCA 484. In that case, residents of the District sought to quash a bylaw permitting a subdivision of 13 hectares of farmland into 57 residential lots. The Society challenged the bylaw on the basis that it was inconsistent with the District's OCP. The land was zoned Agricultural and the OCP contemplated preserving rural lands for rural purposes. The landowner made three subdivision proposals and after a number of amendments, the council passed a resolution changing the zoning of the land from Agricultural to Rural Estate. This new site specific zone permitted 57 residences. The Society argued that this development was too dense to be fairly characterized as rural and thus the bylaw was inconsistent with the OCP.

The Court of Appeal held that the bylaw was sufficiently consistent with the OCP, and was valid. It highlighted several aspects of the bylaw that furthered some of the objectives of the OCP, such as dedication of arable land to agricultural use in perpetuity, creation of parkland, public trails and public garden, and construction of sewer and hydro facilities. In response to the Society's objection which mainly focused on the density of the proposed development, the Court commented:

> "The Society's argument ignores the rather unusual nature of an OCP as a 'visionary' set of policies and objectives that are for the most part laid out in broad strokes. Very little is actually "prohibited", and the definitions of various terms of art used in the plan leaves municipal councils with some latitude in practical application."

The Court stated that consistency or inconsistency with the OCP is likely to involve consideration of guidelines or policy rather than restrictions or mandatory rules. Since the question of consistency is a matter of interpretation, the Court should not interfere with any reasonable interpretation consistent with the OCP. The Court held that the council's decision was reviewable on a standard of reasonableness, and given the development promised to achieve other environmental, economic and social goals outlined in the OCP, the council's decision was found to be consistent with the OCP's vision of rural lands.

In ***Sevin v. Prince George (City)***, 2012 BCSC 1236, the BC Supreme Court took a much less deferential approach to local government classification of uses under an OCP, and declared that a zoning amendment bylaw that rezoned property in a rural zone as a residential addiction treatment centre was invalid as going beyond the scope of what may be considered a residential use.

In that case, the bylaw changed the land from Rural Residential to Therapeutic Community zone to accommodate a women's recovery centre. The centre was to employ 14 staff and accommodate up to 30 residents recovering from drug and alcohol addiction. The OCP designated the land as Rural B for "moderate intensity rural residential use". "Community Residential Facilities" were generally supported in the OCP, but that use was referenced in the part of the OCP addressing urban residential zones, but not rural residential zones. Sevin argued that the bylaw was inconsistent with the OCP since the institutional nature of the recovery facility was at odds with the rural residential use of the lands.

The City argued that since there was nothing in the OCP prohibiting Community Residential Facilities in rural designated areas of the City, it should not be concluded that such facilities were only contemplated in the urban areas. Also, the council was entitled to make a decision of what constitutes a rural residential use in a rural area in the context of OCP as long as the decision is not in direct collision with the OCP.

The Court rejected the City's arguments and stated that the only issue was whether or not the bylaw was consistent with the OCP. The decision was not based on whether the facility was a reasonable use of the land or whether disruption to the neighbours was reasonable. While these considerations were valid matters for council when considering the amendment, they were not matters the Court held relevant to the question of whether the proposed bylaw was consistent with the OCP.

The Court found that Community Residential Facilities in the OCP are described as to providing "a stable residential home environment" and questioned whether the institutional nature of the treatment centre could be captured under this description. In addition, the OCP did not expressly authorize such facilities in rural residential zones. Therefore, the bylaw was declared to be inconsistent with the OCP and was quashed.

As a result of that decision, the City amended its OCP to more expressly allow for residential treatment facilities on the property. The petitioners brought a new challenge to the OCP amendment that was heard in the fall of 2013. We are still waiting for reasons.

However the ***Sevin*** case has been distinguished already in ***Higgins v. Quesnel (City)***, 2013 BCSC 1365. In that case residents of a neighbourhood sought a declaration that a bylaw enacted by the City was invalid as it was in conflict with the City's OCP because it permitted a secondary suite in a house which was within an RS1 zone. The owner of the house constructed and rented out a secondary suite, when such a use was contrary to that zoning. The City allowed the owner to seek an amendment to the zoning bylaw to permit the secondary suite. A public hearing was held where many residents in the neighbourhood voiced strong opposition. Despite the residents' concerns, the City adopted the amendment bylaw.

As in earlier cases, the Court applied the standard of reasonableness in reviewing the City's decision. To be unreasonable, the bylaw must be in "absolute and direct collision" with the OCP. While the Court agreed with the principles outlined in ***Sevin***, the Court distinguished this case, because the OCP in question permitted secondary suites in single detached dwellings upon a rezoning process in addition to any specific zoning that permitted them. The Court found that in this case a specific zoning bylaw was passed to authorize spot zoning in the neighbourhood, which was expressly authorized by the OCP.

It is important to note that although this case involved (a) a previous bylaw violation, which the residents argued that the amendment bylaw resulted in the legitimization of a violation, (b) a strong opposition, and (c) alleged flaws in a city staff's assistance to the council during the stages of bylaw enactment, the Court found that these concerns did not matter in determining the question of whether or not there was a direct collision with the OCP. If the residents were not satisfied with the council's decision, their remedy was found to be at the ballot box. The decision was reasonably open to council to make and the bylaw was upheld.

B. Zoning of Navigable Waters

In ***West Kelowna (District) v. Newcombe***, 2013 BCSC 1411, a house boat owner challenged the constitutional applicability of a zoning bylaw which expressly prohibited moorage of houseboats or use of a vessel for residential purposes within a "Water Use (Recreational)" zone (W1 Zone). Moorage was only permitted as an accessory use to upland parcels. Newcombe owned a houseboat and moored it within the W1 Zone. Since he did not own an upland parcel in the area, the District issued him a notice to relocate. In response, he challenged the constitutional validity of the bylaw and argued that the District did not have the authority to prohibit moorage. The District argued that the purpose of the W1 Zone, within the overall zoning bylaw, is to regulate the use of land, a matter exclusively within the jurisdiction of the Province, which has been delegated to the District.

The Court confirmed that the power to zone extends to the regulation of the use of land covered by water, or the use of water itself. The Court emphasized that in adopting the W1

Zone, the District did not attempt to regulate the operation of boats and other marine vessels, a matter that has been found to be at the core of the federal interest in shipping and navigation. The issue was whether permanent or long term moorage was at the core of the federal navigation interest such that it could only be regulated by the federal government, or whether it was also related to the Provincial and local authority over land use.

The Court found that the prohibition on private moorage not accessory to an upland use was part of a comprehensive regulatory zoning bylaw. While the regulation of the use of the W1 Zone did impact moorage, the court found that the bylaw is about land use and regulation of land use, and not shipping and navigation.

After finding that the bylaw properly fell within provincial constitutional jurisdiction, the Court then applied the doctrine of interjurisdictional immunity and considered whether moorage is a core aspect of federal shipping and navigation. Interjurisdictional immunity applies where "a valid law enacted by one level of government impairs the essential core of a matter within the exclusive jurisdiction of the other level of government". The Court concluded that while some moorage is vital to shipping and navigation, long-term moorage of the type Newcombe utilized was not a core of the public right of navigation:

> "Overnight moorage, emergency anchoring or mooring, anchoring or mooring for repairs, or anchoring or mooring for the purpose of provisioning his houseboat, may well be vital to his rights of navigation. On the other hand, long-term moorage of the type the defendant utilizes at times when he is not actually on board his houseboat, such as during weekdays from August to October 2011, and from October 15, 2011 to June 19, 2012, which in my view amounts to him "using the highway to stable his horse", is not a core of the public right of navigation."

The Court found that the District accepted the distinction between temporary and incidental moorage associated with the use of recreational boats, and non-temporary or permanent moorage in its bylaw. However, the bylaw did not make this distinction, and had to be "read down" to permit temporary moorage incidental to active navigation and shipping. The District's water license from the Province was also found to be applicable, but interestingly was also read down, despite it being a proprietary right. Ultimately, Newcombe's moorage of his houseboat for extended periods of time was found to be contrary to the W1 zone, including periods when he was not actually on the boat for periods of a month or more.

It remains to be seen where the subsequent cases will draw the line between temporary and permanent moorage.

C. Development and Subdivision Approvals

In ***Bradshaw v. Victoria (City)***, 2013 BCSC 1710, a landowner applied to the City for subdivision of two lots he owned into five small lots. After he submitted the subdivision application, but before the subdivision was complete, he applied for building permits for three of the lots. The

City adopted an OCP designating the entire City, including Bradshaw's lots, as a development permit area. After the subdivision application was completed, the City issued Bradshaw a deficiency notice for his building permit application on the basis that he did not have a development permit. He argued that section 943 of the *Local Government Act* effectively grandfathered his building permit applications from the new OCP requirement for development permits.

Section 943 states that if after (a) a subdivision application has been submitted to the City, and (b) the applicable subdivision fee has been paid, and the City adopts a bylaw 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.

The Court found that a development permit was still required, and that section 943 did not insulate building permit approvals from development permit requirements imposed after the building permit application, but before its issuance. Nor did the City have to comply with section 929 of the *Local Government Act* in this circumstance, where the City was not relying on that provision. Finally, the Court found that the duty to consult under section 879 of the *Local Government Act* did not specifically require the City to consult with the petitioner regarding his open building permit file.

D. Judicial Review of Institutional Uses

In ***Paldi Khalsa Diwan Society v. Cowichan Valley (Regional District)****,* 2013 BCSC 1773, the Court dealt with the issue of commercial use of a religious crematorium. In that case, a religious society sought an order from the BC Supreme Court declaring that a commercial crematorium is a permitted use within the Regional District's "Parks and Institutional" zone (P-1). The Society applied for a building permit from the Regional District to construct a modern, gas-fired crematorium for a Sikh temple it had owned for decades. The Regional District approved the permit with the understanding that the construction was to replace the existing wood-burning crematorium for Sikh ceremonial purposes. The Society then obtained a license from Consumer Protection BC to operate the crematorium as a commercial enterprise, without consulting the Regional District. It was only after some time later the Regional District found out the facility was being used commercially.

While the Regional District did not oppose the use of the crematorium for religious purposes, it was opposed to the operation of the crematorium as a commercial enterprise offering service to the general public. The Regional District informed the Society that a commercial crematorium was not a permitted use within zone P-1. The Society argued that crematoriums fell within the permitted but loosely defined institutional use, and that not allowing it to be operated commercially wrongfully discriminated against some members of the public.

On the question of whether a crematorium fell within the definition of “institution”, the Court noted that a crematorium was not listed in the definition, whereas a cemetery was expressly included:

> “A crematorium is a distinct use of land with impacts quite different than other typical institutions such as schools, hospitals and community centres. I am not persuaded that it can reasonably be maintained that a crematorium fits within the ordinary meaning of "institution"; moreover, I think it is reasonable to infer from the specific inclusion of cemeteries that the drafters of the bylaw turned their minds to non-typical institutions such as those dealing with human remains, and opted not to include crematoria among the many listed.”

The Court also rejected the Society’s argument that the crematorium was a religious facility, and thus, a permitted use:

> "Religious facility" is defined as meaning "an assembly building used for public worship" and "assembly" is defined as meaning "the gathering of persons for charitable, civic, cultural, educational, political or religious purposes"….I am not persuaded that "religious purposes" may reasonably be construed as including cremation. Cremation, *per se*, is not a religious ceremony. Simply because it may be an aspect of some religious rites is not enough. I am satisfied that it would offend the principled approach to statutory interpretation to interpret the terms "religious facility" and "assembly" in a manner that would have facilities for the cremating of human remains fall within the definition of "religious facility".

The Court further concluded that even if the crematorium fell within the definition of “institution” or “religious facility”, a <u>commercial</u> operation was still not permitted. The Regional District bylaw drew a fundamental distinction between commercial and non-commercial uses by expressly providing for commercial zones. Since the fundamental purpose of the zoning bylaw is to regulate the uses of the land, to include a commercial crematorium in a non-commercial zone would defeat the purpose of the bylaw. Finally, the Court concluded that a zoning bylaw can, incidentally, limit the users of the land. It is incidental and reasonable in all circumstance that there is a user distinction arising from limiting the use to religious rites.

III. LIABILITY IN NUISANCE AND NEGLIGENCE

Since the *Heyes v. Vancouver (City)*, 2011 BCCA 77, decision which initially found Translink and RavCo liable in nuisance for business losses as a result of street closures and traffic disruptions, and then overturned that finding on the highly discretionary basis of the public utility, we have been closely watching developments in the area of local government liability for nuisance and negligence.

The Supreme Court of Canada's decision in ***Antrim Truck Centre Ltd v. Ontario***, 2013 SCC 13, concerned liability in relation to injurious affection and nuisance more generally. That case considered a permanent rerouting of a portion of Highway 17 running through the Town of Antrim in Ontario, which had the effect of blocking the previously convenient highway access to the Plaintiff's truck stop and related businesses. The Supreme Court of Canada restored a $400,000 award against the Province to the truck stop business on the basis of the highway change being actionable in nuisance.

The Supreme Court's decision in ***Antrim*** confirms that there is a two-part test for nuisance liability. First, the plaintiff must show that there has been a substantial interference with the owner's use and enjoyment of land and, second, the interference must be unreasonable. The Ontario Court of Appeal, which overturned the liability finding, did so on the basis of the Ontario Municipal Board and Divisional Court's perceived failure to undertake a balancing exercise in considering the second, unreasonableness, part of the test.

The Supreme Court of Canada emphasized that, as a liability threshold, the injured party must show that the interference was substantial; that not every interference is actionable and that some interference must be accepted as part of the "normal give and take of life".

The gravity of the harm must be considered again in the second part of the test – whether the interference is unreasonable. ***Antrim*** states that in the reasonableness analysis the severity of the harm and the public utility of the defendant's conduct are not equally weighted considerations; otherwise an important public purpose could always be expected to override the harm caused by carrying it out.

In general terms, the Supreme Court of Canada in ***Antrim*** suggests the question is whether the interferences constitute the normal "give and take" or whether they will be disproportionately borne by the claimant. The public utility of the project is one factor to be considered in the balancing, but is not determinative. In this respect it should be recalled the question for the Court was whether the Ontario Municipal Board had properly assessed the relevant factors, not whether the result was objectively "correct" in the sense it is the same one the Supreme Court would have arrived at if it had been the trier of fact. As to factors that may tip the balance in favour of the owner, the court appears to suggest that a substantial provable loss relating to the nuisance will be highly relevant.

The ***Antrim*** case, like the *Heyes* case, therefore leaves nuisance and injurious affection liability in a highly unpredictable state. We know that the Court will balance the public utility of the works against the losses, and determine if it is "reasonable" for the affected party to bear the loss. Liability in these areas will therefore turn on the specific facts and the views of the decision maker in each case. Unlike negligence, there is no protection from liability on the basis that the losses may arise from policy decisions entrusted to elected decision makers.

In cases of temporary nuisances that do not give rise to injurious affection claims, policy defences may also be a factor in the defence of statutory authority. ***Vancouver (City) v.***

Robinson, 2013 BCSC 1224, illustrates the limitations of those defences, however. In that case, the BC Supreme Court upheld an award of damages against the City for nuisance in relation to particulate pollution associated with the City's public works.

The City undertook a sewer replacement construction project and the contractor used a lane outside Robinson's residence as a staging area for trucks and other heavy equipment. Diesel particulate matter (DPM) accumulated throughout Robinson's residence. She complained to the City numerous times but the City dismissed her complaints. No one from the City attended Robinson's residence to investigate the matter and the construction continued for approximately 17 months. The trial judge found the actions of the City to be inexcusable. She rejected the City's defence of statutory authority and assessed Robinson's damages at $7,548. However, she reduced this amount by 25 percent for Robinson's failure to mitigate by leaving her windows open during the construction.

On appeal, the City contended that the trial judge erred in her rejection of the defence of statutory authority. In order to establish this defence, the City was required to prove that: (a) the act causing the nuisance was expressly or implicitly authorized by statute; and (b) the nuisance was the inevitable result of the statutorily authorized action. The City easily established the first part of the test that it was statutorily authorized to carry out the work repairing the sewer pump station. On the second part, the City argued that the nuisance, being the release of DPM, was the inevitable result of the statutorily authorized action. The Court disagreed and found that the nuisance was the damage to Robinson's residence in the form of DPM being deposited, not DPM itself.

The Court held that while the release of DPM was the inevitable result of having to use heavy diesel equipment, the damage to Robinson's property could have been prevented. The City failed to establish that it was practically impossible to prevent DPM from interfering with Robinson's use and enjoyment of her lands and therefore, the defence of statutory authority was not made out.

Unlike nuisance, the law of negligence continues to recognize a policy area in local government decision making where damages do not arise. In ***PSD Enterprises Ltd v. New Westminster (City)***, 2012 BCCA 319, the BC Court of Appeal has clarified that failures to follow a procedural bylaw do not give rise to a duty of care in negligence. In other words, local governments cannot be liable for damages if they make a procedural error (as opposed to an error in a property inspection, or other operational inspection).

The principal of PSD Enterprises agreed to sell a piece of property to another company that was working with the City on a revitalization initiative, on the condition that the property to which PSD wished to relocate its business was rezoned to allow the business to operate there. PSD had been advised by its lawyer to seek fourth reading of the rezoning bylaw as a condition of selling the property to the company. A representative of the City told PSD's principal that third reading was the stage at which the substantive decision was made by council, and that council

had never turned down a bylaw at fourth reading. PSD maintained that it relied on these statements in agreeing to third reading as a condition of sale.

A public hearing of the rezoning application was held, and council gave third reading approval to the rezoning. The development company gave PSD notice that it was now waiving all conditions precedent and considered the agreement of purchase and sale binding. Before fourth reading, PSD's principal attended a council meeting and made additional submissions to council with respect to the application. This was in contravention of the City's procedure bylaw, which provides that council cannot hear substantive further submissions from a proponent of a bylaw change after the public hearing has been held.

The City followed legal advice to rescind third reading and hold another public hearing. Following the second public hearing, the rezoning did not pass third reading and the bylaw application was defeated

PSD claimed against the City for negligent misrepresentation, negligence, and failure to warn. PSD also claimed promissory estoppel. The BC Supreme Court dismissed the claim, finding that the City had a duty of care with regard to following its own policies and bylaw, but that it was following its standard practice in executing its policy, and so had not breached the standard of care. PSD appealed the decision.

At the Court of Appeal the majority found that the trial judge erred when she held that the City owed PSD a private law duty of care to follow its own policies and bylaw regarding the council meeting process. The trial judge had found that the City clerk's failure to stop the applicant from speaking at the council meeting was operational. On appeal, the City argued that the failure occurred in a quasi-judicial context, and that the judge failed to apply settled law regarding the immunity from liability that attaches to such functions.

The Court of Appeal held that the trial judge took an overly narrow view of the question, eliminating the proper context of the function at issue, which was in fact quasi-judicial. The Court of Appeal went on to note that council has a public law duty to follow the procedural bylaw's provisions, but held that a private law duty should not be superimposed on that public duty. To do so would have the effect of unduly encumbering the City's quasi-judicial function with the threat of private tort liability.

IV. REGULATION VS. PROHIBITION

Section 9 of the *Community Charter* requires a municipality to obtain ministerial approval of bylaws dealing with certain subjects. Soil removal is included in the list and a municipality can only "regulate" soil removal, but not "prohibit", without approval of the Minister of Mines. The question arises as to where to draw the line between a bylaw that is regulatory and prohibitory, and in ***Peachland (District) v. Peachland Self Storage Ltd**,* 2013 BCCA 273, the BC Court of Appeal grappled with this question.

The District amended its existing earthworks control bylaw to impose a 200 cubic metre annual limit on soil removal. The District did not obtain ministerial approval of the amendment. It was initially contemplated that it would only be in place until a new comprehensive bylaw to regulate soil removal could be developed. A couple of years later, a new comprehensive earthworks control bylaw was completed and received ministerial approval. However, rather than adopting the new bylaw, the District decided to leave the amended bylaw in place. Meanwhile, Peachland Self Storage obtained a mines permit from the Province, which authorized extraction of 100,000 cubic metres of aggregate annually. It wished to operate a mine pursuant to the permit, but was not able to operate a commercially viable operation within the 200 cubic metre limit set by the District's bylaw. The District argued that ministerial approval was not required since the bylaw only regulated, but did not prohibit, soil removal.

The Court acknowledged the difficulty for municipalities to know the limits of their jurisdiction when the *Community Charter* assumes that a clear distinction exists between regulation and prohibition. However, in this case, the Court found that the bylaw placed the limit on soil removal so low that no industrial-scale extraction was possible; it effectively rendered the mines permit held by Peachland Self Storage to be of no value. The Court emphasized section 9(3) of the *Community Charter* which captures the provincial interest in the sort of industrial-scale extraction that is important to the provincial economy:

> "It is evident, from s. 9(3) of the *Community Charter* that the requirement for ministerial approval for bylaws that prohibit the removal of soil is to safeguard "the Provincial Interest"."

Therefore, the bylaw could only be characterized, for practical purposes, as a prohibition on soil removal. Under the *Community Charter*, the District required ministerial approval before adopting this effective prohibition, and since it neither sought nor obtained such approval, the bylaw was declared invalid.

This case illustrates that the line between prohibition and regulation is not a bright one. The case law in relation to prohibition and regulation of a business, as seen in *Richmond v. International Bio Research (cob Pet Habitat),* 2011 BCSC 471, recognizes that simply making a business more difficult or a business model unviable is not prohibition. However, prohibiting a class of business is not regulation. ***Peachland*** also recognizes that economic profitability should not be the line between regulation and prohibition, nor does the Court of Appeal suggest that a mines permit is determinative of regulatory limits on soil extraction; prohibition must be something more. However, the extremely low soil removal limits in this case were both intended to and did prohibit commercial extraction, and so wherever that line is to be drawn, we know that a 200 cubic metre limitation goes too far.

V. COSTS

One of the most significant cases of the year for local elected officials was the conflict of interest case, ***Schlenker v. Torgrimson***, 2013 B.C.C.A. 9. That case was discussed in detail in numerous bulletins and papers from this office including this seminar book, client bulletins, and our newsletter (Vol 24 No 1), copies of which can all be found on our website at www.younganderson.ca. However, the costs decision in that case (2013 BCCA 395) is less well known, but may have even more broad ranging implications for local governments.

In *Victoria (City) v. Adams*, 2009 BCCA 563, our courts expanded the scope of cost recovery on an indemnity basis (known as "special costs") to rare circumstances where a case was brought in the public interest rather than for private gain or interest. Generally, these types of costs have been considered as exceptionally rare, and only awarded where a number of conditions were met, including a lack of private interest or personal gain, the use of pro bono counsel, an issue of broad public importance generally involving rights under the Canadian *Charter of Rights and Freedoms,* and a significant discrepancy in that ability of the parties to bear the costs. A number of cases prior to the *Victoria v. Adams* case established that challenges to the qualifications of a person in office, even where successful, do not attract special or public interest costs.

However, the Court of Appeal departed from those findings in the ***Schlenker*** case, and awarded special costs against the challenged elected trustees, on the basis that they had been financially supported in their defence by the local government and UBCM. The Court first noted that the appellants were "private persons contending with public entities who resisted their claims with skill, energy, and public resources". Second, they pursued a significant public interest matter without any realistic expectation of monetary gain. Finally, the Court took into consideration the relative abilities of the parties to pay costs and concluded that the public bodies are much better funded than the appellants to bear the costs. The Court did not consider the lack of a constitutional issue, the private and political interests of two of the petitioners involved in the election opposed to the respondents, or the modest means of the elected officials to be a bar to special costs recovery in this case.

While special costs awards against public bodies are highly discretionary, this case has set the lowest bar for such an award to date.

NOTES