YOUNG ANDERSON
BARRISTERS & SOLICITORS

CASELAW UPDATE

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CASELAW UPDATE

I. IN CAMERA AUTHORIZATION OF FIRST NATIONS SERVICING AGREEMENT

The decision of Vancouver Council to approve a services agreement to facilitate a 6,000-unit residential development on Squamish Nation lands adjacent to and under the Burrard Bridge was challenged by a community association in *Kits Point Residents Association v. Vancouver (City)*, 2023 BCSC 1706. The grounds advanced by the Association included breach of procedural fairness, bad faith, lack of statutory authority and improperly fettering the City's discretion. However, the major issue for the Court was whether the City acted lawfully in considering the servicing agreement in closed session and authorizing the Mayor to execute the agreement. The Association argued that the City exceeded its authority under section 165.2(1)(k) of the *Vancouver Charter*. That section provides that Council may close a meeting to the public where it considers:

> (k) negotiations and related discussions respecting the proposed provisions of an activity, work or facility that are at their preliminary stages and that, in the view of the Council, could reasonably be expected to harm the interests of the city if they were held in public;
>
> [The companion provision in the *Community Charter* is section 90(1)(k)]

The background history of the lands is an example of how lands were dealt with to the detriment of an Indigenous nation. A 10.5-acre portion of the development lands had been expropriated by the Canadian Pacific Railway in 1886 and 1902 for the construction of a rail line and connections. The Province induced the Squamish people to sell the Kitsilano Reserve lands and followed with their illegal removal; by 1946, the Kitsilano Reserve had been completely dismantled.

From 1977 to 2011 the Squamish Nation pursued litigation in the Federal Court and BC Supreme Court seeking compensation for the mismanagement of the Kitsilano Reserve and the return of the 10.5 acres expropriated by the railways. The BC courts determined that Canada's reversionary interest in 10.5 acres of reserve land was held for the benefit of the Squamish, Musqueam or Burrard Indian Band. The claims by the other two First Nations were dismissed, with the result that the 10.5-acre parcel is an Indian Reserve under the *Indian Act* and subject to federal jurisdiction.

In 2019 the Nation obtained approval for the development of the lands and for the business terms to guide a development partnership with a private developer. In December 2019 the Nation announced plans to double the number of units from 3,000 to 6,000, increasing the projected number of occupants to 11,000.

From March 2020 the Residents Association sought a commitment from the City to engage in a comprehensive planning process that would include "robust citizen engagement", allowing the Association to participate meaningfully and make submissions. The Association's stated concerns were the size and density of the proposed development's towers, the impact on neighbouring residential communities, including on traffic, infrastructure and the use of Vanier Park. On learning that it was proposed that the development would be accessed by a road through Vanier Park, a park owned by the federal Crown but subject to a 99-year lease with the City, the Association sought further information from the City, which did not respond as all discussions were being held in-camera.

In further discussions with City staff, the Association argued that it should have been consulted before the City's negotiations with the Squamish Nation and that the City should be using its leverage respecting the provision of municipal services to negotiate a reduction in the size of the development such that it would be no larger than a development that reserve land "would on its own support." The City took the position that as the development would occur on Reserve land, it was outside the City's land use regulation jurisdiction.

In 2020 Council approved guiding principles to govern the negotiations with the Nation, including that Vancouver was a "City of Reconciliation" and recognized the Nation as a separate order of government with the right to develop its land as it saw fit. At an in-camera meeting on July 20, 2021, Council authorized the City Manager and City Solicitor to approve the form of an agreement attached to a staff report, and further authorized the Mayor to execute the agreement on behalf of the City. The form of the servicing agreement before Council on July 20, 2021 contained several "NTDs" (notes to draft) throughout. The authorizing resolution also provided that "no legal rights or obligations be created by the adoption of the preceding resolution giving the Mayor authority to execute the agreement". The resolution directed City staff to negotiate with the Nation and its private partner on the degree to which the service agreement and future agreements would be made public.

Council received a further staff report in November 2021 advising that the Nation sought material changes from the draft agreement relating to rights of cancellation and limitations on the City's liability. There were 9 subjects identified as being incomplete in the agreement, including the status of the Burrard Bridge and the parties interaction respectively as landowner and "right of way" user. Between November 2021 and May 25, 2022, when the services agreement was executed, the remaining substantive issues were successfully resolved. As of the May 25, 2022 signing announcement no consultations had taken place with the residents regarding the proposed development or any related matter.

A. Standard of Review

The BC Supreme Court rejected the Association's argument that the City's decision to close the Council meeting pursuant to section 165.2(1)(k) of the *Vancouver Charter* should be reviewed on a standard of correctness, and not reasonableness. Their argument was the rule of law

required Council be correct as the central issue in the case was the open meeting requirement. The judge found that the interpretation of section 165.2 did not involve a general question of law that was of central importance to the legal system. The presumption of reasonableness from *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 had not been rebutted by the Association.

B. Interpretation of Section 165.2(1)(k)

The Association argued that the City's resolution to approve the servicing agreement at an in-camera meeting on July 20, 2021 was unreasonable on three grounds:

- The stage of the negotiations for the service agreement at that time were no longer "preliminary";
- The "interest of the city" is the interests of the Vancouver residents in their communities and not solely the interest of the Nation; and
- The Council meeting was not required to be conducted in-camera since it could not reasonably be expected to harm the "interests of the city".

1. Were the negotiations or discussions at a "preliminary stage"?

On the first ground, the Court found the City's interpretation of the provision was reasonable, relying on the dictionary definition of "preliminary" as including something coming before an event. The event – execution of the agreement – occurred after Council's July 20, 2021 resolution. As of July 20, 2021 the agreement was still being negotiated and the authorizing resolution stated further that no legal rights of obligations would be created by Council's authorization to approve the form of the agreement and execute it. The Court noted there were five consequential items that had not been resolved as of the July 20/21 resolution.

2. Were "interests of the city" at stake?

The Court rejected the Association's argument that "interests of the city" should be equated with only the interests of City of Vancouver residents. Defining the interests in that way was seen as too narrow and limited. The City could reasonably consider the "interests of the city" as encompassing a variety of considerations, including the City's reputation, fiscal issues, but most importantly in this context, its relationship with the Squamish Nation. Considering the historical and legal context of the proposed development, and interpreting the *Vancouver Charter* consistent with UNDRIP*,* the City's approach to recognize its jurisdictional limitations and to choose not to use negotiations with the Squamish Nation as a lever to change the proposed development was a reasonable view of the "interests of the city".

3. Could discussion in open session reasonably be expected to "harm" the City's interests?

Noting that the negotiations were complicated and lengthy and involved a number of very sensitive subjects, including future use of the Burrard Bridge, the judge was persuaded that if the meetings were held in public it could have undermined the City's negotiating position. The fact that the City had shared the "Guiding Principles" that would govern the content of the servicing agreement, did not mean that the City's "full negotiating stance was known to the Nation". The Court also rejected the Association's argument that the detailed staff report provided for the July 20, 2021 meeting should have been considered in an open Council session. That staff report outlined the negotiations, summarized the provisions of the servicing agreement and commented on the outstanding issues. Public disclosure of this sensitive information could have negatively impacted the negotiations of the outstanding issues and disadvantaged the City's negotiating position.

In light of the record as a whole, and acknowledging the deference owed to the City as an elected body, the Court concluded that the City's interpretation of section 165.2(1)(k) was reasonable and justified holding the July 20, 2021 meeting *in camera.*

C. Remaining Grounds

1. Procedural Fairness

The Association argued the City had a duty to implement a consultation process due to the potential impacts of the services agreement on the residents of the City and Kits Point. The Court concluded, however, that the decision to enter into the services agreement did not involve the balancing of the interests of the Kits Point Association or City residents and thus was not a quasi-judicial decision subject to procedural fairness obligations. Alternatively, the Court found that the law was clear that municipalities are not required to engage in public consultation before entering into commercial agreements, citing the Court of Appeal's decision in *Community Association of New Yaletown v. Vancouver (City)*, 2015 BCCA 227. Finally, the Court ruled there could be no legitimate expectation of consultation as the decision under challenge was a legislative act to which the doctrine of legitimate expectations does not apply. There was no statutory or common law duty of fairness requiring the City to engage in public consultation before the services agreement was executed.

2. Delegated Authority to enter into the Services Agreement

The Squamish Nation had established an Indian land taxation bylaw that would apply to the development lands, meeting the prerequisite for invoking the authority under section 37 of the provincial *Indian Self Government Enabling Act* by which a "Provincial taxing authority"[1] may contract with a band for the purpose of providing services that the provincial authority "is obligated or permitted to provide under its usual mandate." The services agreement covered

[1] Defined as including a municipality or regional district.

the provision of basic services that fell within the City's usual mandate. Section 192 of the *Vancouver Charter* empowered the City to enter into agreements under provincial acts which contemplate municipalities may be parties.

3. Bad Faith

The Association's argument was the City acted in bad faith by creating a false public belief that there would be a meaningful public consultation despite having no intention to do so, which in turn was founded in the City's mistaken position that it did not have jurisdiction to influence what the Nation proposed to build on the development lands. Having previously concluded that the City's interpretation of section 165.2(1)(k) was reasonable and that there was no breach of procedural fairness, the City's process was neither unreasonable or arbitrary. Further, the City had not acted beyond the scope of its statutory authority. The Court found that the City's decision not to use the negotiation of the services agreement as a mechanism to force the Nation to reduce the proposed density of the development was based on the City's fully considered view this was an appropriate strategy. Accordingly, there was no basis for finding the City acted in bad faith.

4. Fettering City's Discretion

The argument on this ground was that by adopting the "Guiding Principles" at the outset of the negotiations, Council fettered its discretion to hear from the residents and precluded any opportunity to negotiate with the Nation on the scale of the proposed development. The Court did not agree that the City was committed to exercise its discretion in a particular way by adopting the 3 principles at issue: (1) respecting the Nation's right to develop its lands as it saw fit; (2) understanding the Nation's aspirations for the development; and (3) taking guidance from the Nation on how to engage in "development of the communication and operating protocol." Respecting the Nation's ability to develop their lands as they wished flowed logically from the legal position that municipalities do not have the power to regulate zoning and land use planning on reserve lands; *Surrey (District) v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 (BCCA). Respecting the second principle, the judge noted there was great benefit to the City in achieving a mutually beneficial agreement, particularly in the resolution of the difficult issue of the use of Burrard Bridge. As to the third principle, the City differed with the Nation on the issue of whether the services agreement should remain confidential and not be disclosed to the public, and thus any "guidance" from the Nation did not bind the City to agree with the Nation's position.

II. TREE BYLAW IS INAPPLICABLE TO ALLOW AGRICULTURAL USE PERMITTED BY ZONING BYLAW

In *McHattie et al. v. Central Saanich (District)*, 2023 BCSC 175, the property owners cut down 108 "protected trees", defined as trees of a certain species and size in the District's tree bylaw, on their property without a tree cutting permit. The District's bylaw enforcement officer and legal counsel wrote letters to the owners indicating that the tree cutting contravened the tree

bylaw. The owners asserted that the cutting down of the protected trees on their property was for the purpose of planting crops and that the tree bylaw did not apply because the District's zoning bylaw permitted agricultural use. Of note, approximately half of the property was in the Agricultural Land Reserve, which was not at issue in the case because the tree bylaw exempted the cutting down of trees from the requirement for a permit on land within the ALR.

The owners filed a judicial review petition in the BC Supreme Court challenging the District's view that its tree bylaw applied in relation to the cutting down of the protected trees on the property not within the ALR. The District also filed a claim in the BC Supreme Court enforcing the tree bylaw against the owners.

A preliminary issue was raised whether the District had made a "decision" that could be subject to judicial review. Based on the facts of the case, the Court found that the District had made a "decision" regarding the applicability of the District's tree bylaw to the owners' tree cutting activities that could be subject to judicial review.

The main issue in the case was therefore whether the District's determination that its tree bylaw applies, including its interpretation of section 50(2)(b) of the *Community Charter* (the "Charter"), which restricts the District's authority under section 8(3)(c) of the Charter to regulate, prohibit and impose requirement in relation to trees, was reasonable.

Section 50(2) states:

> Restrictions in relation to authority
>
> (2) Subject to subsection (3), if a bylaw under section 8(3)(c) would have the effect on a parcel of land of
>
> > (a) preventing all uses permitted under the applicable zoning bylaw, or
> >
> > (b) preventing the development to the density permitted under the applicable zoning bylaw,
>
> the bylaw does not apply to the parcel to the extent necessary to allow a permitted use or the permitted density.

The District's view was that the limitation in section 50(2) of the Charter was not engaged merely because the tree bylaw prevented the owners from cutting certain trees to facilitate the planting of crops on a portion of their property on which agriculture is a permitted use under the zoning bylaw. The District interpreted the word "development" in section 50(2)(b) as the construction of buildings and structures, but not the planting of crops. It also concluded that a restriction on a portion of a property that may be used for a particular use is not a "density" control for zoning bylaw purposes.

For the meaning of the term "density" in section 50(2)(b) of the Charter, the District relied on two Court of Appeal cases in which the Court expressly held that lot coverage restrictions are not density controls for zoning purposes: *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014 BCCA 271 and *0940460 B.C. Ltd. v. City of Burnaby*, 2020 BCCA 142. One of the main arguments of the District was that its interpretation of the term "density" in section 50(2)(b) cannot be unreasonable when it is the interpretation adopted by the Court of Appeal.

The chambers judge disagreed, concluding that the District's interpretation of section 50(2) of the Charter was unreasonable and that the restriction in section 50(2)(b) was engaged by the application of the District's tree bylaw that prevented the owners from planting crops on the entirety of their property. She held that the planting of crops is "development" of the parcel for the purpose of section 50(2)(b) and that by limiting the amount of the parcel that could be used for that purpose, the tree bylaw had prevented that development from occurring to the "density" permitted under the District's zoning bylaw, which she noted allowed agricultural use "from post to post". In reaching her conclusion, the chambers judge relied on the decision of the Court of Appeal in *Service Corporation International (Canada) Inc. v. Burnaby (City)*, 2001 BCCA 708 but did not address the more recent decisions of the Court of Appeal in *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)* and *0940460 B.C. Ltd. v. City of Burnaby*. She declared that the District's tree bylaw was inapplicable to the property to the extent necessary to allow certain farming activities permitted by the District's zoning bylaw.

This case is currently under appeal and will be heard by the Court of Appeal on November 28, 2023.

III. QUALIFIED PRIVILEGE PROTECTION EXTENDED BEYOND COUNCIL MEETINGS

In a number of British and Canadian authorities the defence of qualified privilege to defamation claims has been applied to speech made in the course of municipal council meetings.[2] In *Thatcher-Craig v. Clearview (Township)*, 2023 ONCA 96, the Ontario Court of Appeal has held that the qualified privilege defence should apply as well to comments that are posted to a municipal website as part of a land use planning process.

Comments that are defamatory in content do not result in liability on the part of their maker or a person who republishes where the comment is made on an occasion of privilege unless (i) the dominant motive behind the words was malice, such as where the speaker was reckless as to the truth of the words spoken, or (ii) where the scope of the occasion of privilege was exceeded. An occasion of privilege arises "if a person making a communication has 'an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published' and the recipient has 'a corresponding interest or duty to receive it'"; *Bent v. Plantick,* 2020 SCC 23.

[2] The leading BC decision on this point is *Baumann v. Turner* (1993) 82 B.C.L.R. (2d) 362 (C.A.).

In *Thatcher-Craig v. Clearview,* the claimants operated a hops farm and wanted to expand the operation to include a micro-brewery. The claimants took the position that a rezoning was not required as a brewery was already a permitted use, and that all that was required was a site plan application. The Township's planning department prepared a report that concluded a brewery was not permitted. The proposed brewery was the subject of a local newspaper article, which prompted letters from the public to the Township commenting on the proposal, indicative of a significant public interest in the matter. The Township posted the site plan application to its online database, along with various commenting letters it had received, without any attempt to edit the letters. The claimants asserted various comments in the letters were defamatory and sued the Township, alleging that the contents were inaccurate and had damaged their business. The letters alleged, among other things, that the claimants had engaged in bully tactics, sprayed arsenic on their lands and dug a trench on the property designed to injure dogs, deer and other wildlife.

The Township applied under the Ontario equivalent of BC's *Protection of Public Participation Act* to dismiss the lawsuit as a strategic lawsuit against public participation ("SLAPP"). To succeed with such an application, the defendant must establish the proceeding arises from expression made by the applicant defendant on a matter of public interest. The onus then shifts to the plaintiff to establish that there are grounds for the Court to believe that:

- The proceeding has substantial merit;
- The defendant has no valid defence; and
- The harm likely suffered by the plaintiff is serious enough that the public interest in the proceeding continuing outweighs the public interest in protecting the expression.

The chambers judge accepted that the posted comments were on a matter of public interest. However, the judge held that the defence of qualified privilege would fail, based on a consideration of the following factors:

- The Township did not solicit the comments;
- The site plan application was a less formal process with no mandatory public meeting;
- The Township's development application guideline did not state that comments from the public would be posted online;
- The content of the posted comments was largely irrelevant to the micro-brewery issue;
- The content was available to anyone using the internet (exceeding the scope of the privilege); and

- The Township published the comments without giving any guidance to ensure the information was "appropriate".

The Ontario Court of Appeal allowed the Township's appeal and dismissed the claim, finding that the lower court judge had erred in his approach and analysis of the qualified privilege defence. In assessing the scope of the privileged occasion, the Ontario appeal court referenced the Ontario *Planning Act* provisions relating to public notice, consultation and opportunities for the public to make submissions, and that the Township had chosen to go beyond these statutory requirements in relation to site plan control applications. In light of the statutory structure and the Township's approach to inviting the public to participate in the planning process, the Court of Appeal found that the Township had an interest and duty, both legal and social, "to make the planning process transparent and accessible to its residents and that they have a similar duty and interest in accessing the information related to the process."

That duty and interest extended to "providing access to all information and comments that will form part of the record to be considered by council, including comments from the public." The Court noted this type of information is typically communicated by making it available online on its website. This laid the foundation for the Court's conclusion that qualified privilege extended not only to council meetings but "to the entire public planning process including receiving the material received in response to the [claimants'] application and posted on the Township's publicly available website."

With respect to the factors cited by the lower court judge in finding that the defence of qualified privilege would fail, the Court of Appeal concluded:

- The negative comments in the letters remained relevant as they were intended to alert the Township to further problems if the claimants were permitted to add the micro-brewery operation, consistent with the motions judge accepting the letters were expression relating to a matter of public interest and Supreme Court authority that qualified privilege reflect the fact "common convenience and welfare of society" sometimes require untrammeled communications;

- While the Township's website audience went beyond residents, the purpose of the website was to keep residents informed, the website was the "most efficient, accessible and cost-effective method" of allowing the people most likely to access it to obtain information; and

- Although, as a "counsel of prudence", a municipality may wish to provide guidance to those wanting to comment on planning issues to best ensure relevance, the failure to do so does not alter the analysis for deciding whether any of the content exceeded the qualified privilege; there was no suggestion of malice on the part of the Township; the Court indicated the Township could risk a claim of malice if the content of the comments "clearly amounted to a vitriolic attack on the applicant resident."

The decision can be viewed as a positive development from the municipal perspective in extending qualified privilege beyond council meetings to land use planning processes. While the Ontario Court of Appeal suggested, on the one hand, that municipalities are not obligated to provide guidance to members of the public who submit comments that are posted online, the reservation that "vitriolic attacks" may still carry a risk of liability to a municipality allowing those comments to be posted online indicates an ongoing role in reviewing the content of online contributors may be required.

IV. ZONING BYLAW CAN RESTRICT OCCUPANCY OF RENTAL UNITS TO TENANTS

In *V.I.T. Estates Ltd. v. New Westminster (City)*, 2023 BCCA 183, the City of New Westminster enacted a zoning amendment bylaw restricting certain multi-family residential properties to "residential rental tenure". The bylaw only permitted the units to be occupied if rented to residential tenants. Owners were prohibited from occupying the units.

The bylaw applied to 12 buildings owned by the City and 6 privately owned buildings that had been rental units for decades. The owners of the 6 multi-family residential buildings challenged the bylaw on three grounds:

- The bylaw was void for uncertainty as a result of internal contradictions;
- The City lacked the authority to enact the bylaw; or
- The bylaw was inoperative due to conflicts with the *Residential Tenancy Act*.

With respect to the bylaw being void for uncertainty, the Court applied a standard of review of correctness. The test for vagueness is "whether a reasonably intelligent person would be unable to determine the meaning of the bylaw and govern his or her actions accordingly". The Court determined that because the threshold for vagueness is high, there is no room for residual deference to the municipality.

The owners argued that sections 49(3), (4) and (5) of the *Residential Tenancy Act* mandate that a tenancy be terminated for purposes of enabling a landlord, purchaser, or close family member to reside in the unit. They argued the bylaw was internally contradictory because it requires a residential rental tenure to conform to the *Residential Tenancy Act* but prohibits the occupation of the unit by anyone other than a tenant. The Court rejected this argument finding that the *Residential Tenancy Act* does not establish a right of a landlord to occupy the unit. Rather, the Act restricts an owner's common law right to occupy the unit and establishes procedures and conditions that must be followed before those rights can be exercised. The Court held that the *Residential Tenancy Act* governs the relationship between landlord and tenant, not the rights to land use. The bylaw did not affect the relationship between landlord and tenant but rather restricted the manner in which the landlord was entitled to use the land.

With respect to whether the City had the authority to enact the bylaw, applying a standard of review of reasonableness, the issue was whether the City's decision that it had the authority to enact the bylaw pursuant to Part 14 of the *Local Government Act* was reasonable. In 2018, Part 14 was amended to allow local governments to adopt a bylaw in relation to residential rental tenure, including section 481.1 which provides that a zoning bylaw may limit the form of tenure to residential rental tenure in a zone to which multi-family residential use is permitted. The Court concluded the provisions in the *Local Government Act* are "clearly intended to give the municipality the ability to preserve the availability of rental accommodations within its boundaries, and, in doing so, to limit the ability of landowners to use property for other than residential rental tenure".

The Court rejected the owners' argument that the provisions of the *Local Government Act* do not expressly confer a power on a local government to interfere with rights under the *Residential Tenancy Act*. The Court noted the difficulty with this argument, similar to the vagueness argument, is that it again presumes the *Residential Tenancy Act* establishes a right of a landlord to occupy the unit when there is no such right. The Court concluded "[n]othing in the *Residential Tenancy Act* suggests that a municipality is unable, when exercising delegated powers under other legislation, to place additional restrictions or prohibitions on landlords' rights to occupy residential premises".

On the final ground, the Court found that the bylaw did not conflict with the *Residential Tenancy Act*. The Court noted that it is well-established that a municipal bylaw will only be found to be inconsistent with a provincial enactment under section 10 of the Charter if there is an operational inconsistency between the bylaw and the provincial enactment. Here, nothing in the bylaw in any way is inconsistent with the *Residential Tenancy Act*. The Court therefore dismissed the owners' appeal.

V. DEVELOPMENT PERMIT ISSUANCE – THE GUIDELINES STILL MATTER

In *Hammer Head Equities Inc. v. Rossland (City)*, 2023 BCSC 73, the BC Supreme Court determined that Rossland Council had acted unreasonably in rejecting four development permit (DP) applications to permit tree removal on properties owned or controlled by the same principal. The City was also found to have acted in bad faith and in a manner that was procedurally unfair.

The four DP applications were considered together by Council. The municipal planner had recommended issuance of all four of the DPs on conditions. Two of the four applications involved privately owned forest lands. While the judge did not explicitly state that those lands were "private managed forest land" under the *Private Managed Forest Land Act*, that would appear to have been the case in light of the planner having advised Council that the lands were exempt from any requirement to obtain a permit under the City's tree retention bylaw. Where a forest management plan is in place (as the planner indicated was the case for

the two parcels), section 21 of *Private Managed Forest Land Act* provides that a local government must not issue a permit under Part 14 that "would have the effect of restricting, directly or indirectly, a forest management activity", which is defined as including "timber harvesting activities".

For the two parcels for which DPs were sought that were not private managed forest lands, the applicant claimed the permits were required for site preparation and fire protection. On the one parcel, a nine lot bare land strata subdivision had been developed as first of a two-phase development. The owner stated that a similar subdivision was "likely" for phase two but was subject to geotechnical and engineering assessment, necessitating the tree and vegetation removal. The other parcel was developed with a pub and parking lot and a storage area for rock and aggregate, with forest cover on 20% of the total area. The owner's long-term plan was to develop townhouses on part of the parcel; the stated purpose of the tree removal again was site preparation. There was no suggestion that the DPs would be followed by building permit applications for the proposed developments.

During the initial Council meeting that considered the DP applications, various Council members expressed concern about the proposed clear-cutting having exposed the limitations of the City's tree retention bylaw.[3] Council sought to "slow the process down" by obtaining a legal opinion. After obtaining a legal opinion, Council defeated the DP applications, contrary to the planner's recommendation that they be issued. The general sentiment of Council appeared to be that the DP applications did not accord with the spirit of the OCP's DP guidelines, which did not support clear-cutting.

In response to the owner's petition challenging the DP denials, the City argued that the OCP environmental protection area DP guidelines could reasonably be interpreted such that no vegetation removal should be permitted unless required to facilitate residential, commercial or industrial development. The relevant guideline (OCP section 33.4.8) stated:

> Development activities that will require vegetation clearing shall be limited only to those areas that require levelling, including each unit location, roadways and driveway and that shall be done in accordance to Best Management Practices as determined by the City of Rossland.

The owner pointed to a different guideline (dealing with land reclamation) as permitting vegetation removal where not connected to any other form of development such as residential, commercial or industrial construction. The Court found that the City's denial of the DPs was unreasonable as it had imported a requirement – that any tree removal had to be done in conjunction with other development– that had no basis in the OCP guidelines. That general proposition is consistent with previous cases, but the Court's decision leaves other questions unanswered.

[3] For the managed forest lands parcels, section 50(1)(b) of the *Community Charter* provides that a municipal tree bylaw does not apply if the lands are subject to s. 21 of the *Private Managed Forest Lands Act* [re: forest management activities].

Unfortunately, the Court did not conduct an analysis of the *Local Government Act* provisions respecting the authority to enact differing types of DP areas and the prohibitions on specified activities under section 489 (i.e., no alteration of land) or engage in a more detailed examination of the interaction between the regulation of private managed forest lands and local government tree regulation and Part 14 land use regulation powers. While the excerpts of the debate referenced in the decision suggest that Council failed to distinguish between the private managed forest parcels and those that did not come under the *Private Managed Forest Land Act*, the Court also failed to pursue the significance of Council missing the distinction. While it would have still been necessary for the owner to have applied for a DP for the private managed forest land parcels, Council could not, by virtue of section 21 of that Act, have included terms in any issued DP that would have had the effect of limiting any timber harvesting activity.

For the non-private managed forest parcels, the judge never came to grips with the question of whether denying a DP for the proposed tree cutting for "site preparation", for future, but not imminent, construction, was justifiable. Assuming the Court had found that a development was proposed, section 491(a) of the LGA provides that a natural environment protection DP may "specify areas of land that must be free of development". But if development was not contemplated on some part of the lands in the near future, was there any basis for Council to issue a DP for a development area on the proviso specifying other area(s) to be kept free from development. The City decided not to appeal the decision, so the questions raised from the Court's unreasonableness analysis will have to await another case.

The Court made findings that the City acted in bad faith based on (i) Council's knowledge that, as a matter of law, the DPs ought to have been issued, that (ii) deferring consideration of the DPs to get legal advice was not for the purpose of assisting Council to determine if the applications should be approved, but to find ways to avoid approving them and (iii) Council's adoption of a new tree retention bylaw immediately on the heels of its decision to deny the DPs was an attempt to thwart the owner's plans.[4] These findings may be the subject of further analysis by another judge as the owner has commenced a misfeasance in office claim against the City and the individual Council members who voted against the issuance of the DPs.

VI. ADJUDICATORS HAVE NO DISCRETION TO CANCEL BYLAW NOTICE WHERE BYLAW CONTRAVENTION

In *Peace River (Regional District) v. Pringle et al*, 2023 BCSC 1172, the Regional District sought judicial review of a decision of an adjudicator under the *Local Government Bylaw Notice Enforcement Act.* The subject property contained more than two dwellings and a campground not permitted by the Regional District's zoning bylaw. The property was also in the Agricultural Land Reserve, which did not permit such uses.

[4] The Court did not refer to the s. 50 *Community Charter* exemption from the application of tree bylaws to private managed forest lands.

The adjudicator found that the contravention alleged in the bylaw notice ticket issued to the property owners by the Regional District – that the owners were using their property in contravention of the zoning bylaw on the date the bylaw notice was issued - occurred as alleged. The issue in the case was, once the adjudicator determined that the contravention alleged in the bylaw notice ticket occurred as alleged, whether it was open to the adjudicator to nonetheless cancel the ticket.

The Regional District argued that the adjudicator was required to order that the penalty set out in the bylaw notice is immediately due and payable to the Regional District by the owners under the *Local Government Bylaw Notice Enforcement Act*. Section 21(2) of that Act states:

> If, after the hearing required under section 18 [*adjudication procedures*] in respect of a dispute referred to in section 14(a) [*local government dispute adjudication system*], the adjudicator is satisfied that the contravention alleged in the bylaw notice occurred as alleged, the adjudicator must order that the penalty set out in the notice is immediately due and payable to the local government indicated on the bylaw notice by the person to whom it was issued or deemed issued.

The chambers judge agreed with the Regional District that the adjudicator found that the property did not comply with the Regional District's zoning bylaw and was therefore required to uphold the penalty. She concluded the adjudicator exceeded her jurisdiction under the *Local Government Bylaw Notice Enforcement Act* by cancelling the ticket for improper reasons such as in her view the owners were "doing the best [they] can" and were "actively attempting to rectify" the zoning contravention.

The Court found that the wording of section 21 of the *Local Government Bylaw Notice Enforcement Act* "point to this being an absolute liability offence where proof of the proscribed act inexorably leads to guilt". In any event, the Court noted the owners did not advance any due diligence defence. The adjudicator simply inexplicably found that the zoning of the property was "still in question till all Government Ministries have made a determination". The Court noted that the evidence at the hearing was that all formal avenues to change the zoning had been exhausted and the adjudicator's reference to the owners continuing to pursue informal avenues by writing to various BC government agencies did not mean that the zoning contraventions in relation to the property had not occurred. Nor could any due diligence defence reasonably include simply writing to BC government agencies "in the hope that some political intervention might arise".

The chambers judge ordered that the penalty set out in the bylaw notice is immediately due and payable by the owners to the Regional District. This case is currently under appeal.

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