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## CLIENT BULLETIN

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### **PUBLIC HEARING PROCEDURES: A NEW WRINKLE**

The B.C. Supreme Court has added a new wrinkle to the extensive case law on procedural fairness in the context of statutory public hearings. The decision may require local governments to provide to members of the public, in some situations, not only disclosure of documents relevant to the proposed bylaw that will be considered by the council in determining whether to adopt the bylaw, but a balanced explanation of what the documents mean.

The January 27 decision of Mr. Justice McEwan in *Community Association of New Yaletown v. Vancouver (City)* deals with the rezoning of City land at 508 Helmcken Street in the City's Yaletown district to permit a 36-storey mixed-use development with 448 residential units and commercial and institutional uses at the lower levels. The rezoning is in fact more complex than that; indeed, characterizing it as complex is like characterizing Tolstoy's novel *War and Peace* as a long story.

The project actually involves the following (these are just the key elements):

- The construction by the developer on its nearby site at 1099 Richards Street, under existing zoning, of a building containing 162 social housing units
- The rezoning of the City's Helmcken Street site, which presently has a building with 87 social housing units, to increase the permitted height from 70 to 320 feet and the permitted floor space ratio from 3.0 to over 17
- The swap of the City's Helmcken site and an abutting lane for the Richards Street site including the new building
- The payment by the developer of \$1 million in community amenity contributions
- Demolition of the building on the Helmcken site and construction of the developer's 36-storey building
- A 60-year rental housing agreement with regard to 110 of the units in the Helmcken Street project, to be located in their own air space parcel

Residents of the Yaletown neighbourhood who will be impacted by the developer's Helmcken Street project challenged the validity of the zoning amendment, as well as an official plan amendment for that project and the development permit for the Richards Street project (which is already under construction). The residents relied on grounds established in previous public hearing case law: inadequate disclosure of documents, inadequate notice to the public, prior

fettering of the council's legislative discretion, inconsistency of zoning with the relevant official plan.

Surprisingly, the Court decided the case without applying the applicable case law on these questions, but by posing, and answering, a new question: "whether the City provided enough information for the public, in a form that was understandable, to fairly evaluate the pros and cons of the proposed development". On that question it noted that the information that had been disclosed to the public "is highly technical and organized in such a way that a large volume of information that is, at best, peripheral, interlaced [*sic*] with material that is vital to the issues. There is nothing that addresses the public in simple, direct terms. Rather, the material has the general effect of allowing the public [*sic*] eavesdrop on correspondence between technical staff and City Council." Dealing with the City's argument that the subject of the public hearing had to be restricted to the proposed use and density of the Helmcken Street site, the Court observed that "treating 508 and 1099 as distinct issues does not reflect the true substance of this particular project or the nature of the public interest involved. Residents of the City have a right to a voice in integrated projects of this kind, and a right to a fair opportunity to express themselves relative to the over-all advantages and disadvantages of the proposal. They have a right to make submissions on whether, at the end of the day, the City simply gets what it has and [the developer] gets a tower, to the overall detriment of the neighbourhood, or whether, in fact, the arrangement is a good deal, enhancing the City's social housing and low cost housing goals at minimal cost to those nearby." In summary, Mr. Justice McEwan wrote, "I think the court has been favoured with a more extensive and intelligible description of the project and its perceived benefits than the public got at the public hearing. I make no comment on whether I am persuaded, which has nothing to do with my task. I simply note that I think the public was entitled to an explanation that was more like what the court was given in this proceeding." [emphasis added] Both the zoning amendment for the Helmcken Street site and the development permit for the Richards Street site were quashed.

Case law had already established a standard of "scrupulous fairness" for situations involving the exercise of local government powers to alter the zoning of the local government's own land. This case seems to us to highlight the additional difficulties that can arise when the zoning power is employed to lever public benefits on an *ad hoc* basis. Here the inherent lack of transparency associated with non-statutory "community amenity contributions" in the form of new affordable housing units was allowed to contaminate the public hearing process. Local governments that are engaging in these transactions are, unless this decision is reversed on appeal, now under a positive duty not only to disclose all documentary information they possess regarding the entire transaction, but to provide explanations of the documents that are intelligible to the average citizen.

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