

SEPTEMBER 28, 2010

## CLIENT BULLETIN

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### THE LATEST ON PROCEDURAL FAIRNESS REQUIREMENTS IN PUBLIC HEARINGS

In *Vancouver Island Community Forest Action Network v. Langford* 2010 BCSC 1357 the British Columbia Supreme Court left the door ajar on the requirement to provide documents to the public that were not provided to Council before a public hearing, but did not let anyone through.

At issue was the procedural fairness of a public hearing, including the conduct of the hearing itself, and the document disclosure leading up to that hearing. The petitioner, a non-profit environmental advocacy group, challenged the validity of a comprehensive zoning bylaw amendment that rezoned 209 acres in the area of Skirt Mountain in the City of Langford. The rezoning would have provided for the creation of a new neighbourhood, complete with apartment towers, mixed-use commercial, and single and multi-family dwellings.

The challenge was on procedural grounds and alleged that the City had not conducted the hearing fairly, and had failed to provide a number of highly relevant documents prior to the public hearing, including draft covenants, site traffic impact studies, storm water management plans, and an archaeological impact assessment. None of these documents were actually presented to or considered by Council, however they were referenced and discussed extensively in the staff reports that were provided to Council and the public.

The Court dismissed the challenge and upheld the bylaw.

With respect to the hearing process, Madam Justice Fenlon for the BC Supreme Court makes a number of findings that may be of assistance to other municipalities dealing with contentious public hearings. The first is that a five-minute time limit on speakers was a reasonable procedure for public hearings, particularly where the Chair allows speakers to come up for “seconds” once the initial submissions have been made. The Court also notes the opportunity to submit unlimited written comments to Council.

With respect to the disclosure issues, the City conceded that some of the impact studies and reports were not available to the public at or prior to the hearing. On the strength of a number of court decisions since 1982, the City argued that procedural fairness only requires the disclosure of documents actually considered by Council, as the issue is not the relevance of particular documents generally, but whether the public has access to the same documents that Council is considering.

Despite a thorough review of the substantial case law on this point, the Court found that the Court of Appeal's reasoning in *Pitt Polder Preservation Society* 2000 BCCA 415 supported the conclusion that in some cases procedural fairness may require pre-hearing disclosure not simply of documents before Council, but other documents that are "material to the approval, amendment or rejection of bylaws." Ultimately, however, the Court found that a case by case analysis would be required, such that in some circumstances it may be that members of the public are entitled to receive documents in addition to those that are before Council in advance of the public hearing. The Court then set out a list of considerations that may influence the scope of disclosure required, including:

- Does the contemplated rezoning result in a significant change in land use from the previous zoning?
- Do the disputed records pertain to the concerns of the Petitioner, or add anything to the debate?
- Are the documents relevant to zoning or are they relevant to site specific development or other concerns?

Having identified these and other factors, the Court went on to find, that in this case, the non-disclosure of documents, although arguably relevant, and referenced in the staff report, was not required.

One of the most important factors relied upon in this regard by the Court was that the challenged zoning bylaw did not create a significant change in land use. In making this finding, the Court specifically considered that the *status quo* was not simply the current state of the land, which in this case is largely undeveloped, but what the existing zoning and Official Community Plan already contemplated. In this case, the types of uses did not change significantly, although their density was increased and clustered. More significantly, the Official Community Plan already contemplated an existing neighbourhood centre with mixed use and high-density towers as well as smaller scale residential development. The Court found that the bylaw was consistent with the OCP, and that it was possible under section 890(4) for the City to have waived the holding of the public hearing. Therefore, while the Court notes that having decided to proceed with the public hearing it was necessary for the City to do so in a procedurally fair manner, the existence of the consistent OCP was a significant factor in establishing that the public interest had already been significantly served, and that therefore a lower level of disclosure was required. Thus, while the bylaw would allow a significant change from the present and existing use of the land, the Court found it was not a significant change for the purpose of the procedural fairness analysis.

Overall, the Court found that it was generally sufficient that the staff report summarized the key aspects of the undisclosed documents, and that non-disclosure did not affect the ability of the public to make informed representations about land use issues. Some documents were found to be more relevant to funding, and site specific permits that were not required to be considered as part of the broad land use issues. This is an important distinction for many

rezonings which address large properties likely to be further subdivided or subject to site specific development permit processes in the future.

Finally, in reasoning that is strongly reminiscent of the decision of Madam Justice Southin in *Jones v. Delta* (1992), 92 DLR (4<sup>th</sup>) 714, the Court dismisses the concerns about the non-disclosure of the traffic impact study on the basis that the more specific information that may have been gleaned from disclosure of an in depth site traffic impact study would not have related to the issues of particular concern to the Petitioners. The policy issues raised in the staff report relating to traffic were found to be sufficient for the Petitioners purposes.

Overall, the reasoning in this case leaves the door somewhat ajar on the issue of the requirement to disclose relevant reports that are not provided to Council. Simply the fact that they are not provided to Council may not be sufficient to address procedural fairness concerns, when the reports are highly relevant, relate to the issues raised by the specific objectors, or where the bylaw significantly changes the *status quo* as expressed in the underlying or current bylaw and the Official Community Plan.

We continue to recommend that local governments ensure that document disclosure before a public hearing is as complete as possible. Public hearing binders should include not only all documents that are considered by Council, but also relevant impact studies and reports wherever possible, and additional documents that are not privileged should be made available on specific request. If, however, for confidentiality or other reasons, documents are not disclosed, the Courts have indicated a willingness to consider the prejudice to members of the public on a case by case basis, and where there is no objective prejudice in light of the listed factors in this case, to uphold the bylaws.

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