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NEWSLETTER

UBCM CONFERENCE ISSUE

The Building Act: Unrestricted Matters Revealed

The Province has fleshed out its policy regarding the authority of local governments to continue, after December 15, 2017, to exercise regulatory powers other than the building regulation power itself so as to establish "local building requirements" as defined in the new Building Act*. The detail is in the Building Act General Regulation B.C. Reg. 131/2016, made on June 8, 2016 (in what follows, "the Regulation"). Local authority to establish local building requirements via the regulatory power respecting "buildings and other structures" in s. 8 of the* Community Charter *has been very limited since the* Community Charter *came into force in 2004, and the* Building Act *has extended those limitations to all local government "enactments".*

Section 5: Local building requirements no longer apply …

To review: under s. 5 of the *Building Act*, "local building requirements" will be of no further effect after December 15, 2017, regardless of the statutory authority under which they were enacted, unless they have been deemed by the responsible minister to be "unrestricted matters" or the local government has secured a local variation to the BC Building Code through an application process established in the Act. Since the *Building Act* was introduced, local governments have realized that a broad range of well-used regulatory powers are potentially impacted by the government's plan to standardize building requirements across the province, and have been engaged with provincial staff in working groups tasked with identifying matters that ought to remain within local government jurisdiction. The process has been frustrating for some local government participants, in part because the Province in some cases did not appear to have thoroughly scoped the effect of s. 5 of the *Building Act* before it was enacted.

Lying behind the detail of the Regulation is, from this lawyer's perspective, a profoundly significant feature of the *Building Act*: the delegation to a single government minister of the authority to prescribe "unrestricted

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matters", thereby establishing the division of legislative powers between provincial and local governments as regards matters pertaining to building. Traditionally, the division of powers has been established by the Legislative Assembly itself in the municipal enabling legislation, sometimes after extensive consultation with the Union of B.C. Municipalities and always after an open, public debate in the Assembly. The most recent large-scale example is the *Community Charter* itself, which re-set the division of legislative powers between provincial and local governments except as regards planning and land use management matters. Under the *Building Act* a single minister can, by prescribing "unrestricted matters" and, by implication, what are not "unrestricted matters", reclaim for the Province legislative powers that the Legislative Assembly had previously delegated to local governments via general enabling legislation – mainly the *Community Charter* and the *Local Government Act*. This represents a trend in their enabling legislation that should be of concern to local governments in B.C. One can support a provincial agenda to standardize building requirements, without supporting a fundamentally undemocratic means for carrying it out.

... unless they're "unrestricted"

The context for the list of "unrestricted matters" in the Regulation is the broad definition of "local building requirement" in the *Building Act* itself. A "local building requirement" is a requirement in respect of building activities that is enacted by a local authority, and "building activity" means the construction of new buildings, or the alteration, repair or demolition of existing buildings. The elimination of local building requirements effected by s. 5 of the *Building Act* potentially includes any local government bylaw or permit that touches on how a building may be constructed, altered, repaired or demolished. By defining "unrestricted matters" by regulation, the Province can trim this broad withdrawal of local government powers to leave in place those local requirements that lie outside the Province's standardization agenda. Eight matters have now been identified as "unrestricted", three of them (according to information that has been issued by the Office of Housing and Construction Standards) only temporarily.

> *The elimination of local building requirements effected by s. 5 of the* Building Act *potentially includes any local government bylaw or permit that touches on how a building may be constructed, altered, repaired or demolished.*

Parking stalls for disabled persons

Local governments have authority under s. 525(1) of the *Local Government Act* to require the provision of off-street parking and loading spaces, including spaces for disabled persons, and to establish design standards for the spaces, including standards respecting the size, surfacing, lighting and numbering of the spaces. These requirements and standards might come within the definition of "local building requirement" when the spaces are located in a parking structure, and might therefore be caught by s. 5 of the *Building Act*. This would appear to be confirmed by the fact that the Regulation identifies as unrestricted "parking stalls for persons with disabilities". This part of the Regulation seems to beg the question of whether design standards for other types of parking spaces are also "local building requirements" that are caught by s. 5, though it is only in relation to parking spaces

for disabled persons that are provided in connection with accessible dwelling units and viewing positions in theatres that the Building Code establishes technical standards.

Firefighting vehicle access route design

For buildings more than 3 storeys in height or 600 square metres in building area, Part 3 of the Building Code requires the provision of access routes on private property for fire department vehicles and provides minimum specifications for access route width, centreline radius, overhead clearance, gradient, surfacing and design load, and cul-de-sac length above which a vehicle turnaround is required. Many local governments have more onerous specifications based on local topography, climate, and firefighting vehicle characteristics. The Regulation designates as unrestricted, local bylaws that overlap any of the minimum specifications set out in the Building Code.

DP requirements for building form, exterior design, and finish

The local government authority that probably has the greatest potential to produce a "local building requirement" is the authority to prescribe development permit conditions for the "form and character of development". These permits may under s. 491(7) of the *Local Government Act* include "requirements respecting the character of the development … and the siting, form, exterior design and finish of buildings". Requirements for building form, exterior design, and finish are clearly caught by s. 5 of the *Building Act*. These are "unrestricted" under the Regulation.

DP requirements for energy or water conservation or GHG emissions reduction

Similarly, DP conditions for areas designated for the promotion of energy conservation, water conservation, and GHG emissions reduction can address the siting, form, exterior design and finish of buildings, and may require particular machinery, equipment and systems external to the building. These DP areas were introduced as part of the Province's climate change agenda, and not surprisingly the Province has trimmed the effect of s. 5 of the *Building Act* so that local governments can continue to address these objectives via DP area designations and DP conditions.

District energy systems

Several BC municipalities operate district energy systems, the effective operation of which can involve bylaws stipulating that buildings be connected to the system and establishing requirements and specifications for in-building components. The Regulation declares "any matter as it relates to a district energy system" to be unrestricted for the purposes of s. 5 of the *Building Act*.

The following matters are, according to the government, only temporarily unrestricted at this time.

Wildfire DP requirements

DPs for wildfire hazard areas may include particular requirements respecting the siting, form, exterior design and finish of buildings, such as the use of non-combustible materials, and these requirements are deemed by the Regulation to be unrestricted. According to the Office of Housing and Construction Standards, this is a temporary situation pending the development of provincial standards, which is underway but not expected to be complete until after December 15, 2017.

Building sound transmission requirements

The Building Code does not address the transmission into a building of sound generated outside the building, such as sound from an adjacent highway, railway or airport, and some

local governments have apparently imposed noise abatement requirements as a matter of public health. This matter is temporarily unrestricted, in this case because the Province might consider amending the Building Code to cover it, though it has no present intention to do so.

Radio repeater requirements for emergency communications

The Regulation temporarily allows local governments to impose requirements for in-building radio equipment enhancing the effectiveness and reliability of emergency communications, beyond what is required by the Building Code. Information from the Office of Housing and Construction Standards indicates that the government expects local governments that wish to continue imposing this kind of requirement in the long term will apply for a local variation of the BCBC under separate provisions of the *Building Act*. In the meantime, this matter will be unrestricted. Because the *Building Act* requires local governments to pay a fee for consideration of a local variation that is based on the amount of time government employees of various classifications spend on analyzing the request (hourly rates vary from $49.81 for clerks to $100.19 for assistant deputy ministers), local governments may prefer to rely on the Regulation to keep these requirements in effect, for as long as the Province is willing to designate them as "unrestricted".

Other matters

Local governments should be aware that the Province has determined, internally, that certain other local requirements are "out of scope" of its standardization initiative because they are not "subject to a requirement, in respect of building activities, of a building regulation", that is, the BCBC or another building regulation established by the Province under the *Building Act*. As a result, they don't have to be mentioned in the Regulation. Examples that are given in Office of Housing and Construction Standards publications include flood construction levels enacted under s. 524 of the *Local Government Act* and requirements for rooftop screening of mechanical equipment. It remains open to persons who do not wish to comply with such requirements after December 15, 2017 to take the position that they are, in law, within the scope of s. 5 of the *Building Act*. The opinions of the government on that question will carry little or no weight in court as the local government defends its jurisdiction to impose the requirement.

The Office of Housing and Construction Standards has also issued interpretations as to local requirements that are within the scope of s. 5 and intentionally left out of the Regulation because the government simply doesn't wish local governments to continue to impose requirements of that nature. These include technical standards for accessible or adaptable housing units and requirements for green roofs, full cut-off lighting, in-building recycling facilities, and low-flow plumbing fixtures.

There are other local requirements that are possibly within the actual scope of s. 5, but outside the scope of the standardization initiative: heritage conservation requirements, green building requirements associated with density bonuses or phased development agreements, and so forth. Local governments will, of course, be able to request the Province to amend the Regulation to include these matters, perhaps through UBCM if they are matters of concern to many municipalities. It is possible that the Regulation will be amended before December 15, 2017 to designate additional matters as "unrestricted".

Bill Buholzer ✍

Assessor of Area #01 – Capital et al. v. Nav Canada

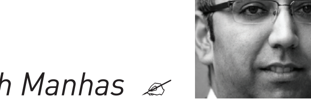
In our last newsletter, we discussed the Reasons for Judgment of the British Columbia Court of Appeal in Assessor of Area #01 – Capital et al. v. Nav Canada *(2016 BCCA 71), which represented a significant victory for local governments in relation to the assessment of land and improvements.*

In the Appeal, the District of North Saanich and the British Columbia Assessment Authority succeeded in having a five-member panel of the Court of Appeal overturn two of its previous decisions and hold that, where there is no market for land and improvements, assessment for tax purposes must take into account the sum that the owner would pay for the land and improvements or for replacement land and improvements suitable for the owner's purposes (i.e. the replacement cost of the property).

Nav Canada sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada, and North Saanich represented the interests of British Columbia local governments before the Supreme Court of Canada on the leave application. On August 11, 2016, the Supreme Court of Canada denied Nav Canada's application for leave to appeal.

As a result, the replacement cost approach to valuing land and improvements has been confirmed as a significant tool that can be used by the Assessment Authority in valuing properties that do not trade or rarely trade in the market. One can now expect that the Assessment Authority will be relying on the replacement cost approach when valuing all such properties, including, for example, the land and improvements used by the British Columbia Ferry Corporation at its major ferry terminals, which were previously the subject of proceedings before the Property Assessment Appeal Board where the Board rejected the replacement cost approach and determined that the properties had only nominal value.

Sukh Manhas ✍



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WWW.YOUNGANDERSON.CA

1616 - 808 Nelson Street, Box 12147, Nelson Square, Vancouver, BC V6Z 2H2
tel: 604.689.7400 | fax: 604.689.3444 | toll free: 1.800.665.3540

#201 - 1456 St. Paul Street, Kelowna, BC V1Y 2E6
tel: 250.712.1130 | fax: 250.712.1180

Medicinal Marijuana Use and Accommodation

Marijuana use raises a whole host of legal issues for local governments. An arbitration case involving the City of Calgary highlights the issue of accommodating employees with disabilities who use medicinal marijuana. In this case, an employee of the City operated heavy equipment and worked in a safety-sensitive position. This employee suffered from a degenerative neck disease that caused chronic pain. The employee's doctor provided the employee with the medical declaration necessary to obtain a medical marijuana permit from Health Canada authorizing him to possess marijuana for a medical purpose.

The employee advised his two supervisors of his medical marijuana use and continued to operate heavy equipment without incident for over a year. However, other management personnel became aware of the employee's marijuana use and were concerned, so the employee was removed from his position and placed in a non-safety-sensitive position pending the outcome of an investigation and assessment.

The employee ultimately agreed to attend an independent medical examination with an expert on addiction and substance abuse. Unfortunately, this expert was given some misinformation by the City that the employee had regularly used marijuana for 15 years and was not provided with any information from the employee's own doctor. Because of this misinformation, the expert did not provide clear direction to the City about whether the employee could return to work in a safety-sensitive position.

... employer is entitled to conduct a fair and proper investigation, which may require obtaining and considering medical information from an employee's doctor or an independent medical exam.

The employee's doctor later provided information to the City confirming that the employee had not been a regular user of marijuana, inhaled only a few puffs at night for pain control, and the doctor had never witnessed any cognitive impairment of the employee.

A majority of the Arbitration Board determined that the employee was fit to return to his former safety-sensitive position because of the flawed investigation by the City, and the fact that no evidence was presented during the arbitration that the employee's use of marijuana for medical purposes had any impact on his ability to perform his duties in a safe manner. As well, there was no evidence the employee had ever exhibited signs of impairment while on duty.

It is important to note, however, that the majority of the Board was mindful of the

serious consequences of operating equipment while under the influence of drugs. The majority also confirmed that an employer is entitled to conduct a fair and proper investigation, which may require obtaining and considering medical information from an employee's doctor or an independent medical exam. Although the employee was reinstated to his former position, conditions were placed on him, including random substance testing and arranging for the reduction of his monthly medical marijuana possession limit as recommended by the doctor who performed the independent medical exam.

Local governments have an obligation to ensure safety in the workplace. If an employee is taking medicinal marijuana and is performing safety-sensitive duties, we do recommend following up if the local government has any concerns that the employee cannot safely perform the duties. This may include requesting information from an employee's doctor or an independent medical exam. However, this case is a good reminder of an employer's obligation to accommodate employees who are using marijuana for medical purposes and to ensure that any investigation of the impact of medical marijuana use on an employee's ability to perform safety-sensitive duties is fair and unbiased.

Carolyn MacEachern ✍

MMAR + MMPR = ACMPR

If you are reading this, then August 24, 2016 has come and gone. Diligent readers of our client bulletins will know that this was the day on which the stay ordered by the Federal Court of Canada in Allard v. *The Queen expired and the Marihuana for Medical Purposes Regulations (MMPR) ceased to be law.*

At the beginning of August, Health Canada announced that the new Access to Cannabis for Medical Purposes Regulations (ACMPR) would be implemented to fill the regulatory void. Health Canada also announced that the new regulations, like the MMPR, would contain a regulatory framework for licensed commercial production and distribution of medical marijuana. The new regulations would also provide opportunities for a limited amount of medical marijuana to be grown at home. This was a feature of the Marihuana Medical Access Regulations (MMAR), Health Canada's first regulation adopted specifically for medical marijuana.

At the time of writing, Health Canada had not yet released a draft of the ACMPR. However, now would be a good time to review whether your local government bylaws address the municipal concerns that might arise with regard to both small-scale residential and large-scale commercial production of medical marijuana under the new federal regime.

Michael Moll ✍

Raising the FOI Compliance Bar for Local Governments

An early summer audit report from the Office of the Information and Privacy Commissioner shows that Office's continued interest in scrutinizing BC's local governments. In 2015, the OIPC investigated one local government's privacy compliance, and made detailed recommendations for improvement. The OIPC has now moved into freedom of information compliance with its audit of the City of Vancouver's FOI practices.

This latest salvo shows the OIPC's continued implementation of its audit and compliance program, on both the FOI and privacy sides of the ledger. The report also demonstrates that BC's local governments should take reasonable steps to ensure their FOI and privacy programs are well run and meet legislated duties under the *Freedom of Information and Protection of Privacy Act*. Even though the search for a new Commissioner is underway, there is no reason to think the OIPC's attention will wander away from local government compliance.

In Audit and Compliance Report F16-01, the OIPC reviewed the City of Vancouver's FOI processes, while inviting input from FOI applicants about their experiences. The audit looked at three years of FOI requests to the City and drew conclusions in four key areas. The OIPC first found gaps in City documentation of its handling of FOI requests, notably gaps in recording what efforts were made to find responsive records. This led the OIPC to conclude the City might not be finding all the records it should, which would be a breach of its legislated duties.

In the second, the City responded to FOI requests on time in 84% of cases, but was almost four times more likely to be late in responding to media FOI requests. In those cases, the response was three times more likely to be late by only a day, leading the OIPC to wonder if media requests could actually have been responded to on time.

A third area is actually a common issue: a failure to give reasons for refusing to disclose information to a requester. Public bodies commonly only refer to section numbers in FIPPA in refusing, even though FIPPA requires reasons as well.

The last area of concern was with the "tone", as the OIPC put it, of communications between the City and FOI requesters. The OIPC found some communications to be "worded in an unhelpful manner", or "curt and perfunctory." Some observers might find this criticism both difficult to interpret yet also a stretch in terms of the OIPC's proper role. This criticism certainly illustrates the OIPC's detailed and wide-ranging approach to its findings and recommendations.

One concern the OIPC expressed should make all local governments pay heed: the OIPC found that the City of Vancouver did not have a policy on use of personal email or devices to conduct City business. The OIPC expressed concern that this might result in records not being disclosed because they were not searched for in personal accounts. This is a FOI compliance concern for local governments, and OIPC decisions make it clear that a policy vacuum can put local governments in the awkward position of having to chase elected officials for emails that should be properly disclosed. Having no policy on the use of personal email and devices can also create real privacy risks. Use of web-based email to send personal information can expose the information to improper disclosure. Personal devices may not have proper security protections for personal information or other information, including confidential local government information. Policy and training

can go a long way to ensuring that FIPPA duties are met, while still enabling flexibility and efficiency for local governments.

This latest OIPC audit report will be far from the last; local governments should expect ongoing scrutiny through audits and investigations. A likely ongoing OIPC focus, in addition to monitoring FOI compliance systemically, is likely to be whether individual local governments are managing their privacy obligations through pro-active privacy management plans, which is an explicit OIPC expectation. The Office has been very active and high-profile and shows every sign of continuing to be.

David Loukidelis, Q.C. ✍

Local Governments with Statutory Rights of Way over Contaminated Sites Protected under *Environmental Management Act*

Local governments that plan to undertake local projects, such as public walkways or sewer lines, which may involve the use of potentially contaminated sites, should be aware that they are likely protected from liability for any contamination on the site, so long as they do not themselves use the site in a way that may cause contamination.

Although the *Environmental Management Act* makes all persons who are current or previous owners of a property that is contaminated jointly and severally liable to remediate the site, owners of easements, rights of ways, statutory rights of way, and restrictive covenants are not liable. Section 22 of the Contaminated Sites Regulation says that any current or previous owner of an easement, right of way (including a statutory right of way), restrictive covenant, or other listed interest in land is not responsible for remediation so long as that owner is able to establish that it did not use or exercise its interest in the property in any manner that would have caused the site to become contaminated.

Local governments that plan to rely on this exemption will need to be sure that they can establish clearly (on a balance of probabilities) that they did not use or exercise their interest in or rights over the property in a manner that caused any contamination. As recently explained in *Dolinsky v. Wingfield*, [2015] B.C.J. No. 291, exemptions or defences set out in the *Environmental Management Act* will be interpreted narrowly, and persons relying on a statutory defence must demonstrate all the elements of the defence. How exactly a local government can establish that it did not use or exercise a right in a manner that caused a site to become contaminated will depend in the factual circumstances of any particular case. However, maintaining clear and complete records of any use of the property, as well as having a well-crafted agreement at the start, will assist local governments who plan to rely on this exemption.

Rosie Jacobs ✍

Province Approves City of Vancouver Vacancy Tax

A tall order awaits the City of Vancouver after the Province provided the City with the authority to levy a tax on vacant homes. The Miscellaneous Statutes (Housing Priority Initiatives) Amendment Act, 2016, *which also includes an overhaul to governance for real estate agents and imposes an additional 15% property transfer tax on non-citizens or permanent residents, came into force on July 28, 2016 after a rare summer sitting of the Legislature.*

The statute amends the *Vancouver Charter* in response to the City's request of the Province to enable the City to impose a tax on vacant or under-occupied homes, intended to address affordability in one of Canada's most expensive real estate markets. According to City staff reports, Vancouver has a rental vacancy rate of 0.6%, approximately 10,800 residential properties that sit vacant for all or a majority of the year, and real estate values that have increased as much as 25% over the previous 12 months. A vacancy tax, the City asserts, will reduce the number of vacant properties and increase affordable rental options for residents.

The City requested that the Province create a new property class under the Assessment Act, being "Residential Vacant", which the City could tax at a rate greater than class 1 residential property. Under this proposed scheme, BC Assessment would have borne much of the burden in determining whether a property was in fact vacant. However, rather than the City's preferred scheme, the Province has provided the City with a distinct but very broad power to impose a tax, for which the City will bear the administrative burden.

The Province has provided the basic outline of the City's new taxing power, but left the details up to the City (and potentially to future Cabinet-made regulations). If the City wishes to create a vacancy tax it has a lengthy to-do list. A bylaw imposing a vacancy tax must establish the following:

- circumstances or periods of time where residential property is to be considered vacant,
- the basis on which the tax is imposed,
- the rate or amount of the tax,
- exemptions to the tax,
- requirements regarding notice to owners that the property is subject to the tax, and
- a process to hear and determine complaints regarding the imposition of the tax.

The bylaw must also provide for the preparation of a publicly-available annual report regarding the tax, including the amount raised and how it was used. The enabling legislation specifies that the money raised from this tax must be used only "for the purposes of initiatives respecting affordable housing" as well as for the administration and collection of the vacancy tax.

In addition to the mandatory requirements listed above, Council may include in the vacancy tax bylaw a requirement that an owner of residential property make a declaration as to the status of a property, including the submission of supporting information to verify the accuracy of the declaration. For example, an owner who declares that their property is not vacant may need to provide copies of utility bills if the property is owner-occupied, or a copy of a lease if it is tenanted. This declaration appears

to be one of the key administrative tools of the vacancy tax. The vacancy tax bylaw may also authorize employees of the City to enter into residential property to determine the vacancy status of the property at reasonable times and in a reasonable manner after advising the registered owner and/or occupant.

The authority to tax vacant homes has been met with mixed reviews. While some municipal politicians outside of Vancouver have expressed desire for the *Vancouver Charter* amendments to be extended to the *Community Charter*, other politicians and academics have criticized the scheme as an administrative nightmare, which they argue will be extremely difficult to implement and enforce.

Even the City of Vancouver has expressed concern about the viability of implementing its new taxing authority, citing a lack of information available to it to administer the scheme efficiently. Mayor Robertson has indicated that the enabling legislation must be followed by a data-sharing deal whereby the City would have access – either directly or through the Province – to provincial data, such as BC drivers licence address lists, the provincial homeowner grant program, and utility billing information in order to identify potentially vacant homes. The Province has indicated a willingness to cooperate, albeit within the confines of the *Freedom of Information and Protection of Privacy Act*.

The next few months should reveal whether the City chooses to exercise its new power to tax vacant properties, and if so what form the tax will take. It will likely take much longer to determine whether the tax will be an effective and successful tool to address housing affordability.

Jay Lancaster ✍

Yanke v. Salmon Arm: The Province Responds

Nearly five years after the Court of Appeal picked apart the B.C. Ministry of Environment's administration of the Fish Protection Act *in its July 2011 decision in* Yanke v. Salmon Arm*, the Legislature has responded with amendments to the scope and content of the legislation. Those changes can be neatly summarized by noting that its name has been changed to the* Riparian Areas Protection Act*. The extent to which provisions of the* Fish Protection Act *that dealt with the designation of sensitive streams, stream recovery plans, and the protection of rivers from new dams may be covered in the new Water* Sustainability Act *is beyond the scope of this article, which focuses on local government riparian area protection responsibilities.*

Of interest to those local governments to which the Riparian Areas Regulation applied, the Legislature has moved invalid and unenforceable aspects of the Regulation and the government's administration of the Regulation into the statute, thereby giving them the legal force that was previously either lacking or questionable. Substituted for the Cabinet's former authority to make "policy directives" regarding the protection and enhancement of riparian areas is an authority to make "directives". This addresses the problem that the Riparian Areas Regulation, which was purportedly established as a "policy directive" under s. 12 of the *Fish Protection Act*, went considerably beyond matters of

policy to address in great detail exactly how local governments ought to protect and enhance riparian areas when managing development under what is now Part 14 of the *Local Government Act*. The Legislature has not, however, disturbed the basic premise of s. 12; it still provides that a local government must only ensure that its bylaws and permits under Part 14 provide a level of riparian area protection that, in its opinion, is comparable to or exceeds the level of protection established by the Cabinet's directive.

The effect of the *Yanke* decision can be seen most clearly in the drafting of the new regulation-making powers in s. 13 of the *Riparian Areas Protection Act*, which has been reverse-engineered to provide statutory authority for the Riparian Areas Regulation and the MOE's past interpretation of the Regulation. The Cabinet now has express authority to make regulations "respecting the directives established under section 12", including:

- establishing the QEP report and senior government "notification" scheme previously established under the Riparian Areas Regulation;
- requiring local governments to impose development approval conditions recommended in a QEP report; and
- requiring local governments to cooperate with the provincial and federal governments in monitoring riparian area development and compliance with QEP recommendations, and in educating the public on riparian area protection.

References in the new legislation to the *Fisheries Act* (Canada) have been changed to incorporate the "serious harm to fish" criterion that has replaced "harmful alteration, disruption or destruction of fish habitat" (HADD) in federal law. We find it remarkable that, having found room in the Legislature's agenda for repairs to the Province's riparian area protection regime, the government would not have included in this legislation some consequential amendments to s. 491(1) of the *Local Government Act*, the "natural environment" development permit power, that mirror the Cabinet's new authority to require local governments to impose development permit conditions based on QEP recommendations. Currently, s. 491 contains no counterpart, in relation to "natural environment" DP areas, to subsection (4), which authorizes local governments to require DP applicants for hazard lands to provide a report to assist it in determining what conditions or requirements to impose in the permit.

DP conditions that have, in effect, been crafted by QEPs may be imposed by local governments but disputed by development applicants, or accepted but then breached. In such circumstances, the new Cabinet authority to require local governments to impose conditions recommended by QEPs will have to be relied on, by implication, as local government authority analogous to that contained in s. 491(4) to require the engagement of a QEP, as well as authority to impose whatever conditions QEPs might recommend as they assess the impact of a broad variety of developments in a broad variety of riparian situations. The absence of any express amendment analogous to s. 491(4) allowing riparian area protection to "trump" development rights afforded by a zoning bylaw will mean that local governments and their legal counsel will have to decide whether the new Cabinet authority actually goes that far.

Bill Buholzer ✍

BC Adopts Human Rights Protections for Gender Identity and Expression

On July 25, 2016, in a special summer sitting of the Legislature, the BC government passed an amendment to the BC Human Rights Code which explicitly extends the Code's protections to transgendered and other gender non-conforming people. Although the Human Rights Tribunal and the courts had previously extended protections to transgendered and gender non-conforming people by including them within the prohibited ground of discrimination based on sex, there was a strong public movement to expressly set out within the legislation itself that the Code also protects against discrimination on the grounds of "gender identity and expression".

For municipalities and local governments, the change emphasizes the need to adapt public facilities, programs, and interactions in order to remove entrenched gender biases. For example, many intake forms require individuals to identify their gender as "male" or "female", a seemingly innocuous requirement that causes stress and difficulty for those whose gender may not conform to their birth certificate or to expectations based on their physical appearance. Public facilities such as washrooms and changing rooms, which are currently divided into male and female options, also pose difficulties and sometimes dangers for transgendered or gender non-conforming people. Physical facilities may need to be retrofitted or repurposed in order to provide access for all individuals. However, patrons who identify themselves in accordance with traditional ideas of male and female gender may not understand the need for change, and so municipal staff should be equipped to respond to both the needs of transgendered and gender non-conforming patrons and the potential concerns of other individuals.

Ideally, classifications based on gender should be avoided where possible and, where not possible, the guiding principle should be that a person is entitled to choose their own gender, given name, and associated pronouns by which they wish to be addressed, regardless of whether or not that gender conforms to their classification at birth. Individuals are also entitled to privacy when it comes to electing to change their gender; information about birth classification should be collected and recorded only where necessary, and should not be disclosed by public officials except where strictly necessary and with respect for the person's privacy rights.

The guiding principle should be that a person is entitled to choose their own gender, given name, and associated pronouns by which they wish to be addressed, regardless of whether or not that gender conforms to their classification at birth.

Elizabeth Anderson

Severability: who decides?

In a recent version of this newsletter we considered examples of the many "boilerplate" clauses that appear in local government bylaws. Here is another one, which deserves special treatment because we see it, and courts have considered it, so often:

> If a portion of this Bylaw is held invalid by a Court of competent jurisdiction, then the invalid portion must be severed and the decision that it is invalid shall not affect the validity of the remaining sections of this Bylaw.

These provisions, supposedly, indicate the council or board's preference that their bylaw continue in effect without a provision that has been found to be invalid, rather than being struck down in its entirely. Before you add a version of this clause to that bylaw you are drafting, or wonder whether or not to leave it in just because it was in the precedent or template you are using, or gloss over it because it doesn't make any sense, consider the following.

Like clauses claiming to cure procedural defects by stating that failure to follow procedures does not affect the validity of resolutions or bylaws, the unequivocal statement that every clause in a bylaw is severable belies what countless courts have decided.

Like clauses claiming to cure procedural defects by stating that failure to follow procedures does not affect the validity of resolutions or bylaws, the unequivocal statement that every clause in a bylaw is severable belies what countless courts have decided. In 1886, for example, a magistrate convicted a Victoria saloon keeper for selling intoxicating liquor "between twelve o'clock at night and five o'clock in the next forenoon", contrary to the City's Retail Licence Regulation. In overturning the conviction on the grounds that other parts of the bylaw were invalid, and refusing to sever the offending parts of the bylaw from the part under which the saloon keeper had been convicted, the BC Supreme Court said:

> A bylaw may be good in part and bad in part, and if it be possible to separate the good from the bad, it should be so separated and the validity of the by-law maintained; but the parts so separated must not be connected with or essential to each other. Each must be whole and complete to stand per se.

This statement, still the law in BC, raises one obvious question: who decides if it is possible to separate the good from the bad? The answer, ultimately, is not the Council that adopted the bylaw in the first place.

In fact, 100 years after *Clay v. Victoria* was decided, the same court found that three separate bylaws, presented together at a public hearing "as an integrated scheme of permission and regulation," were so intertwined that the invalidity of one sealed the fate of the other two (*Rathlef v Cowichan*

Valley (Regional District), [1986] BCJ No 1775). This was despite the enacting Board stating by resolution that the defective bylaw "was not at any time, a fundamental or inseparable part of the board's development controls" for the subject property.

What the cases invariably suggest is that the best a Council can do with a general severance clause is to state its general intention to make the provisions of the bylaw severable. In the end, it is up to the court to decide whether a given clause can actually be severed without giving the rest of the bylaw a legislative effect that wasn't intended. And in regard to zoning bylaws, for example, it has even been suggested in at least one case that "Courts tend not to sever" and "when in doubt, the whole by-law must fall" (*Township of Uxbridge v. Timbers Brothers Sand & Gravel Ltd.,* [1973] 3 OR 107). Those general statements may be broader than the law in BC today, but in one of this province's early zoning cases, the BC Court of Appeal, by a 3-2 majority, decided Point Grey's zoning bylaw could not be saved by severing an invalid portion because to do so would have left "the bylaw in a 'truncated' form the Municipality never intended to pass" (*Carrick v. Point Grey (Corporation of),* [1927] 3 DLR 909).

It was not clear in *Carrick* whether or not the impugned zoning bylaw included a severability clause, but it may not have mattered anyway. In *R v. Varga* (1979) 27 OR (2d) 274, the Ontario Court of Appeal overturned the trial judge's decision to give effect to a bylaw severance clause on the following basis:

> The clause is a factor to be considered, an indication of intent which cannot override the primary intent of Council gathered from the legislative history, the preamble, and the by-law itself.

The BC Court of Appeal in *356226 British Columbia Ltd. v. Vancouver (City of)* (1998 CanLII 6249) cited Varga with approval and perhaps went further when it said that a severability clause is "merely a factor to be considered" in determining council's intention.

It might seem odd that courts can be so quick to refuse severance on the basis that the enacting body couldn't possibly have intended it, when the bylaw includes a broad clause purporting to make every provision severable. Yet the fact that broadly worded severability clauses seem to be sprinkled so liberally throughout so many bylaws supports a cautious approach to relying on those clauses as genuinely determinative of Council's intention. In any case, it is obviously a fiction that the enacting body has actually weighed the consequences of invalidity of each particular provision, and concluded that the balance of the bylaw should remain in place should such invalidity be established.

Indeed, in deciding severance was appropriate in the *356226 British Columbia Ltd.* case, the BC Court of Appeal emphasized the severability clause was specific to the impugned provision, "3(b)". The Court noted Council was aware of the "tenuous legality of 3(b)" and found that Council members, "at the time of passage of the by-law, must have directed their minds specifically to the possibility of a legal attack against the by-law and the present outcome of such an attack." Associating a severability clause with a particular bylaw provision will, of course, make that provision particularly susceptible to legal attack.

Clearly, in the Vancouver case, there was a strong case for severability. But if there isn't, that broad severance provision inserted near the beginning or end of every bylaw may not help.

Guy Patterson ✍

Look for your Lawyers

On August 15, **Michael Moll** spoke at the Bylaw 101 course at the Justice Institute of BC. He will be speaking there again on September 12.

Carolyn MacEachern is speaking at a conference on benefits for Co-operators Insurance in Kelowna on September 14.

Sukh Manhas will be presenting a session entitled "Homelessness Issues and Update on Marijuana Sales Usage" at the Thompson Okanagan Local Government Association Annual Conference in Vernon from September 14 to 16.

On September 21, **Bill Buholzer** will be presenting a Canadian Bar Association webinar on the *Building Act* with Amber Hieb of the Building and Safety Standards Branch of the Province of B.C.

Look for us at the UBCM Annual Convention in Victoria from September 26 to 30. **Reece Harding** will be presenting a session entitled "Open Season on Integrity: Hunting for the Right Solution for BC" on September 27. Many of our lawyers will be around the Convention and otherwise available for meetings upon request.

Guy Patterson and **Bill Buholzer** will be presenting a legal update seminar for PIBC's North Island chapter in Courtenay on October 13. They will also be presenting at the MATI School for Approving Officers in Kamloops on October 17.

On November 8, **Bill Buholzer** will be presenting the SFU City Program's popular "Financing Development" seminar with Jay Wollenberg, at SFU's downtown campus in Vancouver.

On November 18, **Reece Harding** will be presenting a session entitled "Ethics in Local Government" at the Vancouver Island Local Government Association Annual Conference in Campbell River.

Mark your calendars! We will be hosting our annual **Client Seminar** at the Fairmont Hotel Vancouver on November 25. For those clients unable to attend the Vancouver session, we will be hosting a second seminar on February 10 at the Westin Bear Mountain Resort in Victoria.

We are pleased to announce that **Sukh Manhas** has been reappointed to the UBC Faculty of Law as an adjunct professor, teaching Municipal Law. **Bill Buholzer** will once again be teaching the core planning law course, Legal Concepts for Professional Planning, at UBC's School of Community and Regional Planning.

In August, **Stefanie Ratjen** joined the firm as our new articling student. Her strong research skills and passion for municipal law are already making her a great addition to the firm.