

HOW TO ACHIEVE A SUCCESSFUL REMEDIAL ACTION

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I. INTRODUCTION

Council has the power under Part 3, Division 12 of the *Community Charter* to impose a remedial action requirement on a person. The remedial action power is a powerful enforcement tool. The advantage of exercising the remedial action power is that the result can be much quicker and less costly than proceeding by way of a court action. That being said, the power should not be exercised lightly. A remedial action requirement can interfere with a person's property rights and enable a local government to undertake the requirement if the person fails to do so at the person's expense, including recovering the cost in the same manner as property taxes. Failure to undertake the necessary groundwork and preparation before imposing the remedial action requirement may result in local government liability should the validity of the remedial action requirement be challenged in court. Furthermore, there are detailed procedures set out in the *Charter* after council imposes a remedial action requirement that must be followed to limit potential liability to the local government. This paper provides a summary of the remedial action requirement power as well as several points to keep in mind before and after council imposes a remedial action requirement to achieve a successful remedial action.

II. AUTHORITY

Pursuant to section 72(1) of the *Charter*, council may impose remedial action requirements in relation to the following matters or things:

- hazardous conditions,
- declared nuisances, or
- harm to drainage or dikes.

Pursuant to section 72(1)(b) of the *Charter*, a remedial action requirement in relation to hazardous conditions and declared nuisances, may require the owner or lessee of the matter or thing or the owner or occupier of the land on which the matter or thing is located to undertake any of the following measures regarding the matter or thing:

- remove or demolish it,
- fill it in, cover it over or alter it,
- bring it up to a standard specified by bylaw, or
- otherwise deal with it in accordance with the directions of council or a person authorized by council.

Pursuant to section 72(3) of the *Charter*, a remedial action requirement in relation to harm to a drainage or dike may require the person who has caused harm to the drainage or dike to undertake restoration work in accordance with the directions of council or a person authorized by council.

A. Hazardous Conditions

Section 73(1) of the *Charter* provides that council may impose a remedial action requirement in relation to any of the following hazardous conditions:

- a building or structure, an erection of any kind, or a similar matter or thing,
- a natural or artificial opening in the ground, or a similar matter or thing,
- a tree,
- wires, cables, or similar matters or things, that are on, in, over, under or along a highway, or
- matters or things that are attached to a building or other structure, an erection, or similar matter or thing.

Section 698 of the *Local Government Act* provides that the remedial action powers under the *Charter* apply to regional districts in relation to the following hazardous conditions:

- a building or structure, an erection of any kind, or a similar matter or thing, or
- a natural or artificial opening in the ground, or a similar matter or thing.

Pursuant to section 73(2) of the *Charter*, to impose a remedial action requirement in respect of a matter or thing noted above, council must pass a resolution declaring the matter or thing:

- is in or creates an unsafe condition, or
- contravenes the provincial building regulations or the local government's building bylaw.

In order for council to pass a resolution declaring a matter or thing to be in a hazardous condition, it is important to keep in mind that there must be sufficient evidence before council when it imposes the remedial action requirement to support the declaration. Such a declaration should be based on the opinion of a person with the relevant expertise to make such a determination. A report to council should be prepared by the expert setting out in detail the evidence to support their opinion, including photographs.

By way of example, the condition of a fire damaged building should be determined by a local government's fire chief and/or building inspector. The fire chief may consider the fire damaged

building to be in or create an unsafe condition due to the state of the building creating a significant fire risk. The report should set out the evidence to support why the fire chief considers there to be a fire risk. If there are B.C. Fire Code or fire bylaw contraventions, the fire chief's report should also note the contraventions and attach photographs showing the contraventions.

Recently, in *Owners, Strata Plan NW8 v. District of Maple Ridge*, (July 3, 2009), unreported, the B.C. Supreme Court referred to the fire chief's report in finding that the strata corporation's allegation that the remedial action requirement was invalid because there was no fire risk to the fire damaged building was without merit. The court commented:

The fire risk, as identified by the fire chief, is that given the state of the building there is a high risk that if a fire broke out, whether as a result of trespassers using the building or otherwise, it would spread rapidly, and that such a fire would pose a danger not only of destroying the building, but also one adjacent building, and perhaps others as well.

The building inspector may consider the fire damaged building to be in or create an unsafe condition due to contraventions of the B.C. Building Code or the building bylaw. The building inspector's report to council should detail and document all contraventions including the section numbers and what specifically needs to be addressed. The building inspector's observations should also be supported with photographs. It would not be sufficient to simply state that the building is unsafe because there are contraventions of the B.C. Building Code or the building bylaw.

Issues regarding the structural safety of a building or slope may need to be determined by an engineer. For example, if an engineer's report is presented to council indicating that a building or slope is structurally unsafe and requires certain works to be undertaken, council may declare the building or slope to be in an unsafe condition based on the opinion of the engineer. It is questionable, however, whether council could make such a declaration without the local government obtaining a preliminary engineer's report or a previous event occurring (such as a landslide) to indicate that there is indeed an issue which causes council concern.

B. Declared Nuisances

Section 74(1) of the *Charter* provides that council may impose a remedial action requirement in relation to any of the following declared nuisances:

- a building or other structure, an erection of any kind, or a similar matter or thing,
- a natural or artificial opening in the ground, or a similar matter or thing,
- a drain, ditch, watercourse, pond, surface water, or a similar matter or thing, or

- a matter or thing that is in or about any matter or thing referred to above.

The remedial action powers in relation to nuisances under the *Charter* do not apply to regional districts.

To impose a remedial action requirement under section 74 of the *Charter*, the matter or thing must be a “nuisance” as that term is legally defined and council must pass a resolution declaring that it considers that the matter or thing does in fact create a nuisance. In order for council to make such a declaration, as noted above in relation to hazardous conditions, there must be sufficient evidence before council when it imposes the remedial action requirement to support the declaration.

The word “nuisance” is normally defined as something harmful or offensive to the public or a member of the public for which there is a legal remedy. This will depend on the particular circumstances of each case. For example, if a person undertakes certain activities which result in soil being deposited into a creek, council may impose a remedial action requirement on that person if the soil deposited into the creek is considered a “nuisance” at law. This will depend on information regarding the effect of the soil deposited in the creek on neighbouring properties and the environment. This would require a report to council prepared by a person with the relevant expertise (such as an environmental consultant) to make that determination before the remedial action requirement is imposed.

Section 74(2) of the *Charter* specifically provides that “a thing that council considers is so dilapidated or unclean as to be offensive to the community” is a nuisance. Council could therefore declare a fire damaged or abandoned building to be a nuisance based on council’s view that the building is so dilapidated as to be offensive to the community. In this regard, evidence needs to be before council that the community does indeed consider the building to be offensive. Any complaints received by the local government from the community regarding the state of the building as well as photographs of the building in question should be attached to a report to council.

Recently in *Vernon (City) v. Sengotta*, 2009 BCSC 70, the B.C. Supreme Court considered the scope of s. 74 of the *Charter*. In that case the court upheld the City of Vernon’s decision to declare a fire damaged building a nuisance. The court commented on the evidence that was before council as follows:

I do not concur... that there was a complete lack of evidence before City Council. As noted earlier there had been two complaints about the appearance of the fire-damaged building. In addition, the City had an ongoing concern about certain properties in Vernon which, because of their appearance, or maintenance or lack of maintenance, attracted the attention of City officials. The City’s concern is reflected in Mr. Martens’ April 22, 2002 report on such properties in which he advised Council with respect to five

properties attracting the involvement of the City's enforcement staff...

In addition, City Council had, as part of its Strategic Plan, the objectives of ensuring Vernon was a safe community, an attractive business destination, and a goal of community beautification as noted in Mr. Martens' April 2004 report to City Council preceding the May 2004 resolution regarding the fire-damaged building. In six years following the 1998 fire, some work was done to clean up the damaged building, but essentially the building remained as it had after the fire appearing... as "simply not the most aesthetically pleasing building to look at."

I conclude that the decision of the City's Council in passing the resolutions of May 10 and June 14, 2004 was reasonable in the circumstances and a decision to which this court should defer given the Council's knowledge and experience with respect to its community needs and requirements.

C. Harm to Drainage or Dike

Section 75 of the *Charter* provides that council may impose a remedial action requirement if a person has:

- obstructed, filled up or damaged a ditch, drain, creek or watercourse that was constructed or improved under the *Charter* or the *Local Government Act*, or
- damaged or destroyed a dike or other drainage or reclamation work connected with it.

Section 546 of the *Local Government Act* provides that the remedial action powers in relation to harm done to drainage or dikes under the *Charter* applies to regional districts.

To impose a remedial action requirement under section 75 of the *Charter*, council must pass a resolution declaring that harm has been done to a municipal drainage system or drainage works. To make such a declaration, there must be sufficient evidence before council that indeed harm has been done. Some harm may be quite self evident such as if a person's activities results in soil obstructing or filling in a watercourse. Whether "damage" has occurred will depend on information regarding the effect of a person's activities on the municipal drainage system or drainage works. This may require a report from an environmental consultant or geotechnical engineer.

III. REMEDIAL ACTION REQUIREMENT

A. Resolution

To impose a remedial action requirement, council must pass a resolution setting out the remedial action requirement and specifying the person or persons required to undertake the remedial action requirement. The remedial action requirement should be set out in sufficient detail that it is clear to the person who is required to undertake the remedial action requirement what must be done in order to comply with the requirement. In this regard, it is not sufficient to simply require a person to bring a building up to the standards in the B.C. Building Code without setting out in a report to council what contraventions of the Building Code exist. This is particularly important if the person subject to the remedial action requirement fails to undertake the work and the local government wishes to undertake the work at the person's expense. To reduce the local government's potential liability, it must be clear based on the reports and council's resolution what action was required to be undertaken.

Furthermore, section 76 of the *Charter* provides that the resolution must specify the time by which the required action must be completed. Unless council considers that there is a significant risk to health or safety if action is not taken earlier, the time specified for compliance must not be earlier than 30 days after notice has been sent to the person subject to the remedial action requirement. The time limit should be reasonable based on the extent of the work that is required. Council may extend the time for completing the required action if the time limit previously established has expired. If there is a significant risk to health or safety this should be supported by a report to council from a person with the relevant expertise which clearly sets out why the shorter time limit is necessary.

B. The Standard of Reasonableness

To impose a remedial action requirement, there must be sufficient evidence before council to support the remedial action requirement. If the validity of the remedial action requirement is later challenged in court, the court will consider whether council's decision was reasonable based on the evidence before it when it imposed the remedial action requirement.

Recently in *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190, the Supreme Court of Canada commented on the standard of reasonableness in reviewing administrative tribunal decisions as follows:

A court conducting a review of reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The B.C. Supreme Court in *Vernon (City) v. Sengotta*, followed *Dunsmuir* concluding the appropriate standard of review with respect to municipal decisions made under the remedial action powers under the *Charter* is that of reasonableness. If the decision is reasonable such that it falls within a range of possible, acceptable outcomes, the court will defer to the elected municipal decision makers.

The court will consider whether the remedial action requirement was reasonable in the circumstances based on the evidence that was before council when it imposed the remedial action requirement. The court will first consider whether the evidence supports the declaration made by council. Secondly, the court will consider whether the evidence supports the required action imposed by council. For example, the court may consider it to be unreasonable for council to require a person to remove or demolish a building that council considers to be a nuisance if there is evidence before council that the building could be repaired at a lower cost and council has not given the person the opportunity to repair the building. In such circumstances, council may wish to impose a remedial action requirement which gives the person the option of repairing or demolishing the building.

The reports to council are therefore of utmost importance to the remedial action process. In a court challenge they are the main documents on which the local government can rely to support the validity of the remedial action requirement. If the person fails to undertake the remedial action requirement and the local government undertakes the work, the local government could be liable for the costs of the work if a court finds that the remedial action requirement was unreasonable and therefore invalid. A remedial action requirement should therefore not be imposed without undertaking the necessary groundwork and preparation.

IV. NOTICE

A. Statutory Requirement

Pursuant to section 77(1) of the *Charter*, once the resolution imposing the remedial action requirement has been adopted by council, the local government must give notice of the remedial action requirement by personal service or registered mail to the person subject to the requirement and the owner of the land where the required action is to be carried out (if not the same person required to undertake the remedial action). The requirement for personal service or registered mail is presumably to ensure that such persons receive the notice. Proof of hand delivery or a signature acknowledging receipt is therefore essential. Section 77(2) also requires that notice of the remedial action requirement be mailed to each holder of a registered charge in relation to the property whose name is included on the assessment roll and any other person who is an occupier of the property.

Section 77(3) provides that the notice must also advise that the person subject to the requirement or the owner of the property where the required action is to be carried out, may request a reconsideration by council in accordance with section 78 of the *Charter* and that if the action required by the remedial action requirement is not completed by the date specified for

compliance, the local government may take action in accordance with section 17 of the *Charter* at the expense of the person subject to the requirement.

B. Prior to Imposing Remedial Action Requirement

There is no statutory requirement for the local government to notify any person that council is considering imposing a remedial action requirement under the *Charter*. The question arises, however, whether there is a common law duty of natural justice and procedural fairness which requires a local government to provide notice and an opportunity to be heard before council imposes the remedial action requirement. That question was considered in *Sengotta v. Vernon (City)*. In that case, the Sengottas argued that the council resolution ordering the removal of the fire damaged building significantly interfered with their vested property rights and as such they were entitled to notice and an opportunity to be heard before council passed the resolution. The court disagreed finding that the reconsideration provisions of the *Charter* provided the Sengottas with a sufficient opportunity to be heard and respond to the resolution.

That being said, a local government may still wish to notify the person who would be subject to the remedial action requirement of the council meeting when the remedial action requirement will be considered to ensure that any potential argument regarding a common law duty of procedural fairness is met. Undertaking such action may assist the local government in any subsequent court application regarding whether council was reasonable in imposing the remedial action requirement.

V. RECONSIDERATION

Pursuant to section 78 of the *Charter*, if the person subject to the requirement or the owner of the land where the required action is to be carried out requests, in writing within 14 days of the date on which the notice under section 77 was sent, that council reconsider the remedial action requirement. Council must provide the person with an opportunity to make representations to council. After providing the opportunity, council may confirm, amend or cancel the remedial action requirement. Notice of council's decision must be given in accordance with section 77(1) and (2) of the *Charter*.

Before confirming, amending or cancelling the remedial action requirement, council must consider all of the evidence that has been presented to council and determine whether the evidence before it still supports the remedial action requirement. This includes any information provided to council by the person subject to the remedial action requirement. If the remedial action requirement is confirmed or amended and the validity of remedial action requirement is later challenged, the court will consider whether council's decision was reasonable based on the evidence before it when it made its decision. For example, if council imposed a remedial action requirement requiring a building to be demolished and the person subject to the remedial action requirement provides to council at the reconsideration hearing an engineer's report indicating that the building is structurally stable and can be repaired, a court may consider it to be unreasonable for council to confirm the remedial action requirement to demolish the building based on the new evidence.

VI. NON COMPLIANCE

A. Undertaking the Remedial Action Requirement

In the event that the person subject to the remedial action requirement does not comply with the remedial action requirement by the date specified for compliance in the resolution, the local government may exercise its powers under section 17 of the *Charter* and carry out the remedial action requirement at the expense of the person. The local government may recover the costs incurred from the person subject to the remedial action requirement as a debt. If the costs are in relation to work done or services provide in relation to land or improvements, the local government may also recover the costs in the same manner as property taxes. In the resolution imposing the remedial action requirement, council may wish to include an authorization for the local government to undertake the remedial action requirement pursuant to section 17 of the *Charter* if the person subject to the requirement fails to comply the requirement.

Before entering on to the property to exercise its powers under section 17 of the *Charter*, the local government must comply with the requirements under section 16 of the *Charter* in relation to the authority to enter onto private property.

B. Sale of Property

Pursuant to section 80 of the *Charter*, if a remedial action requirement has not been satisfied by the date specified for compliance, the local government may sell the matter or thing in relation to which the requirement was imposed or any part or material of it on the later of the date specified for compliance and 60 days after the notice under section 77(1) of the *Charter* is given. If the local government sells the matter or thing, it may retain from the proceeds the costs incurred by the local government in carrying out the sale and any costs incurred by the local government in exercising its powers under section 17 that have not yet been paid by the person subject to the requirement. The local government must pay the remainder of the proceeds to the owner or other person lawfully entitled.

Section 80 of the *Charter* only applies in relation to remedial action requirements in relation to the following:

- A building, or other structure, an erection of any kind, or a similar matter or thing that is declared a hazardous condition under section 73(1)(a),
- A building or other structure, an erection of any kind, or a similar matter or thing that is declared a nuisance under section 74(1)(a), and
- A matter or thing that is in or about a building, or other structure, an erection of any kind, or a similar matter or thing that is declared a nuisance under section 74(1)(a).

Section 80 provides local governments with an additional remedy to recover the local government's costs in undertaking the remedial action requirement. This section applies to

matters or things that can be removed from the land but does not extend to the sale of the land itself. Pursuant to section 17, a local government has the power to impose the cost of the remedial action requirement in the same manner as property taxes and may ultimately sale the land through tax sale if the property taxes are not paid. This section does not allow a local government to circumvent that detailed process.

VII. CONCLUSION

The remedial action powers under the *Charter* are a unique and powerful enforcement option for local governments. The remedial action powers may prove to be the best option cost wise and time wise if undertaken properly. To limit a local government's potential liability, however, the necessary groundwork and preparation must be undertaken before imposing a remedial action requirement and the statutory procedures must be followed carefully after imposing the remedial action requirement. The time and care spent on the remedial action process, although seemingly cumbersome, will ultimately pay off with a successful remedial action!