RECENT DECISIONS OF THE COURTS

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I. GOVERNANCE

A. Bylaw Enactment Procedure

Virdis v. North Vancouver (City) 2009 BCSC 1118

This challenge to an OCP amending bylaw dealt with whether the rather distinctive legislative process of the City involved separate reconsideration and adoption motions for bylaws. A group of 6 owners applied for rezoning and amendment of the OCP. Following the public hearing and three readings, the OCP amending bylaw was before council on December 3, 2007. The motion was defeated on a vote of 4 to 3. The petitioner argued that council had voted to defeat the bylaw. The City argued that the motion only related to reconsideration. The significance of the differing positions was that on the petitioner's interpretation it would not have been open to council to consider the OCP amending bylaw for one year pursuant to the City's Development Procedures Bylaw. If the City was correct then council was entitled to reconsider and adopt the bylaw, as it did, at its June 9, 2008 meeting.

The court viewed a DVD of the December 3, 2007 council proceedings, which included the following comments of the Clerk (Ms. Dowey), the Mayor (Mussatto), and the Director of Community Development (Mr. White):

Ms. Dowey:	Thank you, Your Worship. Uh the next item on the agenda is Reconsideration and Final Adoption of the first Bylaw is Bylaw No. 7 and its item 7 Bylaw No. 7875 which is the City of North Vancouver Official Community Plan Bylaw, 2002, No. 7425 Amendment Bylaw, 2007, No. 7875, 1404 – 1458 Bewicke Avenue, Level 2 to Level 3 density Your Worship.
Mayor Mussatto:	I'm just going to ask Mr. White if Mr. White um could we just have one of our staff members grab Mr. White.
Mr. White:	I'm here.
...	
Mayor Mussatto:	... I just want to be very clear about uh if we have seven members of council here. I want to be very clear about we're, we're voting on here and um I think I might have been confused last uh meeting so I'm just going to ask

Mr. White if he could just explain on what we're voting on and what's and where we're at.

Mr. White: ... where we're at right now based on the resolutions that council made uh last meeting is the final – Reconsideration and Final Adoption of the Official Community Plan Amendment Bylaw which was the same Bylaw that uh was viewed by the public at the Public Hearing and the Zoning Bylaw but that has been amended. The, the, the amendments relate to um the parking change, uh but they do not eliminate uh something that the applicant was agreeable to, but was not agreed to by Council at the last meeting which is the elimination of ah the um additional uh suite potential in those uh in those projects. That uh was a bit confusing at the Council Meeting because it failed on a three-three vote that, that motion to remove failed on a three-three vote, therefore, the clauses stay in the Bylaw and that I think might have been something that uh people may have missed at that time because it was a motion that failed which had the consequences of leaving something in which was anticipated of being removed. So that's where we're at. So the Bylaw for the zoning change has only two of the four clauses removed that were agreeable to the applicant.

Mayor Mussatto: Right. So if we were to vote on this item here, uh the OCP, it, it does not really relate to the suites at this time am I correct Ms. Dowey or not Mr. White?

The discussion continued and a councillor moved reconsideration of item 7. The various council members expressed their views with the mayor noting that the votes weren't there for the motion to pass. He called for the vote and the Clerk stated: "Your Worship this is on Reconsideration of the OCP." The minutes of the meeting respecting the motion stated:

BYLAWS – Reconsideration and Final Adoption

7. City of North Vancouver Official Community Plan Bylaw, 2002, No. 7425, Amendment Bylaw, 2007, No. 7875 (1404 – 1456 Bewicke Avenue Level 2 to Level 3 density).

Moved by Councillor Keating, seconded by Councillor Schechter

That the said ***Bylaw 7875*** be reconsidered.

A recorded vote was taken on the motion

...

The motion was **DEFEATED** by a vote of 4 to 3.

Following the defeat of the December 3, 2007 motion, the applicants came back before council as a delegation two weeks later. In April 2008, they submitted a revised application which proceeded through public hearing and the first 3 readings in May 2008. The revised OCP amending bylaw was reconsidered and adopted on June 9, 2008.

The City's Development Procedures Bylaw provided that where council rejects an application, no reapplication for the same amendment shall be considered within one year of the date of council's rejection. Section 895 of the *Local Government Act* states that where a development procedures bylaw establishes a time limit for reapplication, the time limit may be varied on a 2/3 affirmative vote. No such vote was conducted by council prior to the revised OCP bylaw adoption in June 2008. Thus the characterization of the December 3, 2007 vote would apparently determine the outcome.

The court noted that at the same December 3rd meeting council had reconsidered and adopted two other land use bylaws in separate steps. However, the judge was not willing to accept the description of the vote on the impugned bylaw as it appeared in the minutes:

> I conclude that the members of council in attendance believed that they were voting, and did vote on whether or not to reconsider and adopt Bylaw 7875, not simply whether or not to reconsider the matter. I conclude that they voted not to reconsider and not to adopt that bylaw and that in so voting, they considered that they were defeating Bylaw 7875 and putting an end to the application at that time.

In respect of the original OCP amending bylaw, therefore, the vote of council was a single legislative act; encompassing both reconsideration and adoption.

The City then argued that the Development Procedures Bylaw one year prohibition from considering a reapplication did not preclude a reconsideration under the provisions of the general Council Procedure Bylaw. The court's reasoning on this argument is hard to understand. The judge merely refers to his earlier finding that the December 3 defeated motion was to reconsider and adopt the bylaw. It is not clear why this characterization of the vote would bar resort to the reconsideration provision in the Council Procedure Bylaw, although a further argument might have been mounted that the provisions of the general Council Procedure Bylaw should give way to the more specific Development Procedures Bylaw. However the court did not address this apparent conflict.

The court did find the power to reconsider the defeated bylaw in the combination of the mayor's power to bring a defeated bylaw back for reconsideration under the Council Procedure Bylaw and S.131 of the *Community Charter*. Under S.131 the reconsideration must be initiated within 30 days. The judge held, even in the absence of an express statement by the mayor that he was acting under either the *Charter* provision or the Council Procedure Bylaw to return the matter for reconsideration, that council's decision on December 17, 2007 to refer the applicants' submission to staff was the initiation of the reconsideration process by the mayor.

The court was prepared to uphold the OCP amending bylaw on an alternative basis: Even accepting the petitioner's contention that council acted contrary to the Council Procedure Bylaw, that amounted to a mere procedural irregularity. The court referred to several cases holding that a council's failure to follow its own procedures is not fatal to the bylaw or resolution passed; the inclusion of a procedural rule in a procedural bylaw does not make the rule "statutory" in its effect.

The origins of this case may be found in the old *Municipal Act* requirement that every bylaw had to be reconsidered not less than one day after third reading and before adoption. That reconsideration requirement was quite a separate and distinctive procedure from the reconsideration power reserved to the mayor now under S.131 of the *Charter*. Municipalities may avoid the confusion that arose in the *Virdis* case by removing any outdated references to reconsideration in their bylaw adoption procedures.

There was a further challenge to the bylaw on the basis that the City had provided assistance to the applicant. The judge was satisfied that S.25 of the *Charter* might have application as a multi-family development, of the type pursued by the applicants, was a commercial activity, and thus a "business." The petitioner argued there was assistance by virtue of the City charging only one application fee, whereas there were actually six applicants and six properties. However, the judge accepted as reasonable the City's interpretation of the Development Procedures Bylaw that it had received only one application. A further argument that the City had failed to collect a resubmission fee was dismissed as raising at most a mere procedural irregularity.

The third aspect of the assistance challenge was that the $50,000 amenity contribution from the applicants was insufficient to cover the real cost of amenities that would be necessary as a result of the proposed development. The court did not lay out the basis for the petitioner asserting that the $50,000 contribution would not be sufficient. S.25(1)(a) of the *Charter* speaks to assistance in the form of an exemption of a tax or fee. The amenity contribution was simply put, a contribution, not a fee and thus S.25 was not engaged.

B. Conflict of Interest

Fairbrass v. Hansma 2009 BCSC 878

In this case the mayor of Spallumcheen survived a conflict of interest challenge brought by 39 electors who sought his disqualification from office.

The mayor and his two sons were separate owners of two parcels that stood to be affected by an amendment to the OCP. The amendment introduced a policy that non-ALR A2 parcels be rezoned as Small Holdings, which would have the effect of reducing the minimum parcel size for subdivision to 2.5 acres. The mayor's parcel was 4 acres in size. The sons' parcel was 10 acres. The change in OCP policy would not have had the immediate effect of changing the zoning of course, but it would have facilitated such applications.

The mayor obtained a legal opinion due to his concerns that voting on the proposed OCP amendment would put him in conflict. The material facts assumed in the opinion were that:

- the mayor's parcel would be affected by the OCP amendment
- the mayor's parcel could not be subdivided if rezoned to Small Holdings
- his sons' parcel could be subdivided if rezoned to Small Holdings
- the mayor's financial affairs were not intertwined with his sons

The opinion concluded that because the OCP amendment did not change the zoning of any properties, it would not be until a zoning application that a conflict could arise. Second, the mayor did not have a personal interest in the matter because his property was too small to be subdivided. Third, any benefit that the mayor's sons might gain would be too remote to constitute a benefit to the mayor. The remoteness lay in the fact that achieving subdivision required a rezoning and there was no guarantee of success in that regard. Finally, the opinion asserted there would be no conflict because a significant portion of the property in the township would be affected by the proposed changes. (The evidence was that 60 out of 2100 parcels would be affected). Armed with this opinion the mayor participated in the discussion of the OCP amendment despite objections that he had a conflict of interest.

The court readily dismissed the argument that the mayor had a direct pecuniary interest in the bylaw. The petitioners argued that while the mayor's lot would be too small to be subdivided if rezoned to Small Holdings, the prospect nevertheless existed that he could increase the size of his lot by adding land from an adjacent parcel – and a likely donor site existed in his sons' land. It was also argued that the zoning bylaw might be amended in the future to reduce the minimum parcel size in the Small Holdings zone. The judge concluded that the prospect of either of these two events coming to pass was too speculative. The petitioners had no evidence to suggest that the mayor intended to enlarge his property or that the township was contemplating further change to the subdivision criteria for Small Holdings lands.

With respect to an indirect pecuniary interest the petitioners argued that the mayor had an interest in relation to the sons' property. The judge accepted the reasoning that the OCP amendment increased the prospect of the sons' property being rezoned and made the property more amendable to subdivision. He accepted this made the property more attractive to developers, which would translate to an increase in value. The ultimate issue was whether the mayor, by virtue of his relationship with his sons, had no indirect pecuniary interest.

B.C., unlike some other provinces, such as Ontario, does not have a provision which deems the pecuniary interest of spouses, parents, or children of the councillor to also be a pecuniary interest of the councillor. Without the benefit of such a presumption the judge held that the mere familial relationship of father and son was not sufficient to found a pecuniary interest; it was incumbent on the petitioners to bring evidence to establish a link between the pecuniary interests of the official and the matter under discussion. In all of the several cases examined by the court, where a conflict was found based on a family relationship, there was some evidence establishing a link between the pecuniary interests of the council member and the relation in respect of the matter before council. The mayor argued there was no evidence of his having a pecuniary interest in the sons' property, or in their financial affairs in general. The judge agreed and declined to draw the influence of a pecuniary connection "out of thin air."

Interestingly, the judge did not stop after having found neither a direct or indirect pecuniary interest. In *orbita dicta* he wrote that had he found the mayor to have been in a pecuniary conflict of interest, he would have held that the mayor did not act inadvertently when he participated in the discussion. The judge concluded that the mayor could not have relied on certain parts of his lawyer's opinion in good faith. Justice Rogers reasoned that the lawyer's opinion that the proposed changes to the OCP would not affect the value of the sons' lands was "patently wrong." He went on to conclude that "no reasonable person could have relied on such an obviously flawed opinion."

The judge's comments are relevant to the S.101(3) of the *Charter* which provides that a council member who has contravened the conflict provisions will not be disqualified if the contravention was done inadvertently or in good faith. Obtaining legal advice, even if ultimately proved incorrect, has previously been considered an indicator of good faith. Justice Rogers' comments will raise an additional concern for any council member who relies on legal advice that they do not have a pecuniary conflict. It will be incumbent on the council member to read the legal opinion critically. Blind acceptance of the conclusions in the legal opinion may not meet the good faith standard for S.101(3).

In terms of Mr. Justice Rogers' specific conclusions, lawyers should perhaps be cautious in expressing conclusions as to whether a change in a land use bylaw will have a positive, negative, or no effect on the value of land. However, it should be noted that Justice Rogers endorsed the lawyer's opinion that the OCP change would not affect the mayor's lands, yet savaged the opinion in its conclusion that there would be no effect on the value of the sons' lands. The answer may be in the cases that have stressed that on issues of prospective impacts on land values the courts will not be swayed by the opinions of experts such as appraisers or land economists. Rather, judges should keep in mind that the purpose of conflict of interest legislation is to promote confidence in the administration of local affairs through the eyes of the reasonable, right thinking member of the public. And on the question of potential pecuniary benefit, it is the perception of that reasonable and knowledgeable member of the public that governs.

C. Remedial Action Requirements – Process and Standard of Review

Sengotta v. City of Vernon 2009 BCSC 70

The B.C. Supreme Court's decision in *Sengotta* addresses some of the process issues that can arise in using council's remedial action powers as well as the scope of these powers.

In 1998 a fire damaged a building located on a property owned by two members of the Sengotta family and leased to RMTL, a company operated by two other members of the family. The City's building inspector formed the opinion that one-third of the building had been damaged. Prior to the fire, the use of the building was a lawful non-conforming use. The building inspector accordingly cautioned RMTL that if the entire building were to be demolished it could not be replaced with a new building. RMTL applied to the Board of Variance to make structural alterations to the building. Eventually the Board resolved in July 2000 to permit RMTL to undertake structural alterations and additions based on a finding of undue hardship. There then followed a dispute as to whether the effect of the Board's resolution allowed RMTL to replace the fire-damaged building with a new building, or whether the City was entitled to reject a design providing for new exterior walls and roof as being a new building. While the parties exchanged correspondence on the effect of the Board's resolution there was no evidence RMTL applied for a building permit to repair the building.

In early 2003 council passed a resolution declaring the building a nuisance and ordering that it be removed. While notice of the resolution was sent to the owners, RMTL as lessee and occupier was not notified. Attempts to enforce the 2003 resolution were abandoned due to problems with service of the court petition. During the interim the City and RMTL were continuing to communicate about RMTL's repair plans and what would be required to comply with the building and zoning bylaws.

The chief building inspector made a report to council in May, 2004 requesting a second resolution declaring the fire-damaged building to be a nuisance and that it be removed. To that point only two neighbours had complained to the City about the building. Council addressed the matter in two stages: a resolution of May 10, 2004 declaring the building a nuisance, and a resolution of June 14, 2004 directing the building be removed within 60 days. Notices of the resolutions were sent out by registered mail to the owners and RMTL. RMTL requested a consideration by council, as provided for in S.78 of the *Charter*, which was rejected. Some 30 months later, in December, 2006, the City sent out notice of the May 10 and June 14, 2004 resolutions to the owners after it learned that the address used for the previous notice was incorrect. No further reconsideration was requested by the owners after receiving the December 2006 notice.

The City bought a petition in Supreme Court against the owners for an order that they comply with council's order to remove the building. Their response was that the City had named the wrong party, they ought to have named RMTL, and that as owners they had no right to enter the property and remove the building. The court concluded that while the statute requires notice

must be given to both owners and occupiers, municipalities may determine whether they pursue court enforcement against the owners, occupiers, or both.

The owners' next technical objection was that council's June 14, 2004 resolution was invalid because it failed to identify the person upon whom the remedial action requirement was imposed. The court did not address directly the argument that S.72(2) requires identification of the person who must take remedial action. Rather, the court observed that the City's eventual notification of both the owners and occupiers was effective notice. It is implicit in the court's comments that it is not necessary to stipulate in the resolution who, as between the owners or occupiers, is responsible for undertaking the remedial action.

The most significant aspect of the decision is the discussion as to whether the fire-damaged building was a nuisance within S.72. The Sengottas contended that the only basis for the City's action was aesthetic concerns about the building; there had been only two complaints from neighbours and they had been about the appearance of the building. Furthermore, it was not suggested that the damaged building represented a fire or safety hazard. The court noted that the predecessor provision in the *Municipal Act* had been found by the Supreme Court of Canada in *Nanaimo v. Rascal Trucking* as empowering the City to declare a pile of dirt to be a nuisance. A similar purposive interpretation of the *Charter's* remedial action provisions authorized Vernon council to declare the fire-damaged building a nuisance.

On the threshold jurisdictional question of whether the *Charter's* remedial action provisions were broad enough to allow a council to declare a fire-damaged building a nuisance the court applied a standard of correctness. As to whether there was sufficient evidence for Vernon council to declare the particular building a nuisance, the standard for reviewing council's decision was the deferential standard of reasonableness.

In 2008 the Supreme Court of Canada had reduced the standards of review analysis to correctness and reasonableness, eliminating the standard of patient unreasonableness. The judge instructed himself that in applying the reasonableness standard to Vernon's decision he should consider:

> That standard of deference, to paraphrase *Dunsmuir*, requires from this Court respect for the legislative choices to leave some matters in the hands of elected municipal decision makers, for the process and determinations that draw on their particular expertise and experience, and for the different roles of the courts and elected municipal bodies within the Canadian constitutional system.

The court rejected the Sangottas' argument that there was a complete lack of evidence the property was a nuisance. Cumulatively the evidence the judge found to support council's decision consisted of the following:

- the two complaints about the building's appearance;

- the City's ongoing concern about certain properties due to their appearance or lack of maintenance;
- the City's concern had been reflected in the building inspector's April, 2002 report regarding five properties, including the Sengottas', which had been the subject of enforcement action;
- the City's Strategic Plan objective of ensuring that Vernon was a safe community, an attractive business destination, with a goal of community beautification;
- little work had been done to clean up the damaged building in the six years since the fire, leaving it essentially as it remained after the fire.

Having cited these factors, the judge did not attempt to articulate in a detailed way how a goal of community beautification, for example, was supportive of the conclusion that the building constituted a nuisance. Instead the judge stated that he should defer to council's knowledge and experience of its community's needs and requirements. On that basis he was satisfied council's decision to pass the May 10 and June 14, 2004 resolutions was reasonable in the circumstances.

The judge went on to reject the further submissions of the Sengottas that council improperly assumed that the condition of the building was having an impact on the community and that council had not been instructed that the building had to be so dilapidated or unclean as to be offensive to the community. The judge simply responded that there was no evidence to indicate that council acted on any such assumption.

The Sengottas also argued that it was procedurally unfair of the City not to have notified them in advance of council's consideration of the resolutions declaring the building a nuisance and in failing to give them an opportunity to be heard on the issue. They argued that the right to request reconsideration under S.78 could not cure this procedural error. Part of their submission was that, having made the decision that the building was a nuisance, council was unlikely to undo its previous decision. The judge considered it as speculative at best that council members on the reconsideration would not act in a fair and open-minded fashion. He concluded that the right to request reconsideration gave the party affected an opportunity to be heard and respond to the resolution. It should be noted that in the case of the property owners the judge was prepared to accept that their right of reconsideration was still present a full 30 months after the resolutions, as they were not effectively served until the City's December 13, 2006 letter which advised them of the right to request reconsideration.

The Supreme Court's decision in Sengotta can be seen as demonstrating a high level of deference to council's decisions as to what may constitute a nuisance for the purpose of imposing remedial action requirements.

D. Public Hearing Disclosure

Baynes Sound Area Society for Sustainability v. Comox Strathcona (Regional District) 2009 BCSC 565

One of the critical questions with a development proposal covering some 850 acres was how water service would be provided. Based on its own engineering report the developer proposed obtaining water from an existing improvement district, which would have to increase the volume of water in Langley Lake by raising the height of the Langley Lake Dam. The Regional District commissioned an engineering report questioning this option. Thereafter the Regional District and the developer negotiated a proposed development agreement providing for water to be provided from an alternative water system operated by the District of Cumberland. Meanwhile the petitioner environmental group had obtained a report from environmental consultants critical of the developer's initial water supply proposal. In advance of the public hearing the Regional District announced that the developer intended to service the development via Cumberland's system. As a consequence the petitioner did not press its objections to the initial water service plan based on increasing the improvement district's supply source. After the public hearing the developer entered into a S.219 covenant with the Regional District that no building permits would be issued until the developer reached agreement with the improvement district on water supply, which contemplated using the same source of concern to the petitioners.

The petitioner applied to quash the OCP and rezoning bylaws for the development, arguing that the Regional District improperly receiving new information from the proponent – the change in the proposed source of water – following the public hearing that it was not given the opportunity to address.

The court rejected the Regional District's response that the further identification of the water source was simply addressing a detail at a "technical level", something which had been regarded as acceptable in previous cases. Viewed from the perspective of those members of the public with an interest in the matter sufficient to attend the public hearing, the court held that the Regional District's change in position post-public hearing deprived them of the opportunity to make submissions or be heard on the water source change. This was unfair in the view of the court and the bylaws were set aside.

It is hard to disagree with the decision in this case. The water supply source was an important issue, as evidenced by the petitioner having obtained a report from an environmental consultant. To allow the development to go ahead without the public having the opportunity to air their concerns about the plan to utilize the Langley Lake source, with the benefit of professional consultant advice, would diminish confidence in and respect for the public hearing process.

II. REGULATORY

A. Business Licensing

Dragonwood Enterprises Ltd. v. Burnaby (City) 2009 BCSC 1236

Burnaby requires any person wishing to undertake a development to apply for Preliminary Plan Approval (PPA) from the Director of Planning before a building permit may be issued. The PPA application must include a statement of the purpose of the development, a preliminary plan showing lot dimensions, location, plan and profiles of all buildings, parking spaces, landscaping, fences, and surrounding land uses. The PPA requirement is found in Burnaby's Zoning Bylaw.

Dragonwood owns a 23-acre industrial park. The industrial park has operated for over 30 years but is now surrounded by residential and commercial development and the OCP designation of the lands is non-industrial, while the zoning remains industrial. As background to the current controversy, the owners applied in 2005 to redevelop the property with a mixture of warehousing, commercial and high-density residential development. The City's response was that the plan was not acceptable, that redevelopment under the existing zoning would require adherence to the industrial zone regulations and certain encroachment issues had to be resolved. No mention was apparently made of any requirement to obtain PPA. In 2007 the City made an offer to purchase the property which was rejected.

Burnaby declined to issue business licenses for the 2009 license year to seven of Dragonwood's tenants, initially on the basis that they would first have to obtain a determination from the Planning Department whether PPA was required. By the time the matter had proceeded to court, Burnaby had solidified its position to requiring a PPA submission from the tenants. The owner's position was that preparation of a preliminary plan would involve tens of thousands of dollars and several months' preparation. Burnaby acknowledged that given the size of the property preparation of the PPA application would be onerous for a single tenant. Its solution was to suggest the owner and other tenants submit a joint PPA.

Dragonwood brought an application for an order that Burnaby issue business licenses to its tenants without any requirement to first obtain PPA. Dragonwood's position was that the PPA process applied only to those seeking development or building permits and, as its tenants sought neither, the PPA requirement did not apply to them. Burnaby's response was the requirement to obtain a PPA was intended to ensure that licensed businesses do not operate contrary to the City's bylaws, and thus was an appropriate exercise of its powers.

The court first considered the definition of "development" in the Zoning Bylaw. "Development" was defined as:

> "means <u>a change in the use</u> of any land, building or structure for any purpose…."

The court then considered the section of the Zoning Bylaw imposing the PPA requirement. A person undertaking a development had to obtain PPA before the issuance of a building permit. Again, none of the owner's tenants sought a building permit from Burnaby. Despite some of the tenants having changed the use of their premises from that conducted by previous tenants, the court held that alone was not sufficient to support the requirement to obtain PPA. If the tenants were not seeking building permits, they were not subject to the PPA requirement.

The judge considered the reasonableness of the PPA requirement in the alternative and in the event that he was wrong in holding that the bylaw did not require a preliminary plan where only a change of use was being proposed. In reviewing both the statute and the case law, the judge accepted that a council has a wide discretion whether to grant or refuse a business licence. However, while zoning is a relevant factor to consider whether a business licence should be granted, the authority to grant business licences should not be employed as a tool to effect zoning. The judge noted that the City's concern was that buildings may have been modified without building permits. The PPA requirement would lead to identification and rectification of this problem. However, the judge characterized this as a burden that the City should impose on the landowners and not on tenants seeking business licences. The City was requiring as a condition precedent to licence issuance that the tenants provide information that would be expensive and perhaps difficult for them to obtain. In the court's view this requirement did not relate to the attributes or defects of the particular businesses of the tenants. Further, the reach of the PPA to the whole of the property was seen as an unwarranted requirement that each tenant establish that all other tenants were operating in compliance with the City's bylaws.

The end result of the judgment was that Burnaby was ordered to consider the tenants' licence applications without the requirement to provide the PPA.

B. Advertising Content Restrictions – Freedom of Expression

Greater Vancouver Transportation Authority v. Canadian Federation of Students 2009 SCC 31

The Supreme Court of Canada rejected an appeal by the Greater Vancouver Transportation Authority (GVTA) and BC Transit from a decision of the BC Court of Appeal that had held a prohibition on advertising with a political content to be an infringement of freedom of expression that could not be justified as a reasonable limit under S.1 of the *Charter of Rights*.

The case arose out of requests by the Canadian Federation of Students (CFS) and the BC Teachers Federation (BCTF) to place ads on transit buses that, in the case of the CFS, mentioned 3 issues of particular concern to students and urged them to vote and, in the case of the BCTF, would have drawn attention to there being fewer teachers and school closures. Both the GVTA and BC Transit had adopted policies that they would not accept advertisements with a political content. The challenge to the policies had been dismissed by the trial judge on the basis that there was no history of permitting political or advocacy advertising on the sides of buses, and therefore the location of the proposed ads was not a "public place." The Court of Appeal allowed the appeal of the CFS and the BCTF, citing the history of permitting advertising on buses. Therefore the proposed location for the ads could not be seen as inimical to the function of the buses as public transit vehicles. The transit authorities took the case to the Supreme Court of Canada.

The first issue, which the SCC disposed of readily, was whether the GVTA and BC Transit were "government" such that the *Charter of Rights* had application to their policies. The *Charter* may be applicable to an entity because it is government by its very nature or because government

exercises substantial control over it. Alternatively the entity may be performing activities which are governmental in nature. The Regional District exercised substantial control over the GVTA in terms of appointments to its board and ratification of certain bylaws and its strategic plan which made the GVTA itself a government entity. BC Transit, being a statutory body, and designated in its legislation to be an agent of government, was clearly a government entity.

Turning to the question of S.2(b) of the *Charter*, the content of the messages that the CFS and BCTF to have advertised was clearly expressive in nature. Agreeing with the Court of Appeal, the SCC found that the location of the expression – the sides of buses – did not remove the ads from the scope of the S.2(b) guarantee. Not only was there some history of use of transit buses as advertising forums, there was actual use to show that the buses could continue to function as transit vehicles while carrying the proposed advertisements.

The threshold question in terms of the S.1 test for justifying the restriction on political ads was whether the policies of the transit authorities qualified as "law" for the purpose of being a "limit prescribed by law." The policies were considered to be "law" for the purposes of S.1 as they were intended to be binding rules of general application. However, the policies did not survive two other elements of the S.1 analysis. The limit on political content was not rationally connected to the proffered objective put forward of providing a safe and welcoming transit system. Further, the means chosen in support of that objective – a complete prohibition on political content – was neither reasonable nor proportionate. In the result, the policies of the authorities were declared to be of no force and effect.

The decision will likely have implications for other public facilities and property. If prevailing policies permit some form of advertising but attempt to restrict the content to non-political messages, they will be difficult to uphold.

C. Tax Rates – Unreasonableness – Standard of Review

Catalyst Paper Corporation v. North Cowichan (District) 2009 BCSC 1420

The Supreme Court of B.C. in this judgment rejected a challenge to the Class 4 tax rate imposed on Catalyst's Crofton pulp and paper mill. Similar proceedings were brought by Catalyst in respect of the taxation bylaws of Campbell River, Powell River, and Port Alberni. All were heard by the same judge. The *North Cowichan* case is the only one decided to date.

A summary of the some of facts and data before the court is as follows:

- Catalyst's municipal tax bill for 2009 in North Cowichan was $6.8 million
- Catalyst only paid $1.5 million of the total 2009 tax bill
- The Class 4 rate was 20 times the rate for Class 1 Residential
- 37% of the total property taxes levied in North Cowichan were allocated to Class 4 properties while Class 4 properties accounted for just 3.7% of the total tax base

- Class 1 properties comprise 90% of the total assessed value and pay just 40% of the property taxes
- From 1991 to 2007 Class 4's share of North Cowichan's total assessed value fell from 15.7% to 4.7%, while its share of overall property taxes decreased by a smaller proportion – from 58% in 1991 to 48% in 2007
- Catalyst's consultants produced a "sustainability model" estimating that Catalyst consumed only $1 million in municipal services in 2008.
- The average homeowner's property tax bill in North Cowichan is $610 annually, said to be one of the lowest rates in the province
- Over the five year period from 2004 to 2008 Catalyst had after tax losses of $186 million and paid $157 million in municipal taxes in BC

From these facts one can see the stakes were significant for both parties.

Catalyst did not argue that the District had acted for an improper purpose or in bad faith in setting the tax rate for Class 4 properties. It argued that council's decision was unreasonable. The judge's assessment of Catalyst's unreasonableness submission was very much framed by the Supreme Court's 2008 judgment in *Dunsmuir v. New Brunswick*, where the court expounded on what reasonableness means in the judicial review context. Justice Voith cited the following passage from *Dunsmuir*:

> What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?
>
> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for 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.

Catalyst asserted that North Cowichan's decision-making process in relation to tax rates was unintelligible. While the judge ultimately rejected this submission, his reasons were much influenced by the emphasis in the foregoing passage in *Dunsmuir* on the need for justification, transparency and intelligibility of the decision being challenged, as his comments as follow demonstrate:

> Thus, in order for the court to fulfill a meaningful or effective role in considering the reasonableness of an administrative decision, it must have some sense of the basis on which that decision was made
>
> The very factors which militate in favour of judicial deference to municipal decision making – that municipalities are political bodies and that they are best positioned to weigh the interests of their constituents – support the importance of ensuring that such decisions are transparent and intelligible. It is neither palatable, nor would it engender confidence in the municipal decision making process, for a municipality to simply cloak itself in the mantle of deference when its decisions are questioned.
>
> In this case, where the Bylaw is the product of an exercise of power which is legislative in nature, there is no obligation to provide any reasons in the formal sense. There must, however, be sufficient evidence in the record before the court to enable the court to have some understanding of how and on what basis the decision was made. The court must be able to satisfy itself that the decision is rational.

Again quoting from *Dunsmuir*, the judge referred to the identification of the outer boundaries of reasonable outcomes as the role of the reviewing judge in assessing the reasonableness of the decision maker. But Justice Voith acknowledged how constrained the court was in questioning the outer boundaries of a municipal decision made under taxing powers:

> Barring something aberrant or "overwhelming", barring a decision "no reasonable body could come to", a court will not revisit the outcomes or "outer boundaries" determined by council to be appropriate. It will not substitute its own view of a more suitable outcome. (para. 80)

One of Catalyst's lines of attack was to show that the level of taxes it bore was disproportionate to the level of services consumed as a Class 4 property owner. However, the court noted that the type of decision making contemplated under S.197 of the *Community Charter*, dealing with the establishment of property tax rates, was inconsistent with a "single-minded reliance on a consumption model" for determining tax rates. Service consumption levels could certainly be a relevant factor to be considered by council in fixing property tax rates, but the court concluded that the weight or significance given to consumption patterns was a matter for council alone, to be considered with other categories of relevant information.

The next stage in the reasonableness analysis was a consideration of whether the taxation bylaw was rational. This inquiry focused on the information that was before council in setting the rates. Catalyst argued that the District acted unreasonably in failing to consider its consultants' sustainability model. The evidence though was that the District had considered the model and the judge correctly saw Catalyst's complaint was not a failure to consider the model but a failure to give it the effect that Catalyst wanted. The judge also rejected Catalyst's assertion that the District's consideration of the relative ability to pay of each of the property classes was itself unreasonable in light of Catalyst's difficult financial circumstances. The District had weighed competing interests and this was clearly within the purview of council and not the court.

The court had before it the other key information that council considered before it set the rates:

- a staff report with options for apportionment of taxes between classes;
- a series of 15 charts comparing the District's Class 4 rates and ratios to Class 1 with other BC local governments;
- the report of the District's Property Tax Restructuring Committee that recommended a significant tax shift from Class 4 over a 3-year term.

The judge acknowledged that this information spoke to the complexity and discretionary nature of the exercise of setting tax rates. It was also significant that the District had communicated directly to Catalyst on the considerations and reasoning that went into council's decision on the 2009 tax rates. On this rationality inquiry the judge stated that he was satisfied that the District had met the obligation set out in Dunsmuir to ensure that there was sufficient information in the record before the court to allow it to glean the factors council had considered. All of that information, he found, was rationally connected to the tax rate setting exercise.

The analysis then turned to the consideration of whether the bylaw was within the range of possible and acceptable outcomes. Here, Catalyst argued the District's Class 4 rates were unreasonable because they were outside of the range of such rates elsewhere; the ratio of Class 4 to Class 1 rates in North Cowichan being the highest in the province in 2008. The fact that the District's rates were at the far end of the spectrum though did not mean that the result was not a possible or acceptable outcome. The judge's reasoning on this point was as follows:

> In any instance where a number of decision makers address the same question there will be a range of outcomes. The fact that each of Mr. Frame [the Director of Finance], the Tax Restructuring Committee which included the mayor, and Council came to three different outcomes for 2009 Class 4 tax rates reflects this. There will always be outliers in the data. Such outliers are not, of necessity or even on a persuasive basis, unacceptable outcomes.

Having concluded that the effects and outcomes of the bylaw were within the range of permissible outcomes, the judge turned to North Cowichan's concession that Class 4 tax rates were too high. This was simply an acknowledgement that council accepted the importance of trying to reduce the rates but the pace and extent to which the reduction would occur was entirely within council's discretion and not something that the court could interfere with.

The decision is a good one for local governments in affirming that courts should show considerable deference to local governments in respect of legislative decision that are reviewable on the reasonableness standard. On each point where Catalyst sought to have the court second-guess and overturn the District's decision, the court deferred to council's judgment.

What may prove challenging in future cases is that part of the court's inquiry regarding the "existence of justification, transparency and intelligibility of the decision-making process", the focus for the court's review outlined in *Dunsmuir*. Putting the onus on the legislative decision maker to assemble a record that will establish a rational basis for its decision can be seen as a change in emphasis from previous cases. The courts have generally recited the formula that bylaws are presumed valid and the onus is on the party challenging a bylaw to establish its invalidity. Clearly North Cowichan was assisted by its ability to place a strong factual record before the court showing that it had considered the plight of the Class 4 property owners and had done so in a transparent fashion. Other local governments may have difficulty providing similar background material to support their challenged legislative decisions. At what point the court will decide that insufficient material has been provided to the court to meet the *Dunsmuir* standard of reasonableness will have to be determined in future cases.

An appeal has been filed by Catalyst in this case.

III. EFFECTIVE DESIGNATION OF LANDS IN AN OCP

Wood v. Langley (Township) 2009 BCSC

At issue in this case was the requirement for relocation of a fish bearing stream, Jeffries Brook, and to re-establish it as fish habitat. This requirement was included as part of the 2000 Southwest Gordon Estate Neighbourhood Plan. The question was whether Mr. Wood's lands were included in this Neighbourhood OCP. If they weren't, the requirements relating to Jeffries Brook did not apply.

Above the Southeast Gordon and other neighbourhood plans in the planning hierarchy was the Willowbrook Plan. The Willowbrook Plan included a map showing the boundaries of various neighbourhood plans within the Willowbrook Plan area. That map showed the Wood property outside the area of the Southwest Gordon Neighbourhood Plan. A staff report on a rezoning of the lands immediately adjacent to Wood's seemed to confirm that both properties were outside of the Southeast Gordon Neighbourhood Plan.

Langley's rather ingenious argument was that more than one OCP could apply to the lands. Langley accepted that the Wood property was "designated" by the Willowbrook OCP but it contended that the designation of the feature – Jeffries Brook – in the Neighbourhood Plan should carry over onto Wood's lands, even if it may not have appeared within the plan area. In that respect Langley argued the Neighbourhood Plan also "designated" Wood's lands.

The court resolved the question solely by reference to the mapping. The judge acknowledged Langley's point that there was a dashed line on the Neighbourhood Plan map representing the proposed re-alignment of Jeffries Brook. However, the colour coding for the various land use designations stopped at a BC Gas right-of-way and this confined the boundary of the Neighbourhood Plan.

Wood's property was on the other side of the gas right-of-way where the colour coding ended. The judge concluded that the property was not designated within the Neighbourhood Plan and thus the requirement of relocating Jeffries Brook could not be considered applicable to the property.

A. Parcel Tax Bylaws – Zoning Density

O'Flanagan v. Rossland (City) 2009 BCCA 182

In *O'Flanagan* the BC Court of Appeal affirmed the Supreme Court's decision that upheld parcel tax bylaws based on zoning densities.

The City established a local service area to construct a water reservoir for a particular area of the City where the property owners had petitioned 80% in favour. The service establishment bylaw provided that approximately 40% of the project's cost should be raised by a parcel tax. The parcel tax was calculated on the basis of "full parcel build out" or the maximum number of units achievable under the zoning bylaw.

Section 202(2) of the *Community Charter* provides that a parcel tax may be based on one or more of the following:

a) a single amount for each parcel,

b) the taxable area of the parcel, or

c) the taxable frontage of the parcel.

Where the tax is based on area or frontage, S. 202(3) goes on to require that the method for determining the tax must be based on "the physical characteristics of the parcel and may be different for parcels having different classes of physical characteristics." The appellants argued that calculating the tax in relation to the maximum build out permissible under the zoning bylaw was not a determination based on physical characteristics, but rather a legislative characteristic.

The Court of Appeal held that the area in gross hectares (one part of the equation determining unit entitlement and thus the amount of the tax) was obviously a physical characteristic. In addition the court approved the lower court judge's reasoning that the zoning density would also have taken into account the physical characteristics. In fact it went so far as to say zoning "must take into consideration the physical nature and dimensions of a property." The court used the example of a land with 80% rock face not supporting the density of a level tract of land. However, there is nothing to prevent a council from conferring the same density of development on the rock face parcel as the level parcel. In any event, the combination of permitted zoning density and actual physical area in gross hectares resulted in a taxable area based on physical characteristics, as required by S. 202(3). The court seemed to suggest that it would be permissible to base a parcel tax in part on zoning considerations not related to physical considerations if there were other physical considerations that were taken into account in the parcel tax bylaw.

The appellant's second argument was that as the zoning density was capable of adjustment by council and the taxable area could vary over the amortization period of the service the bylaw was invalid as not permanently establishing the rate of tax per unit of taxable area, per S.200 3(b)(i). The court considered the argument as misconceiving the process of parcel taxation generally. The court noted the provision for annual review and authentication of the parcel tax roll and for amendment on the application of a parcel owner. Thus the tax payable in any given year could vary depending on the proportion that the owner's taxable area bears to the total taxable area within the local area service. It was sufficient that the bylaw lay down the general framework and methodology of the tax.

The appellants' third argument was the City had exercised its discretion unreasonably in excluding certain properties from the local area service. The City's rationale for excluding properties was that (1) the excluded properties has paid a significant amount towards another water improvement, a water treatment plan expansion, and (2) the excluded lands were already fully developed and serviced by the existing utility, with no further development that could benefit from the new reservoir. The appellants asserted that it was unreasonable to impose a tax on vacant land to encourage development rather than a tax on parcels that benefit from the service. This argument was seen as going to matters beyond the purview of a reviewing court. The court considered that the effects of the bylaw – i.e. encouraging development – to be a policy issue and thus a proper consideration for a municipal council. Further the decision to exclude parcels because they had been previously taxed for an earlier improvement was a matter for council and not for the court, in the absence of bad faith or improper motive. Even if it was possible that some benefit might accrue to the excluded properties from the new reservoir, it was

open to council to determine that the benefit was sufficiently minimal that it was not justifiable to impose a new burden on those who had borne the earlier burden.

The decision in *O'Flanagan* provides a good example of the application of the deferential standard of judicial review and the courts being respectful of the responsibility of elected officials to serve their constituents and not substituting their views of what is best for the citizens for those of municipal councils, as observed by McLachlin J. in dissent in *Shell v. Vancouver.*

B. Parcel Tax – Pre-Community Charter Adoption

Andrex Developments v. Colwood 2009 BCCA 222

The City of Colwood successfully appealed the decision of a BC Supreme Court judge setting aside its decision to change the method of recovering the cost of a sewer specified area service from a property value tax to a parcel tax.

The sewer service proceeded as a specified area service under an owners' petition. That petition provided that the City could recover the debt incurred by way of the charges permitted under S.646(4) of the *Municipal Act*. That subsection authorized the imposition of one or more of the following:

(a) a rate on the land or improvements;

(b) a frontage tax;

(c) other changes provided in the Act

The Supreme Court judge had held that the change from a property value to a parcel tax required the City to obtain a fresh assent from the property owners. The Court of Appeal concluded this was an error and the original petition indicated that the owners had assented to all the forms of cost recovery. No fresh assent was required. Further it was an error for the judge below to consider the *Community Charter* provisions governing the process for establishing local area services had application to specified area bylaws adopted under the *Municipal Act*. In this respect it is worth noting that the *Community Charter*, in S.211, is more exacting than the *Municipal Act* in requiring identification of the cost recovery method in the establishing bylaw.

The Appeal Court also found the Supreme Court judge erred in ruling that the City had unlawfully redelegated to itself through the establishing bylaw the legislative discretion to decide on the particular form of cost recovery (Andrex had argued this legislative choice had to be exercised in the establishing bylaw). It was only at the point of adopting a taxing bylaw that council had to demonstrate certainty and this did not restrict the City in the mode of taxation it might impose from time to time.

C. Interpretation of Land Use Contract

264215 B.C. Ltd. v. Surrey (City) 2009 BCSC 1336

The B.C. Supreme Court ruled in this case that the City was in breach of contract by narrowly intercepting a land use contract to deny business licences to several prospective businesses that the court ruled were permitted under the LUC. A hearing to determine the damages owing is to be scheduled.

The LUC in question was entered into in 1976. Previously the lands were zoned residential. The owner sought rezoning to C2 to permit commercial development. For reasons which are not explained, the parties proceeded with a land use contract instead. The LUC provided that use of the lands was limited to those specified in a schedule to the LUC which read:

> Schedule of Permitted Land Use
>
> Land and structures shall be used for Retail Commercial Buildings and Retail Commercial Uses, together with permitted accessory uses only.

Significantly, no reference was made to uses in the C2 zone under the prevailing zoning bylaw. The LUC provided for on-site works to be provided as approved by the municipal engineer. Off-site works were the subject of an ancillary agreement.

The judge noted that the C2 zone, at the time the LUC was entered into, allowed for a long list of commercial uses, including retail store, offices, restaurant, delivery services, shoe repair, appliance repair shop. In 1979 the zoning bylaw was amended with a Retail Commercial Zone One C-R(1) allowing for “retail stores”, “services”, and “offices.” Between 1990 and 1997 Surrey denied business licences for several proposed uses – including professional offices, auto glass replacement, church, adult business education school, travel agency, and printing shop – which admittedly fell within the C-R(1) zoning. During the period that business licences were being refused, Surrey received two legal opinions. The first concluded that the term “Retail Commercial Uses” in the LUC would include all of the commercial retail uses permitted in any of the C-C, C-R(1), C-R(2), C-R(3), C-S, C-H, and C-L zones in the zoning bylaw. The second opinion essentially confirmed the earlier one, with the additional observation that “retail” meant there had to be a sale for final consumption, as opposed to the sale for further sale or processing (wholesale).

The planning department took from this opinion that the uses permitted under the LUC must be limited to those retail uses listed in the commercial zones of the current zoning bylaw. The judge observed that the bylaw did not include a category called “retail uses” but instead provided for “retail stores”, “services”, and “offices”, along with a list of described activities under each. The judge also took note of the admission of Surrey’s senior planner at examination for discovery that the specific uses allowed in a land use contract would always prevail over any underlying zoning for the lands.

The court then turned to the key issue of interpreting the words "Retail Commercial Uses" found in the schedule to the LUC. Justice Dillon relied on dictionary definitions of the constituent words to discern their plain and ordinary meaning. She noted that the Black's Law Dictionary definition of "retail" was not restrictive to the sale of goods. More positively, the Dictionary of Canadian Law definition defined "retail" as:

> "a sale by a retailer directly to the consumer"

and as:

> "any sale of <u>products</u> to a purchaser or user for consumption or use but not for resale"
>
> The judge then cited the definition of "product" as including:
>
> "any article that may be the subject of trade or commerce including an article or service, but not land."
>
> "Retail sale" was noted as including the sale of taxable services.

The judge referred to "the surrounding circumstances at the time", including the then current zoning bylaw, as making it apparent that the parties must have intended to allow a broader range of uses than the general business commercial uses provided for in the zoning and other (unnamed) bylaws. By not including a list of permitted commercial uses in the schedule to the LUC, the judge inferred that the parties intended "retail commercial uses" to mean any business involving the sale of a product, good, or service directly to the public.

Without having outlined what specifically were the "surrounding circumstances" that the judge had in mind as evidencing the parties' intention to broaden meaning of "retail commercial uses" it is difficult to accept that the court's reasoning extends beyond reliance on dictionary definitions and the negative implication from not having incorporated zoning bylaw terms to define the uses.

The judge concluded that Surrey's refusal of business licences for the sale of services rendered it liable to the plaintiff for damages. Similarly it was liable for refusing a business licence on the basis that utilities had to be upgraded to bylaw standards, beyond what had been provided through the LUC.

The case highlights the perils of land use contract interpretation. Had there been no land use contract and Surrey denied a business licence based on its interpretation of what was permitted under the zoning bylaw, it is questionable whether the denial would give rise to liability. First, the applicant could be expected to pursue any denial of a business licence by an application to the court for an order in the nature of *mandamus* to compel the issuance of the licence. Second, our Court of Appeal acknowledged in 1981 in *Inland Feeders v. Virdi* that a municipal official can be wrong in the interpretation of a bylaw but so long as they exercise care and are reasonably

competent, they will not be liable in negligence for any loss arising from their error in interpretation. However, by converting the land use regime from one of general bylaw regulation to one of contract the municipality enlarged the scope of liability for any breach of contract through an erroneous interpretation.

D. Development Permit – Standard of Review – Application of Guidelines

Yearsley v. White Rock (City) 2009 BCSC 719

The developer applied for a development permit for a proposed commercial/residential building that was higher – six storeys in this case – at the front street due to the calculation of allowable building height. Nearby residential developments were two or three storeys in height. The OCP "form and character" guidelines did not reference height directly. They required that a proposed building "take into consideration the surrounding physical environment and the character, scale and form of other nearby buildings" and that the applicant should avoid use of extensive solid walls and certain materials on street facing ground floor facades.

At council's first meeting to consider the DP, concerns were raised that the building did not meet the guideline because it was not similar in height to other buildings nearby. In response to staff comments, the developer made changes to the design and reduced the number of units. Following these changes the Director of Development Services provided a report to council that the proposed building met all the zoning requirements, particularly in relation to height and density. The staff report gave council the option of referring or not referring the application to a public hearing. In the absence of any specific negative comments related to the OCP guidelines the court interpreted this as a recommendation that the application be moved forward and that the proposed design satisfied the guidelines.

Two public meetings followed where concerns were raised about the impact on views and the character of the neighbourhood and that the building did not meet height and density requirements (which it did). Council voted to deny the DP after the second meeting and this was reported to the applicant without stating reasons. Through counsel the developer asserted that the denial appeared to be based on extremes considerations and that the failure to state reasons for the refusal indicated bad faith. Council then reconvened to give council members the opportunity to individually express their reasons for the denial of the DP. The developer then brought a petition to overturn the denial and to have the court order that the DP be issued.

The first issue for the court was to determine the appropriate standard for reviewing council's decision – correctness or the deferential standard of reasonableness. The court framed the issue as requiring it to determine whether council failed to apply the criteria set out in the OCP guidelines. If it did not, it followed that council would have acted outside its jurisdiction. Having characterized the issue as going to council's jurisdiction, the court was able to cite a number of earlier decisions stating the standard of review was correctness, and that it should not show any deference to council's reasoning process.

In approaching the review of White Rock council's decision the judge noted that while a council has discretion to refuse to issue a DP, that discretion must be exercised in accordance with the OCP guidelines in an objective manner. Further, the guidelines must be applied consistently with the zoning bylaw, so as to not vary permitted density. More specifically the judge set out the following parameters:

- the staff report, along with councillors' comments and stated reasons, provide direct evidence of whether council considered the form and character issue;
- if the staff report is not followed, it cannot be inferred that council considered the guidelines property;
- in that case the evidence then must disclose that council considered relevant and proper matters in arriving at a decision;
- in reviewing council's reasons the court should look to whether councillors directed their minds to the legal requirements of the case but not minutely dissect their reasons in a search for error; and
- reasons of council must be sufficient and referenced to the guidelines to allow the applicant to know what must be done to make the plans acceptable.

Unlike the Salmon Arm OCP guidelines reviewed in *511784 BC Ltd. v. Salmon Arm (District)* (2001) which specifically referred to massing of buildings to complement surrounding development, the court noted White Rock's guidelines were without similar reference. Accordingly the judge concluded height was not a permissible consideration within the OCP guidelines. The staff report had also been clear that the proposed development complied with the zoning height requirements.

The judge then reviewed the reasons expressed by the council members. Two points emerged; first that some of the councillors used the opinions of the public from the two meetings to oppose the DP, and those opinions expressed opposition to the height of the building. All council members spoke of the building being not of character with the neighbourhood. These comments did not reflect the language of the OCP guidelines, and were subjective in nature, rather than a reference to the required "objective considerations." One councillor's reference to the "shape" of the building was seen as perhaps a vague reference to the guidelines but then dismissed by the judge as so lacking in specifics as to be unreasonable. Further references to the "pedestrian experience" and the development not in keeping with the "vision of the neighbourhood" were seen as not within the OCP criteria.

The judge summarized her conclusion as follows:

> Council acted to refuse the application because of unspecified, vague stated concerns that are not referenced in the OCP, including implied concern about height, regardless that the proposed building

> was within the height requirements of zoning and OCP guidelines, according to the staff report. In this circumstance, the reasons must be specific enough to indicate that council has considered relevant and proper matters. The failure to give adequate reasons to inform the petitioner how to comply so that the application could be acceptable suggests that councillors could not give reasons because it was known that height was not a proper consideration within the context of this application.
>
> White Rock took into consideration matters that were not within the OCP guidelines and essentially came to a conclusion that supported public opposition to the height of the proposed development even though the development permit application met all of the zoning and other requirements, except for minor variances that are not in issue here. I conclude that council acted in excess of its jurisdiction in so doing. The decision must be quashed.

The final matter for the court was whether to remit the issue of the DP's issuance back to council for further consideration or to simply order that White Rock issue the permit. On this issue the court noted that the staff report indicated the development complied with the guidelines. Further the City had many months to consider reasons for rejecting the application and there was no suggestion that there were further legitimate problems that would merit consideration by council. On that basis the court ordered White Rock to issue the DP.

E. Highway Dedication on Subdivision

Kaim Developments v. Mott 2009 BCSC

This case considers the statutory provisions supporting requirements for the dedication of a highway on subdivision and the extent to which plans for a highway must have taken shape before the dedication can be said to be "necessary and reasonable."

The petitioner Kaim owned land on Cranbrook Street, the main thoroughfare in Cranbrook, which is also a provincial highway under the authority of the Ministry of Transportation. In 2004 the Ministry prepared an access plan outlining three options for improving Cranbrook Street. One of the options involved the creation of a "couplet", by which Cranbrook Street would become a one-way street and a parallel roadway, along the CP tracks, would become a one-way street running in the opposite direction to Cranbrook Street. Kaim's lands were situated between Cranbrook Street and the CP tracks.

The Ministry's access plan was presented to council. The decision was not to proceed with the couplet option; the evidence of the Ministry's official was that traffic volumes required to justify cost-sharing the couplet would not be reached for a further 15 to 20 years. The couplet though

was included in the City's 2005 – 2002 OCP as part of the Major Road Network Plan for future roadworks.

Kaim applied in November, 2007 to subdivide its lands into two parcels, both of which would front on Cranbrook Street. The approving officer Mott first gave preliminary approval without any consideration of the couplet route. Further discussions between Mott and Kaim's agent resulted in a proposal that the City purchase a 20 metre strip along the rear of the property for the potential couplet route. On presenting the draft report recommending the purchase, the CAO queried Mott as to why the City would pay for lands for a future road if it could rightfully acquire them without compensation. Further discussions between the City and the Ministry resulted in the latter changing its position regarding Kaim's proposed subdivision from one of "no concerns" to support for the City acquiring a portion of the lands for the proposed couplet alignment. Mott then revised the terms of his preliminary approval to include dedication of 20.17 m from the rear of the lots for the couplet. Kaim attempted to have this condition deleted through further discussions and meetings with the CAO and mayor. Council passed a resolution supporting the recommendation that Kaim be required to make the full dedication.

One further important part of the factual picture was that the uncontradicted evidence was that, with the exception of Kaim's property and an adjacent lot (from which Kaim's land has been subdivided in 2003), all of the land required for the couplet was either in the name of the City or the Province.

The main statutory provision at issue was S.75(1)(a) of the *Land Title Act* requiring a subdivider to provide a sufficient highway to provide "necessary and reasonable access" through the land subdivided to land beyond. Kaim argued that the proposed couplet alignment amounted to a "road to nowhere" as there was no assurance that the couplet would ever be built. Accordingly, Kaim alleged there was no adequate factual basis for the approving officer's requirement.

The court was satisfied that S.75(1)(a)(ii) was properly applicable and that the required road allowance was for the purpose of allowing access through Kaim's lands to other lands beyond which had been set aside for the couplet. The judge turned Kaim's "road to nowhere" argument on its head, observing that the couplet would become the road to nowhere if the missing link through Kaim's property was not obtained. While the couplet could not be said to be a certainty, it was not merely speculative. The couplet was the City's preferred option and for the most part the necessary lands had been set aside. The approving officer's requirement was further bolstered by S.75(3)(f) which directs the approving officer to consider "the likely or possible role of the highway in a future highway network serving the area."

The decision on this issue is consistent with earlier cases which have upheld a requirement for access for the future needs of residents; *Re Kamloops Realty* (1976), or the refusal of a subdivision application because the Ministry would in the future require a highway route through the lands but the route had yet to be finalized; *Shannon Woods Developments v. B.C.* (1996).

The judge confined his role to determining whether there was an adequate factual basis for the approving officer's decision in accordance with the principles established in the well-known case

of *Vancouver v. Simpson*. Having satisfied himself there was an adequate factual basis the judge declined to second-guess the approving officer.

Kaim's subsidiary argument was that the approving officer could not rely on the OCP designation of the couplet as a proposed major road as there were no funds provided for it in the five-year financial plan. The judge's treatment of this issue is a bit uneven. He referred to this argument in terms of the "consistency" requirement in S.884(2) of the LGA. However, that provision does not address the linkage between the OCP and the financial plan. Rather S.884(2) requires that bylaws or works undertaken by council be consistent with the OCP. Until 1999 the LGA provided that the OCP had to be consistent with the local government's capital expenditure program and there were a number of cases in the 1990's setting aside OCP provisions because no corresponding provision could be found in the capital expenditure program. None of these cases are mentioned by the court in the Kaim decision and thus we do not know whether the petitioner's argument was based on this line of authority. What the judge failed to observe was that the "consistency" requirement in respect of a capital expenditure program was replaced with the less stringent requirement that the local government "consider the [OCP] in conjunction with its financial plan"; S.883(a)(i). Regrettably the court missed the opportunity to render a decision as to whether this legislative change meant that the earlier decisions were no longer good law.

F. Building Permit Expiry – Discretion to Refuse Relief

Bomford v. City of Vernon (unreported oral reasons – July 30, 2009)

Bomford owned property on Okanagan Lake in Vernon. He applied for a building permit in March, 2005 just two days before the *Riparian Areas Regulation* came into force. The 30 metre protected setback under the regulation was noted by the court as likely to preclude any subsequent building permit being issued at the location where the owner wished to build. The City's building bylaw provided that a building permit application that had not been approved expires one year after the date of the application. Additionally, where a building permit had been issued and the work been discontinued for six months or not completed within two years, the permit shall expire.

The City issued a document in January, 2006 purporting to be a building permit. However, the work had long been discontinued before the owner filed his court petition. The City's position was the document was a valid building permit but that it had expired by application of the discontinuance provision in the bylaw. The owner argued that by virtue of certain conditions included with the "building permit" that were not lawful, the building permit could at best be considered to be an "approval" by the City. As a lawful building permit had not been issued, however, the owner asserted that the one-year expiry provision did not apply and the City should be ordered to consider the application and issue the permit.

In thorough oral reasons Justice Griffin rejected the owner's highly technical arguments. The judge found that if, as argued by the owner, the building permit had not been issued by the City in January, 2006 because it imposed conditions, then for the same reason it could hardly be said to have been approved in the unconditional manner that would have made for a valid approval on

the owner's own argument. As a consequence then the application would have expired within one year of the application date of March 29, 2005. Although the judge was inclined to the view that the City's issuance of a building permit with conditions was a sensible and efficient response to the owner's designer having submitted new plans (that might be updated and sealed by the registered professional), she set that argument aside, insisting that the owner had to be logically consistent and that his assertion that the imposition of conditions rendered the permit invalid also rendered any approval invalid.

The court found an alternative ground to reject the petition. Even assuming the owner was correct in suggesting that the building permit was approved, the judge would have declined to exercise her discretion due to delay and acquiescence by the owner. There were valid public policy reasons for the imposition of time frames in building bylaws. Any defects in the process were technical irregularities and S.9 of the *Judicial Review Procedure Act* provides that a court may refuse relief where the ground for relief is a defect in form and there has been no substantial wrong or miscarriage of justice. The owner was taken to have known from the date he received the building permit in January 2006 that there were conditions affecting its validity. Yet he did nothing to clarify the conditions or the form of the building permit. It was not credible for the owner to claim that he believed that the permit was approved but remained unissued for an extended period of time. The owner's conduct was at odds with his claim the permit was invalid. In September of 2006 he had called for an inspection of the foundations. By commencing work in September, 2006 the court held that the only plausible inference was that the owner must have thought he had a valid permit.

The recognition of the public policy grounds supporting adherence to time limits is particularly noteworthy as many owners tend to treat them casually and local governments risk being accused of being overly technical when they seek to apply them. Justice Griffin has given municipal officials encouragement in enforcing building permit time limits:

> There is a strong public policy rationale for the time limits applicable to a building permit. Municipalities are at the front lines of ensuring that *Building Code* regulations are met. These regulations are designed for the safety and welfare of the public and are continually changing to accord with changes in scientific knowledge and technology. Property owners are not entitled to indefinitely preserve their right to build under the building regulations in force at the time of a building permit application, simply by parking a building permit application and doing nothing to move it forward.

The judge observed that all of the alleged irregularities in the permit could have been addressed by the owner had he chosen to deal with the City in a timely fashion.

The decision stands as a useful reminder to owners and builders that time limits in building bylaws have consequences and that they should act in a timely fashion when issues arise in the building permit and inspection process.

IV. BYLAW ENFORCEMENT

A. Finessing the Discretion to Refuse an Injunction

Osoyoos v. Nelmes 2009 BCSC

In this case the BC Supreme Court attempted to reconcile the limitation on the court's discretion to deny a statutory based injunction with the court's discretion in crafting the terms of the injunction; in particular the time frame for compliance.

The respondent Nelmes constructed a retaining wall 18 feet high that extended from just under seven feet into the road allowance on one end to just over nine feet at the other. The wall was constructed without a building permit. The judge accepted Nelmes' evidence that he constructed the retaining wall not knowing a building permit was required and without knowledge that it encroached on the road allowance. In response to the City's injunction application Nelmes sought an order under the *Property Law Act* vesting in him title over that portion of the road allowance covered by the retaining wall. In the alternative he argued that his was one of those cases where the court should exercise its discretion against granting the injunction.

Recognizing the narrow scope of the court's discretion to refuse a statutory based injunction, the judge concluded that he should be careful not to apply the vesting provision of the *Property Law Act* in a manner that would enlarge the discretion to decline the injunction. The town led evidence that vesting the encroached upon portion of the road allowance would prevent it from being unable to upgrade the road to typical municipal standards in the future. On the other hand the judge accepted that the cost of removing the retaining wall would be substantial and would pose a significant hardship to Nelmes.

In comparing the facts of the case before him with the leading case – *CRD v. Smith* – where a statutory injunction had been refused, the judge concluded that unlike the *Smith* case there was practical utility in granting the injunction in that the town would be able to use the road allowance for the purpose it was ultimately intended. However, the judge went on to observe that the town had no immediate plans to upgrade the road. Thus he declined to make the injunction enforceable immediately. The injunction was stayed for a period of one year with leave to Nelmes to extend the stay or for the town to reduce the stay depending on whether its plans to upgrade the road had crystallized. The judge was mindful of the effect of the stay in mitigating to some extent the hardship on Nelmes.

While the town's interests would undoubtedly have been better served by an order that had immediate effect without the added expense of further proceedings to lift the stay, the court's order in this case arguably strikes a fair balance by (1) not circumventing the narrow discretion

to refuse an injunction by resorting to the vesting authority under the *Property Law Act,* and (2) timing the onset of the injunction to a demonstrable need to make use of the road allowance.

V. LIABILITY

A. Abuse of Office

Costello v. Hornby Island Local Trust Committee 2009 BCSC 1334

Following a 23 day trial Justice Stromberg-Stein dismissed claims for abuse of office, negligence and breach of trust against two local trustees, the Hornby Island Local Trust Committee, the Islands Trust Council and the Islands Trust.

The case arose out of the decision by the plaintiff Joan Costello to move an admittedly ugly Department of National Defence building, that was slated for demolition, onto her Hornby Island property. She applied for a siting and use permit from the Local Trust Committee (LTC) before bringing the building to the island, but on the basis of erroneous information as to its height. From the outset the building was over-height. Costello claimed that the subsequent attempts by the LTC to obtain compliance, latterly through issuance of a development variance permit, was an attempt to drive her off the island and cause her financial ruin. Ultimately compliance came in the form of an amendment to the bylaw that allowed for fill placement, reducing the height of the building above grade.

The judge held that the events that ensued and the costs incurred by the plaintiff were the result of her failure to exercise due diligence through her lack of concern as to the height requirements of the zoning bylaw. The over-height issue was readily foreseeable, as was the prospect of the LTC taking enforcement action. The judge rejected any notion that the defendants engaged in any deliberate, unlawful conduct. To the contrary, she accepted that the defendant trustees attempted to facilitate a compromise. In reviewing the evidence with respect to the actions of the trustees, the judge demonstrates a sympathy for the difficult position they found themselves in and the steps they took to discharge their duties:

> In the case at bar, this court is being asked to second guess the decisions of local politicians, as well as staff of the Islands Trust, who were attempting to solve a very heated dispute between neighbours with entrenched views. The court is being asked to find liability from within the grassroots efforts of those elected and non-elected officials with no regard to the practical circumstances facing the officials on Hornby Island. The evidence establishes the defendants acted in good faith. No liability rests upon them for the tort of abuse of public office or misfeasance in public office.

The case does not establish any new legal propositions but is a solid application of settled legal principles to highly charged facts. The fact that all defendants were absolved of liability in such strong terms may provide some deterrent to would-be plaintiffs contemplating similar actions.

Interestingly the defence asserted, not only that the defendants had not committed any wrongs, but also that the plaintiff's action was motivated by her husband's efforts to eliminate the Islands Trust and the land use and development control under the *Islands Trust Act*. Although the judge did not make a specific ruling in this respect, there appeared to be some substance to the defendants' claim that the plaintiff and her husband had a motivation beyond just recovering damages. In dismissing the case the judge agreed with the defendants that the claims brought by the plaintiff were very serious stigmatizing actions "without any legitimate foundation." The judge ruled that the defendants were entitled to their costs but allowed for further submissions and her findings may provide an opportunity to claim special costs.