Crease Harman LLP
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Since 1866

800-1070 Douglas Street
Victoria, BC V8W 2C4

Reply to: Spencer C. J. Evans
Email:
File No:

June 5, 2025

By Electronic Mail: legislativeservices@victoria.ca

City of Victoria
1 Centennial Square
Victoria, BC V8W 1P6

Attention: Mayor & Council

Dear Sirs & Madams:

RE: Business Licence (Short-term Rental) Appeal for 402-960 Yates Street

We have been retained by Tanya Dodd, the owner of the property identified above (the **"Property"**), with respect to her appeal from the February 7, 2025 rejection of her application for a 2025 principal residence short-term rental licence for the Property. Please accept this letter as Ms. Dodd's reply to the May 8, 2025 report authored by Manager of Bylaw and Licensing Services Mark Fay (the **"Report"**). A list of authorities is attached as Schedule "A" to this submission.

Background

Ms. Dodd purchased the Property in 2018 shortly after going through a divorce. The Property has been Ms. Dodd's principal residence since it was purchased in 2018. In 2023, Ms. Dodd decided to offer the Property for short-term rentals and she applied for and received a Principal Residence Licence (**"PRL"**) to allow her to offer short-term rentals of the Property on an occasional basis.

In September 2023, Ms. Dodd decided that she wanted to offer the Property for short-term rentals without having restrictions on how often she could do so, so she requested to change her licence type from a PRL to a Non-Principal Residence Licence (**"NPRL"**). Ms. Dodd understood that, under a PRL, she was only permitted to offer the Property for short-term rentals up to four stays

per year. She understood that a NPRL would permit her to offer the Property for short-term rentals more often. This change of licence type was not due to the Property ceasing to be Ms. Dodd's principal residence, but rather solely to permit her to continue to offer the Property for short-term rentals without restrictions on how often she could do so.

In 2024, Ms. Dodd continued to offer the Property for short-term rentals under a NPRL. Again, this was not because the Property ceased being her principal residence, but only so that she could host more than four stays in a calendar year. On May 1, 2024, Ms. Dodd was unable to continue to operate under a NPRL so she reverted back to operating under a PRL. From May 1, 2024 until August 2024, she abided by the four-stay per year limit. In August 2024, the limit was changed from four stays to 160 nights per calendar year. Ms. Dodd has always abided by all licencing restrictions at all the relevant times.

In January 2025, Ms. Dodd applied for a 2025 PRL. During this time, the Property was being repaired due to a flood that occurred in or around November 3, 2024. The damage from the November 2024 flooding was not repaired until February 21, 2025. There had also been damage from flooding on June 16, 2024, and this was not repaired until September 5, 2024.

The 2024 flood damage events limited the amount of time Ms. Dodd could stay at the Property, but she still managed to reside there longer than any other place. Ms. Dodd intends to spend more time at the Property in the remainder of 2025 than she did in 2024.

On January 30, 2025, a by-law officer inspected the Property. On February7, 2025, Ms. Dodd was advised that her PRL application was rejected.

Response to Mr. Fay's Version of the Facts

In response to para. 16 of the Report, Ms. Dodd had flexibility with respect to her schedule, and as such, she offered a widely available calendar from August 2023 to May 2024. Her intention, and practice, was to offer a wide range of dates for stays, and then plan to travel if and when stays were booked. During the period from August 2023 to May 2024, Ms. Dodd continued to reside at the Property as her principal residence despite offering flexible availability in her calendar.

In response to paras. 25 and 26 of the Report, the Bylaw Officer Statement from the May 8, 2024 inspection of the Property does not appear to note that the personal items or other contents in the Property "appeared to be quite minimal". On the contrary, the statement notes there were "2 large closets" that were "full of clothing and personal items", as well as "dog bowls, treats, leash and toys" for Ms. Dodd's mother's dog, Bella.[1]

[1] See Appendix J.

In further response to paras. 25 and 26 of the Report, Ms. Dodd had purchased the Property shortly after going through a divorce. She left many personal items behind in the former spousal home and decided that she wanted to start anew with limited personal belongings. Ms. Dodd lives a minimalistic lifestyle and generally does not purchase more personal items than necessary, but that does not mean she does not reside at the Property.

In response to para. 29 of the Report, regarding Ms. Dodd's insurance coverage for the Property, when Ms. Dodd commenced operating a short-term rental at the Property she contacted her insurance agent and informed them that she required a policy that would cover short-term rentals in addition to her own occupation. By way of an oversight, Forward Insurance Managers Ltd.'s policy issued to Ms. Dodd only states "RENTED TO OTHERS – SHORT TERM" under "Occupancy",[2] but as Ms. Dodd stated in her February 27, 2025 email to Legislative Services she intends to investigate why her coverage does not indicate that she occupies the Property.

In response to paras. 37 and 38 of the Report, Ms. Dodd did not state that she would "go live in Mexico with her father". Ms. Dodd is unable to, and does not wish to, move to Mexico. Ms. Dodd makes frequent trips to Mexico to visit her elderly father; however, the Property remains her primary residence, and she has no intentions of residing anywhere else. Furthermore, Ms. Dodd is required to live in British Columbia for at least 6 months out of the year to maintain her provincial Medical Services Plan coverage, which is her intention. Ms. Dodd has always been open and honest about her plans to spend some time in Mexico, but she certainly has never indicated that it was ever her intention to live there full time, reside there, or move there.

In further response to para. 37 of the Report, Ms. Dodd never indicated to the Bylaw Officer during the January 30, 2025 inspection that the Property was not being used as her principal residence or that she did not plan to use the Property as her principal residence in the future. In fact, Ms. Dodd did positively affirm to the Bylaw Officer that the Property was her principal residence,

Ms. Dodd started keeping track of her living situation when she reverted back to operating under a PRL on May 1, 2024. From May 1, 2024 to the end of 2024, Ms. Dodd stayed at the following locations:

- 66 nights at 402-960 Yates Street, Victoria, BC (i.e., the Property)
- 58 nights at , Metchosin, BC (i.e., Ms. Dodd's friend, Jana King's)
- 30 nights at , Chapala, JAL, Mexico (i.e., Ms. Dodd's father, Keith Dodd's)

[2] See Appendix K.

- 23 nights at , Chilliwack, BC (i.e., Ms. Dodd's mother, Dianne Dodd's)
- 16 nights at Calgary, Alberta (i.e., Ms. Dodd's sister, Sheryl Dodd's)
- 9 nights on a cruise to Alaska with Norwegian Cruise Lines, departing/arriving at Seattle, Washington
- 9 nights at Nopolo, Loreto, Mexico (i.e., a rented condo)
- 8 nights at various hotels in Europe: 1 night on the plane; 2 nights Legoland Woodland Village, Windsor, UK; 1 night Premier Inn London Bank (Tower), London, UK; 4 nights Explorers Hotel, Magny Le Hongre, France
- 5 nights at , Vancouver, BC (i.e., Ms. Dodd's brother in law, Ryan Maier's)
- 4 nights at , Sayulita, Mexico (i.e., an Airbnb condo)
- 4 nights at the resort Barcelo in Puerto Vallarta, ona Hotelera Sur Km 11 5, Puerto Vallarta, Mexico
- 3 nights at , Fernie, BC
- 3 nights in Liverpool, UK: 2 nights at Staycity Aparthotels Waterfront, Liverpool, UK; 1 night on the plane
- 2 nights at , Lewisham, London, UK (i.e., Ms. Dodd's cousin, Stuart Gibson's)
- 2 nights at , Bruxelles, Belgium (i.e., Ms. Dodd's cousin, Mark Richardson's)
- 1 night at an Airbnb condo in La Paz, Mexico (exact address unknown)
- 1 night at Edmonton, Alberta (i.e., Ms. Dodd's friend, Tanya Boutin's)
- 1 night at , Nanaimo, BC (i.e., Ms. Dodd's friend, Angela Dyce's)

From the beginning of 2025 to the present, as of June 6, 2025, Ms. Dodd has stayed at the following locations:

- 69 nights at Chapala, JAL, Mexico
- 40 nights at the Property
- 17 nights at , Metchosin, BC
- 16 nights in Southeast Asia: 3 nights at Avani Plus Riverside, Bangkok, Thailand; 3 nights at Vijitt Resort, Phuket, Thailand; 2 nights at Phi Phi Hotel, Koh Phi Phi, Thailand; 3 nights at Krabi Resort, Ao Nang, Thailand; 2 nights at Meredith & Hamel's, Tijani 2 North, Unit B1-5-1, Jalan Tijani, Kuala Lumpur, Malaysia; 1 night at Aerotel Singapore, Terminal 10, Singapore; 2 nights on the plane
- 10 nights at , Chilliwack, BC

- 2 nights at Rosellen Suites at Stanley Park, Vancouver, BC
- 1 night at , Vancouver, BC

In total, from May 1, 2024 to June 6, 2025, Ms. Dodd has stayed at the following locations:

- 106 nights at the Property
- 99 nights at , Chapala, JAL, Mexico
- 75 nights at , Metchosin, BC
- 33 nights at , Chilliwack, BC
- 16 nights in Southeast Asia
- 16 nights at Calgary, Alberta
- 9 nights on a cruise to Alaska with Norwegian Cruise Lines
- 9 nights at , Loreto, Mexico
- 8 nights at various hotels in Europe
- 6 nights at , Vancouver, BC
- 4 nights at , Sayulita, Mexico
- 4 nights at the resort Barcelo in Puerto Vallarta
- 3 nights at , Fernie, BC
- 3 nights in Liverpool, UK
- 2 nights at , Lewisham, London, UK
- 2 nights at , Bruxelles, Belgium
- 2 nights at Rosellen Suites at Stanley Park, 2030 Barclay St., Vancouver, BC
- 1 night at an Airbnb condo in La Paz, Mexico
- 1 night at ., Edmonton, Alberta
- 1 night at , Nanaimo, BC

In further response to para. 37 of the Report, as the scheduled inspection date approached and Ms. Dodd realized flood remediation would not be complete, she reached out to the City short term rental office and asked if she should reschedule the inspection. Ms. Dodd was advised they could not confirm if her licence would be approved or not but confirmed the purpose of the inspection was to "help establish principal residence and to review the proposed business plan".[3] Ms. Dodd believed this could be accomplished despite the repairs underway so she chose to proceed.

[3] See Appendix L.

The Report indicates that "staff recommended that the inspection be scheduled for a date after the remediation, however the appellant preferred to have the inspection done as that was a date for when she was available". No such recommendation was made to Ms. Dodd. When the bylaw officers attended at the Property, Ms. Dodd let them know that she had communicated with the short term rental office about this and the bylaw officers assured her that they could make their assessments despite the ongoing repairs.

In further response to para. 37 of the Report, while Ms. Dodd is unable to confirm specifically where she will sleep or travel for every night for the remainder of 2025, it is her intention that the Property will be her principal residence and the place where she will "reside for a longer period of time in the calendar year than any other place".

In further response to para. 37 of the Report, the "advertisement sign" for the property manager engaged by Ms. Dodd to manage her short-term rental stays on the table in the spare bedroom at all times. Ms. Dodd simply feels no need to put it away when she is home and, if anything, she believed that leaving it out for the inspection showed she had nothing to hide. Ms. Dodd has a professional property manager who manages the property when she is away, which she understands is required under section 6 of the Victoria Short-Term Rental Regulation Bylaw (the **"STR Bylaw"**).

In further response to para. 38 of the Report, another reason there may have been fewer personal belongings than bylaw officers expected in the Property at the time of the January 30, 2025 inspection (aside from her above noted minimalistic lifestyle post-divorce) was because the Property was undergoing significant remediation as a result of the flooding damage in 2024.

In response to para. 51 of the Report, Ms. Dodd has consistently declared her intention to reside elsewhere only on a temporary basis while travelling, but never full time or as a permanent change of residence.

In response to para. 52 of the Report, the Licence Inspector refers here to the following documents submitted by Ms. Dodd on February 27, 2025 which show her address as the Property:

1. Driver's licence issued February 11, 2022;
2. BC Services card issued February 11, 2022;
3. A Manulife investment account statement for the period ending December 31, 2024;
4. A bank account T5 for 2024;
5. An October 25, 2024 letter from Service Canada;
6. A January 23, 2025 health coverage letter from Manulife; and
7. A February 27, 2025 letter from Connie Johns, the live in caretaker at 960 Yates Street.

The Licence Inspector says these documents "are based entirely on self-declarations", which is implied to be in contrast to Ms. Dodd's insurance policy. The first issue with this proposition is that the insurance documents should also be based on Ms. Dodd's report to her insurer. We submit that the insurer has misapprehended Ms. Dodd's declared use, but regardless of this there is no suggestion that the insurer has independently verified the Property's use, and therefore the insurance policy does not on its own override the fact that the vast majority of documentary evidence supports Ms. Dodd's position that the Property is her principal residence.

Second, the letter from Ms. Johns is not at all based on "self-declarations". Like the insurance policy, it comes from a third party. Unlike the insurer, Ms. Johns has seen Ms. Dodd's comings and goings since 2018 and is actually in a position to know who does or does not reside full-time at the Property.

Third, the above classes of documents are exactly the kinds of evidence that the BC Ministry of Finance would expect to be provided to support an owner's principal residence, for instance, in an audit under the *Speculation and Vacancy Tax Act* or the *Property Transfer Tax Act*. While the City does not necessarily need to rely on the same kinds of evidence as the Province, no cogent reason has been suggested for departing from these verification practices.

The Decision

The denial of the 2025 business licence application was communicated to Ms. Dodd in a letter dated February 7, 2025 (the **"Decision"**). The letter states that Ms. Dodd had failed to establish that the Property was her principal residence under section 3(2)(e) of the STR Bylaw. According to the letter, this decision was based on the following considerations:

1. the Property's current advertisement;
2. "open-source data";
3. the results of the January 30, 2025 inspection; and
4. Ms. Dodd's insurance policy for the Property.[4]

It was decided that Ms. Dodd had failed to satisfy the principal residence requirement due to there being "few personal effects" in the Property during its post-flood remediation, as well as the indication in the insurance policy that the occupancy was for short-term rental.[5]

There was no mention of the applicable criteria for a principal residence under section 2 of the STR Bylaw in the February 7, 2025 letter, i.e., "the residence in which an individual resides for a longer period of time in a calendar year than any other place".

[4] See Appendix N.
[5] See Appendix N.

In addition to the above factors, the submissions found in the Report suggest that the 2025 licence was denied, at least in part, on the following additional bases:

1. the licence inspector's interpretation of some of Ms. Dodd's answers to questions posed to her during the January 30, 2025 inspection;
2. the presence of promotional materials for the Property's property manager; and
3. a consideration of "[t]he 2023 and 2024 history of the unit having operated as a non-principal resident short-term rental".

The applicable law

The STR Bylaw defines "principal residence", under section 2, as meaning "the residence in which an individual resides for a longer period of time in a calendar year than any other place." Accordingly, whether a residence is an individual's principal residence must be determined by looking at how the residence is used throughout a single year. If an individual resides in a particular residence for a longer period of time than any other place in any given calendar year, then that residence is the individual's "principal residence" for the purpose of the Bylaw. By definition, this does not necessarily require an operator to live at the residence for the majority of the year.

Section 4 of the STR Bylaw provides the following:

> 4. The Licence Inspector may refuse to issue a licence for a short-term rental if, in the opinion of the Licence Inspector,
>
> (a) the applicant has failed to comply with section 3; or
>
> (b) the short-term rental operation would contravene a City bylaw or another enactment.

While a municipality's authority to refuse to issue a business licence appears to confer a rather wide discretion, the BC Court of Appeal (**"BCCA"**) held in *Sunshine Valley Co-Op Society v. Grand Forks*, [1948] B.C.J. No. 103 (**"*Sunshine Valley*"**) that council must exercise its discretion "within the limitations imposed by law" and its use of discretion must not be based on "indirect or improper motives or based upon irrelevant or alien grounds, or exercised without taking relevant facts into consideration."[6]

The Supreme Court of BC (**"BCSC**") in *Westfair Foods Ltd v. Saanich (District),* [1997] B.C.J. No. 331 (**"*Westfair Foods*"**) found that the District of Saanich had ignored or misconstrued the definition of "wholesaling" in the Zoning By-law and substituted their own definitions in their decision to refuse the petitioner's business licence application. The BCSC held that this was an irrelevant consideration for the refusal of the application.[7] It was ordered that the petitioner was

[6] *Sunshine Valley* at para. 10.
[7] *Westfair Foods* at para. 62.

entitled to declarations that its development permit and business licence applications comply with the applicable bylaw, and Saanich was accordingly ordered to issue a development permit and business licence for the operation of the petitioner's wholesale grocery warehouse.[8]

The BCSC further addressed the issue of irrelevant considerations in *L.P. Management Corp. v. Abbotsford (City)*, 2006 BCSC 1426 (**"*LP Management*"**) and held that, while municipalities may have broad powers to enact bylaws, they must act within the confines of the bylaws and are not free to consider matters that do not properly fall within the considerations provided for in the bylaw.[9] Abbotsford was found to have failed to apply the criteria set out in its Soil Removal and Deposit Bylaw and denied the petitioner's permit application based on extraneous considerations.[10] Accordingly, the BCSC ordered Abbotsford's resolution quashed, and remitted the petitioner's application for consideration and determination in accordance with the applicable bylaw.[11]

Argument

Definition of "Principal Residence"

The Decision and the Report refer to numerous irrelevant considerations to support the Licence Inspector's decision to deny Ms. Dodd a PRL. Of particular concern is the fact that the Licence Inspector did not once refer to the definition of "principal residence" in the STR Bylaw. Instead, it is evident that the Licence Inspector and Bylaw officer improperly substituted their own definition of "principal residence" in place of the definition under the Bylaw; for example, the Licence Inspector's statement that Ms. Dodd living in hotels during the flood remediation of the Property "clearly identified the unit was not a principal residence at the time of the inspection."[12]

This shows that the Licence Inspector was substituting his own definition for "principal residence" as the definition of "principal residence" in the STR Bylaw is determined over the course of a year rather than a single point in time. If one were to use the Licence Inspector's own definition, then anytime a property owner is residing away from their short-term rental property, whether for vacation, travel, or otherwise, this would render the property not their principal residence. This is clearly erroneous and not supported by the definition of "principal residence" in the STR Bylaw.

Ms. Dodd has kept meticulous records of the number of nights she stays in her Property and elsewhere. From May 2024, when Ms. Dodd first began operating under her PRL, until the end of

[8] *Westfair Foods* at para. 65.
[9] *LP Management* at para. 52.
[10] *LP Management* at para. 72.
[11] *LP Management* at para. 74.
[12] The Report at "Summary".

the 2024 calendar year, she recorded that she stayed more nights at the Property than she spent in any other place. This falls squarely within the Bylaw's definition of "principal residence". While Ms. Dodd has stayed in other locations longer than the Property so far in 2025, this was, in part, due to the post-flood remediation work. We note that Ms. Dodd has stayed at the Property longer than any other place since May 1, 2024, and that she does intend to reside at the Property longer than any other place for the calendar year of 2025.

The substitution of definitions of terms is precisely what occurred in *Westfair Foods*, which caused the BCSC to hold that ignoring or misconstruing the defined terms in the Bylaw and substituting a different definition is improper and constitutes an irrelevant consideration for refusing a municipal application.

Personal Possessions

The Report makes multiple mentions of Ms. Dodd's purported lack of personal possessions at the Property. As mentioned above, Ms. Dodd purchased the Property shortly after going through a divorce. As such, she left many of her personal belongings behind in the divorce and decided that she wanted to start anew with limited personal belongings. Ms. Dodd lives a minimalistic lifestyle and intentionally chooses to not purchase more personal items than necessary.

It would also be reasonable to assume that someone whose home has been damaged by flooding may have relocated some of their personal property during the subsequent remediation.

Furthermore, the number of personal items a person should have in their residence is entirely subjective. The Licence Inspector's subjective view of how many personal effects a person ought to have at their principal residence should not play a role in deciding to refuse a licence application. This is again an irrelevant consideration. An individual should not be denied their application simply by reason of living a minimalistic lifestyle.

Still further, Ms. Dodd had explicitly inquired with City staff about whether the January 30, 2025 inspection could proceed before repairs had been completed. Staff responded by informing her that the purpose of the inspection was only to establish principal residence and to review her proposed business plan.[13] As Ms. Dodd had stayed at the Property longer than any other place since May 1, 2024 when she started keeping track, there was no reason for her to believe the state of the Property on January 30, 2025 would impact the Licence Inspector's decision regarding principal residence.

As the BCSC held in *LP Management*, municipalities, in deciding to grant or refuse an application, must act within the confines of the applicable bylaws. Accordingly, they are not free to consider

[13] See Appendix L.

matters that do not properly fall within the considerations provided for in the bylaw. The Licence Inspector, in applying his subjective view on how many personal effects an individual should have in their principal residence, was not acting within the confines of the STR Bylaw. As such, it was improper for him to consider Ms. Dodd's limited personal possessions as a reason to deny her application.

It is further noted that, according to the definition of "principal residence" in the STR Bylaw, there is no minimum period of time that an individual must stay at a particular property in a calendar year for it to be considered their principal residence. Accordingly, an individual may stay at their property for only a handful of months out of a year (for instance, where they stay at more than two properties throughout the year), and as such, keep a limited number of personal belongings at the unit, while still fitting precisely within the definition of "principal residence" under the STR Bylaw. Again, the Licence Inspector was likely considering the number of Ms. Dodd's personal effects in the context of his own personal definition of "principal residence" rather than as defined under the STR Bylaw.

History of Short-Term Rental Licences

The Licence Inspector states the following in the Report: "The 2023 and 2024 history of the unit having operated as a non-principal resident short-term rental is also an indication, albeit not a certainty, that the unit would continue to operate a non-principal short-term rental." This again constitutes an irrelevant consideration and runs contrary to the principles set out by BCCA and the BCSC in *Sunshine Valley*, *Westfair Foods*, and *LP Management*.

Additionally, the fact that Ms. Dodd was operating short-term rentals under a NPRL does not even mean that the Property was not her principal residence during that time period – in fact, as stated, the Property has always been Ms. Dodd's principal residence; her operating under a NPRL rather than a PRL was merely due to her desire to offer stays more often than four times per year.

Ms. Dodd's licence history has no bearing on her current use – or even her past use – of the Property as her principal residence. Therefore, it is improper to consider Ms. Dodd's licence history as a factor for denying her application.

Other Irrelevant Considerations

In addition to the above, the Licence Inspector also considered at least two additional irrelevant factors: the property manager brochure being visible during the inspection and Ms. Dodd "not

provid[ing] the Bylaw Officer with explicit verbal confirmation that [the Property] is in fact their principal residence".[14]

With respect to the brochure, Ms. Dodd advises that it stays on the table in the guest suite at all times. While she is home at the Property, she does not use the guest bedroom. As such, she keeps the brochure on the table and does not feel the need to put it away. Ms. Dodd takes great care of the Property because it is her home. She employs a professional property manager to ensure that the Property is well taken care of and maintained while she is away, and to comply with section 6 of the STR Bylaw. The Licence Inspector framing this as a reason to deny Ms. Dodd's application is illogical, as the fact that Ms. Dodd employs a professional property manager does not have any bearing on whether or not the Property is her principal residence as defined under the Bylaw. In fact, Ms. Dodd's desire to ensure that the Property well taken care of indicates that she cares deeply about maintaining the Property for reason of it being her principal residence.

With respect to the Licence Inspector statement that Ms. Dodd would not provide explicit verbal confirmation that the Property was her principal residence, firstly, this is entirely contradictory to what is stated at para. 37 of the Report, which reads, in part, "the appellant slightly avoided the question by affirming the unit was their principal residence".

It is not clear why the Licence Inspector expressly admitted that Ms. Dodd verbally affirmed that the Property is her principal residence, then later states that she refused to provide verbal confirmation that the Property is her principal residence. Additionally, the question the Bylaw Officer asked Ms. Dodd was unclear and confusing. The Bylaw Officer asked Ms. Dodd, "So this is your principal residence but not the place you're currently using as your principal residence." Again, it is evident that the Bylaw Officer and the Licence Inspector have substituted an alternate definition of "principal residence" in asking such a question. The question itself is confusing, contradictory, and clearly indicates that the Bylaw Officer is not aware of, or failing to consider, the meaning of "principal residence" under the STR Bylaw.

These considerations are again inappropriate – using these factors as reasons for denying Ms. Dodd's application seem to be rooted in irrelevant considerations, contrary to binding decisions of the BCCA and BCSC.

Conclusion

One question that logically arises from the Licence Inspector's finding that the Property was not Ms. Dodd's principal residence is: what is her principal residence? Ms. Dodd is a resident of British Columbia. She receives her mail at the Property. The majority of her relatively few personal

[14] The Report at para. 49.

possessions are kept at the Property. There is nowhere else, in BC or the rest of the world, that she calls home.

During the relevant time period, there was no other location where she resided for a longer period in a year than the Property. The Property was therefore her principal residence.

For the reasons outlined above, it is submitted that the Licence Inspector's Decision to deny Ms. Dodd's application for a 2025 PRL ignored or misconstrued the definition of "principal residence" in the STR Bylaw, and relied on other considerations which are irrelevant under the STR Bylaw, and therefore the City's discretion has been improperly exercised. It is requested that Mayor and Council reverse the Decision and issue the 2025 PRL to Ms. Dodd.

Thank you for considering these submissions.

Kind regards,

CREASE HARMAN LLP
Per:

Spencer C. J. Evans
SCJE/

SCHEDULE "A"

1. *Sunshine Valley Co-Op Society v. Grand Forks*, [1948] B.C.J. No. 103
2. *Westfair Foods Ltd v. Saanich (District),* [1997] B.C.J. No. 331
3. *L.P. Management Corp. v. Abbotsford (City)*, 2006 BCSC 1426

SUNSHINE VALLEY CO-OPERATIVE SOCIETY v. GRAND FORKS

British Columbia Judgments

British Columbia Court of Appeal

Sloan C.J.B.C., Robertson, Sidney Smith JJ.A.

Judgment: November 22, 1948

[1948] B.C.J. No. 103 | [1949] 2 D.L.R. 51

(10 paras.)

Counsel

T. G. Norris, K.C., for respondent, appellant.

W. A. Schultz, for applicant, respondent.

The judgment of the Court was delivered by

SLOAN C.J.B.C. (oral)

1 I think both counsel are to be congratulated for the able manner in which the arguments have been presented.

2 What I propose now to do is to deliver sketchy reasons for reaching the conclusions I have. These may necessarily have to be extended later. The respondent, the Sunshine Valley Cooperative Society, a co-operative association, conducted a wholesale flour and feed business in Grand Forks. That business commenced on August 1, 1947, and was granted a trade licence by the appellant, the City of Grand Forks, a city to which the provincial *Municipal Act*, R.S.B.C. 1936, c. 199, applies. The members of the Sunshine Valley Co-op. Soc. are Doukhobors, and they have opposed to them, on religious and other grounds, other sects of Doukhobors known as the Sons of Freedom and probably others. There is considerable enmity between these various groups. The Sunshine Valley Co-op. Soc. carried on business in the Burns Block which is situate in or near the business centre of the City of Grand Forks. On the night of December 31, 1947, the Burns Block was destroyed by explosion and fire. The circumstances of that occurrence are set out in an article in The Grand Forks Gazette dated Thursday, January 1, 1948, the morning after the fire or the same morning of the fire as it burned for some time, and while taking into consideration it is written as a newspaper article it does give a comprehensive picture of what occurred. I quote:

> "At about 11:45 p.m. an explosion (which) was felt by residents of many city blocks occurred in the premises occupied by the Sunshine Valley Co-operative Society and fire quickly swept through the adjoining office of E. B. Mitchell, insurance and accounting and the store of the Dollar Cleaners.
>
> "So terrific was the explosion that plate glass from the Cooperative windows covered the entire width of the street. 'Boots' Anderson who was walking down the street near the building was thrown across the road. A large plate glass window in the Gazette Building was severely cracked in many pieces by the concussion of the explosion as were other smaller windows in the Gazette Building.
>
> "Investigation by police and fire officials indicate that what must have been a large number of sticks of dynamite were set off in the middle of the floor of the Co-operative as a 12 x 8 floor beam was sheared off like a match stick, and thrown into the basement. The explosion also tore a gaping hole in the roof

according to firemen who were first to pour water into the building before the flames completely burned the roof.

"The volunteer fire department was on the scene immediately with both fire trucks and all necessary equipment. Six hose lines were put into play and the efficient work of the fire department both in the fighting of the fire in the Burns Building and taking precautions with adjoining buildings was the only thing that probably prevented the entire city block from being burned to the ground.

"It was only by a miracle that serious loss of life did not occur due to the explosion and fire. Had anyone been in any of the three places of business or walking directly in front of the building at the time of the explosion it would have been impossible for them to escape destruction."

3 I quote again: "Provincial Police under Sergeant E. F. McKay are investigating. Feelings amongst all sections of the city are running high regarding this latest apparent outrage and only strict action by police at the scene of the fire prevented several fights breaking out."

4 Another quote: "Other residents are appealing for a public meeting of indignation while some of the real hotheads are for taking the matter in their own hands and dealing out what they figure is the only effective justice."

5 It is to be seen from those quoted excerpts that the bombing and fire created a situation that was, to say the least, extremely troubling to the public mind and one that might have caused a serious breach of the peace. On January 2nd, the day following this outrage which fortunately did not cause loss of life, the Sunshine Valley Co-op. Soc. applied for a renewal of its trade licence. On February 9th the city council of Grand Porks at a meeting passed a resolution that the applicant be advised that a licence would not be granted for the Burns Block location. Notice of this was received by the applicant on February 10th. On February 13th the solicitor for the Co-operative wrote to the city council setting forth arguments in favour of granting the licence. That letter was referred to the city solicitor. On February 23rd a delegation representing the Sunshine Valley Co-op. presented a brief to the council and two members spoke on its behalf. Mr. Hutton, the city clerk, in his affidavit, described this meeting as follows:

"On February 23rd a delegation from the said Society headed by J. Jmayoff and W. Sookochoff attended a meeting of the city council, presented a brief and urged that the licence be issued. At such meeting the whole situation was thoroughly discussed and the matter was laid over pending action by the government in connection with a sect of Doukhobors who were blamed for the outrages. The said delegation was given a fair, free and full hearing which lasted well over an hour. The fire chief of the city of Grand Forks was present and the question of the fire hazard was discussed by him. The said delegation urged that they would have much better protection in the so-called 'Burns Block' than anywhere else in the city. The said delegation was given every facility to present its views and the delegates, after thanking the council, left the council meeting."

6 On March 10th the solicitor for the applicant again wrote presenting further argument on behalf of the applicant. On March 22nd the city council met and unanimously passed a resolution refusing to grant the application and I might as well read Mr. Hutton's affidavit in reference thereto:

"That the said Council of the Corporation of the City of Grand Forks, on the 22nd day of March A.D. 1948, by the unanimous vote of all the members of its Council present at a duly constituted meeting therefor, passed the following resolution concerning the application of the Sunshine Valley Co-operative Society for the aforesaid licence:

"'That notwithstanding any previous motions in connection with this matter, this Municipal Council unanimously refuses to grant the request of the Sunshine Valley Co-operative Society for a Licence to operate a wholesale and retail business in the City of Grand Forks.'"

7 A letter was addressed to the Society on March 31, 1948, advising it of this resolution.

8 The council in refusing to grant the application was acting pursuant to authority conferred by s-s. (7), s. 308, of the *Municipal Act*, which reads: "Notwithstanding anything contained in this Act or in the by-laws of the municipality,

the Council may by the unanimous vote of all the members present refuse in any particular case to grant the request of the applicant for a licence under this section."

9 Following this refusal of the city council of the City of Grand Forks to grant the licence Court proceedings were launched by the Society by way of *mandamus* which resulted in an order in its favour (*[1949] 1 D.L.R. 234*) and from that order the appeal has been taken.

10 In my view the quoted s-s. (7) gives the council a wide discretion which it may or may not exercise. In this particular case they chose to exercise it against the applicant, and the question arises whether that exercise of the discretion was reasonable and proper in the circumstances or did they act on indirect and improper motives and on irrelevant or alien grounds indicating that in law no discretion had in fact been exercised at all. If we could reach the conclusion that no discretion had been exercised by the council then I think our proper action in these *mandamus* proceedings would be to remit this matter to the council with a direction that they exercise a proper discretion. In my view, however, after consideration of all the surrounding facts and circumstances before the council, it exercised its discretion properly and reasonably. Whether its decision was right or wrong on the merits is not, I think, our concern. It is prerogative of the council to make the decision one way or the other provided its discretion is exercised within the limitations imposed by law and is not activated by indirect or improper motives or based upon irrelevant or alien grounds, or exercised without taking relevant facts into consideration. So in consequence therefore and with deference to the learned Judge below in my view the appeal ought to be allowed.

End of Document

Westfair Foods Ltd. v. Saanich (District)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Cohen J. (In Chambers)

Heard: January 20, 1997.

Judgment: filed February 11, 1997.

Vancouver Registry No. A963110

[1997] B.C.J. No. 331 | 30 B.C.L.R. (3d) 305 | 38 M.P.L.R. (2d) 202 | 69 A.C.W.S. (3d) 184 | 1997 CanLII 971

Between Westfair Foods Ltd. and 399338 British Columbia Ltd, petitioners, and The Corporation of the District of Saanich and David Duke, Business License Inspector, respondents

(44 pp.)

Case Summary

Land regulation — Land use control, zoning bylaws — Business or development permits — Right to issue of — Land use control, appeals — Judicial review — Mandamus.

Application for declaration and prerogative writ of mandamus. The petitioner purchased land and a warehouse for the purpose of wholesaling and distribution. The petitioner's application for a business licence and a development permit was rejected due to non-conformity with zoning By-laws and failure to provide sufficient assurance that the business would be a wholesale operation. The petitioner claimed that the respondent exceeded its authority, engaged in irrelevant considerations, fettered a discretion and acted improperly. The petitioner applied for a declaration and an order requiring that the respondent issue the development permit and business licence.
HELD: Application granted.

The petitioner was entitled to declarations that the petitioner's development permit and business application licence complied with the respondent's zoning By-law. The respondent acted outside the scope of its legislative authority by rejecting the applications on the ground that the petitioner did not provide sufficient assurance that the its business would be a wholesale operation. Further, the attempt to regulate zoning through the business licence application constituted irrelevant consideration. An order in the nature of mandamus requiring the respondent to issue a development permit and business licence to the petitioner for the operation of a wholesale grocery warehouse on the property was issued.

Statutes, Regulations and Rules Cited:

District of Saanich Zoning By-law No. 6120, ss. 2, 901.1, 901.1(b). Municipal Act ss. 498, 508, 513, 945(1), 945(4)(e), 945(4) (g), 976(1)(b), 976(2).

Counsel

D.G.S. Rae, Q.C., and S.B. Ledingham, for the petitioners. G.E. McDannold and C.G. Nation, for the respondents.

COHEN J.

I. The Petitioner's Application

1 Westfair Foods Ltd. (the "petitioner"), wishes to open a wholesale grocery warehouse on land zoned for industrial use. The Corporation of the District of Saanich (the "respondent"), has refused to grant the required development permit and business licence because it is not convinced that the petitioner will operate as a wholesale, as opposed to retail, warehouse outlet.

2 The petitioner applies for a declaration that the respondent has exceeded its authority and acted improperly in refusing to issue a development permit and business licence to the petitioner, and an order in the nature of mandamus requiring the respondent to issue the development permit and business licence.

II. Background

3 On June 1, 1994, the petitioners purchased 3.49 acres of land and a warehouse located at 3934 Quadra St, on the corner of Hulford Road in the District of Saanich (the "property"). The property was purchased through the petitioner's subsidiary, 399338 British Columbia Ltd. The petitioner and its subsidiary amalgamated on December 31, 1995.

4 The property is zoned M-1 Industrial pursuant to section 901.1(b) of the respondent's Zoning By-law No. 6120 (Zoning By-law). Section 901.1 permits use of the property for wholesale and warehouse distribution. Section 2 defines "wholesaling and wholesale distribution" as:

> Wholesaling and Wholesale Distribution - means the use of land, buildings, or structures by establishments or businesses engaged in selling merchandise to retailers, to industrial, commercial, institutional, or professional business users or to other wholesalers; or acting as agents, or brokers and buying merchandise for, or selling merchandise to such individuals or companies.

5 The property is located in a Development Permit Area ("DPA") known as "Quadra-Mackenzie" according to the respondent's Official Community Plan ("OCP") By-law No. 7044. The purpose of the DPA is described in Appendix J to the OCP By-law as the "establishment of objectives and the provision of guidelines for form and character of commercial, industrial, or multi-family residential development" pursuant to section 945(4)(e) of the Municipal Act (the "Act"). It also provides that when an OCP designates a DPA, land within the area shall not be subdivided and construction of, or addition to, a building or structure for which a building permit would be required, shall not be commenced unless the owner first obtains a development permit. The stated objective in the OCP By-law for this area is to ensure that redevelopment reflects the suburban form and character of adjacent development and that Quadra Street and McKenzie Avenue are protected as major transportation corridors. The stated objective was to be achieved through guidelines for the issuance of development permits relating to the massing and scale of new buildings, building setbacks, landscaping and signage.

6 Use of the property as a wholesale grocery warehouse complies with the objectives and guidelines for the Quadra-Mackenzie area as set out in the OCP By-law and also complies with the provisions of the Zoning By-law.

7 The petitioner purchased the property from Coca-Cola Bottling Ltd., which used the property as both a bottling plant and a distribution warehouse. The existing warehouse on the property could be altered to premises for a wholesale grocery warehouse. This physical alteration to the building requires a development permit.

8 On February 6, 1995, the petitioner submitted a development permit application to the respondent to develop a wholesale grocery warehouse. On February 17, 1995, the petitioner submitted a business licence application to conduct a wholesale grocery warehouse on the property.

9 By letter dated September 13, 1995, the respondent advised the petitioner that its business licence application was rejected:

> With reference to your application for business licence, the following report has been submitted by the Zoning Department.
>
> "Based on information contained in the consultant's report, and a first hand inspection of an existing facility, the proposed use would not comply with the provisions of the M-1 (Industrial Use) Zone."
>
> We therefore regret to inform you that your application for a licence to operate the business of Wholesale Grocery Warehouse, from 3934 Quadra Street is hereby rejected.

10 The petitioner responded in a letter dated September 19, 1995, from it's solicitors as follows:

> It has always been our client's intention to comply with the bylaws of the Municipality. While we have a different interpretation of the requirements of the zoning bylaw (as we have discussed previously), our client is prepared to conduct its business in a manner that satisfied the concerns expressed by the Planning Department, notwithstanding that this is not, in our view, required by the bylaw itself.
>
> As has been stated previously, the business to be operated by our client at the location is a wholesale grocery warehouse. Our client will implement procedures in the warehouse to "qualify" the customers as wholesale customers. The plan is to have staff at the warehouse make inquiries of each customer as to whether they are buying for a wholesale purpose. If the customer indicates that he or she is buying for a wholesale purpose then the customer will be permitted access to the warehouse and permitted to purchase products. If the individual indicates that he or she is not purchasing for a wholesale purpose then the individual will not be allowed to access the warehouse and purchase products. The inquiry will be made at the time that the individual attempts to enter the warehouse.
>
> As you are aware, the process of obtaining the development permit for this location has been much delayed. The proposal as set out in this letter meets all the concerns expressed by the Planning Department to date and our client anticipates that the Planning Department will support the development permit application before Council. Please confirm that this is the case and advise us of the timing of bringing the development permit application before Council.
>
> We have received a letter from the License Department of Saanich dated September 13, 1995 rejecting the business license application for the warehouse. We assume that the proposal set out in this letter will remedy the reason for the rejection of the business license application. Kindly advise us whether it is necessary to reapply for the business license or whether the business licence application previously submitted can now be reconsidered by the License Department.

11 The petitioner's development permit application was then considered by Mr. Alan Hopper, the respondent's Planner. In a memorandum to Council dated October 19, 1995, he stated that the respondent's Solicitor, Mr. C.G. Nation, had recommended issuing a business licence. He also suggested that most outstanding issues had been dealt with, or could be dealt with later. He reported to Council, inter alia, as follows:

> The question of land use is not part of the Development Permit Process. Development Permits regulate the general character and design of buildings and structures.
>
> ...
>
> Insofar as site development is concerned, a key issue is related to the new use and operational changes that will occur. The only direct access to the site is via Hulford Avenue, although there is a reciprocal access arrangement with the Keg restaurant from Quadra Street. Although there was never any legal limitation on access via Hulford, the Goodwill family did agree to limit access when they operated the plant.
>
> ...
>
> As noted earlier, the issue of land use is not the subject of this application. The matter, nevertheless, has been a major concern. Following much investigation, the Municipal Solicitor is of the opinion that a business

license could be issued. The applicant has given certain assurances they will comply fully with the wholesale use provisions of the Zoning By-Law.

Proposal

The plans submitted by the applicant reflect minor external changes to the building, as well as landscaping, parking and signs. Plans have been approved by the Design Panel. Key changes are basically the introduction of corporate colours as well as relocating several doors and loading bays.

While staff are concerned about the access issues to Hulford Street, Saanich is unable to restrict its use by way of the Development Permit. Council could, however, examine operational adjustments to Hulford Street if the need arises. Regulating turning movements from Quadra, weight limitations on Hulford, parking restrictions, etc. could be considered if problems do arise.

12 Mr. Nation sent Council a memorandum dated October 27, 1995, with comments from Mr. R.M. Sharp, the respondent's Administrator. In the memorandum, Mr. Nation reviewed the outstanding issues and the positions of the parties. He also drew Council's attention to the difference between the municipality's licensing and by-law enforcement powers:

> The property is in the M-1 (Industrial Zone) which permits "wholesale and warehouse distribution" and "retail sales incidental to a permitted use". Section 901.5 of the bylaw also stipulates that
>
> > "(b) a retail sales area for any business shall not exceed 25% of the gross floor area of any buildings or parts of buildings which are on the parcel and used by the business."
>
> "Retail sales area" is defined as "the portion of gross floor area used for the sale and/or display of goods and services to the ultimate consumer but does not include areas used for wholesale and wholesale distribution".
>
> These sections of the Zoning Bylaw have traditionally been interpreted by staff to mean that if retail sales are carried out from an industrial zoned property, retail customers must not be able to circulate through any more than 25% of the building used in the business. In typical industrial uses with ancillary retail components such as bakeries or dairies, there is a small well defined retail area adjacent to the production facility.
>
> The proposed Real Canadian Wholesale Club outlet is part of a chain of businesses operated in western Canada by Westfair Foods, a company controlled by Loblaw's. On receipt of the development permit plans, Municipal staff noticed that the plans bore a resemblance to conventional retail supermarkets and questioned the applicant on whether the business would be retail or wholesale. The applicant, a company known as 399338 B.C. Ltd. replied in a letter of November 21, 1994 as follows:
>
> > "As we have consistently stated throughout the building permit process, in this area and all other areas in the building we intend to be "engaged in selling merchandise to retailers, to industrial, commercial, institutional, or professional business users or to other wholesalers" in accordance with the Corporation of the District of Saanich Zoning Bylaw 5120 definition of wholesaling and wholesale distribution. The customers of the business will not be the public but rather will be individuals or companies who are wholesale users, being individual or corporate retailers, industrial, commercial, institutional or professional business users or other wholesalers, as contemplated in that definition".
>
> Despite that assurance, Municipal staff continued to have questions as to whether the business would be wholesale only and in fact received a number of letters from other food related businesses raising the same question.
>
> As Municipal staff had no direct experience with any existing Real Canadian Wholesale Club outlets, it was decided to retain an outside consultant to investigate the other businesses in the chain. The firm Site Economics Ltd. carried out this survey last summer and a report of its findings is attached.
>
> It is evident from the report that there are wholesale and retail components to the other Wholesale Club stores with the actual mix depending on factors such as location and competition. The repot says

"Given these considerations it is reasonable to conclude that the majority of sales at the existing wholesale clubs stores are generated by wholesale customers. In the case of Saanich however, due to the lack of a discount food retail or warehouse store infrastructure, the ratio of retail sales would likely be higher than at existing stores in the prairies."

Westfair representatives had advised Saanich that the proposed Quadra Street outlet would be run in the same fashion as the outlet in Esquimalt which opened in early September. As a result, Saanich staff visited the Esquimalt store and observed that a significant number of shoppers in the outlet appeared to be retail customers.

As a result of the Site Economic's report and the visit to Esquimalt site, the Business Licence Inspector and Municipal Planner concluded that the proposed business would contravene the Zoning Bylaw and advised Westfair that their business licence application would be denied.

As a result of that advice, the Company responded with a proposal set out in the attached letter of September 19, 1995 from its solicitors, Blake Cassels and Graydon, to screen customers entering the business to ensure they were wholesale customers.

Municipal staff considered this proposal and decided that if the screening process were properly carried out and retail customers were physically barred from entering the store, the business would be in compliance with the bylaw. The Company was then advised that a business licence would be issued subject to the following:

1. The screening process be put in place and properly administered.
2. A sign be posted adjacent to the entrance of the store saying "Wholesale Sales Only".
3. The Company's business licence limit the business to wholesale sales only,.

Once the business is in operation, the Municipality will have its usual bylaw enforcement remedies available if the Company is found to be carrying out retail sales. These would include bylaw prosecutions, injunctions in the Supreme Court and suspension of the Company's business licence if it is convicted of a bylaw infraction.

ADMINISTRATOR'S COMMENTS

The Municipal Solicitor's report is for Council's information further to the Development Permit application for 3934 Hulford Street as outlined in the Municipal Planner's report of October 19, 1995.

13 The minutes of Council dated November 6, 1995, record as follows:
Councillor Gillespie questioned the Municipal Solicitor:

- the difference between a wholesale business licence and a retail business licence;
- would the difference pertain to parking.

The Municipal Solicitor stated:

- there is, under the zoning bylaw, a difference in permitted uses of wholesale business and general commercial retail business, such as parking requirements;
- the zoning bylaw addresses the definition of wholesale as "the use of land, buildings or structures by establishments or businesses engaged in selling merchandise to retailers, to industrial, commercial institutional or professional business users or to other wholesalers";
- the business in question has stated clearly it intends to carry on only a wholesale business from these premises, and has agreed to put in place a screening process whereby customers would be identified as being wholesale or retail customers;
- letters from the law firm representing the developer would serve as part of the record;
- the Municipality's general process is to accept assurance of a prospective business that they comply with the zoning bylaw; ultimately, if they carry on business in contravention of the zoning

> bylaw the Municipality would take bylaw enforcement action through bylaw charges, an injunction, or the lifting of the business licence;
>
> (my emphasis)

14 By letter dated November 28, 1995, the respondent wrote to the petitioner's solicitors as follows:

> This is further to your client's application for a Development Permit pursuant to development of the above property for use by the Real Canadian Wholesale Club and the related Business Licence application.
>
> Council has again discussed the matter at an "In Camera" meeting November 27, 1995 and I have been instructed to advise you that the following resolution was approved:
>
> > "That Council advise the applicant it is not satisfied the proposed business will operate in compliance with the Zoning By-Law and that unless the applicant commits to measures which will ensure that no retail sales are carried out from the premises, Council will consider refusing a business licence under Section 508 of the Municipal Act".
>
> As you are aware, the Development Permit Application was
>
> tabled at the November 6, 1995 Council meeting for
>
> further discussions revolving around your client's
>
> application. Now that this has taken place, the
>
> Development Permit can be rescheduled at your request.
>
> In light of Council's above resolution you may wish to
>
> have further discussions with Municipal staff prior to
>
> reconsideration of the permit application.
>
> (my emphasis)

15 By letter dated January 11, 1996, the respondent wrote to the petitioner's solicitors as follows:

> This is further to the Development Permit application at the above address by the Real Canadian Wholesale Club considered at Council's Committee of the Whole Meeting of January 8, 1996 and your letter of January 10, 1996 to Mr. Nation requesting the application be put on the next Committee of the Whole agenda.
>
> As you are undoubtedly aware from discussion at the aforementioned meeting, Council tabled the Development Permit consideration until all other aspects of the application can be placed in front of Council which includes the issuance of a business licence for the proposed operation.
>
> With respect to rescheduling the item, as you were advised on November 28, 1995 Council is not satisfied that the proposed business would operate in compliance with the Zoning By-law and unless your client commits to measures which will ensure that no retail sales are carried out from the premises Council will consider refusing a business licence under Section 508 of the Municipal Act. You should, therefore, respond in writing with respect to any proposed controls to ensure wholesale use further to your previous discussions with Mr. National because a future meeting will consider both the Development Permit and the business licence application in accordance with Council's resolution of January 8, 1996.
>
> In addition, as you may be aware a petition was received from owners and residents of Hulford Street raising a number of issues with respect to the use of Hulford if this proposal proceeds. Planning and Engineering staff have been asked to respond in a report to Council regarding the matters raised in the petition and, therefore, the matter cannot be rescheduled until I receive these.
>
> (my emphasis)

16 On March 7, 1996, Mr. R.H. LLoyd, the respondent's Deputy Engineer-Design and the respondent's Planner

sent a report to Council responding to a petition presented to council by members of the public requesting Council to implement a variety of restrictions should the applications be approved.

17 The respondent wrote again to the petitioner on March 12, 1996 as follows:

> This will confirm that in accordance with your recent request, the above Development Permit application will be considered at Council's Committee of the Whole Meeting of April 1, 1996.
>
> As you were previously advised, on January 8, 1996 the Committee of the Whole tabled the Development Permit application until all other aspects of the application are in front of Council which will include consideration of the refusal of a business licence for the proposed operation under Section 508 of the Municipal Act.
>
> As you are aware, Council has previously expressed concerns that the operation at the proposed business will not comply with the requirements of the Zoning By-law with respect to retail sales. Council has asked you to commit to more effective measures to ensure that only wholesale sales are carried out at the store and you should be prepared to advise Council at the meeting whether you will make that commitment. Under Section 508 of the Municipal Act the Council may, on the affirmative vote of at least two/thirds of its members, refuse in any particular case to grant the request of an applicant for a licence under Section 497 to 513 of the Act.
>
> (my emphasis)

18 At a meeting on April 1, 1996, Council defeated a resolution recommending the approval of the petitioner's development permit application, notwithstanding the memorandum dated October 19, 1995, from the respondent's Planner to the respondent recommending that the development permit be approved. At the same meeting, Council passed a resolution recommending that the business licence application be refused. The Council minutes record the following statements made by some of the Councillors at the meeting, as follows (my emphasis throughout):

> MOVED by Councillor Williams and seconded by Councillor Cass: "That it be recommended that the business licence be refused pursuant to Section 508 of the Municipal Act."
>
> Councillor Garrison stated:
>
> - this property has been zoned to allow a wholesale use, therefore, the applicant is entitled to that;
> - The issue with the business licence is whether Council feels that the application meets the requirements of the zoning by-law and that the applicant will ensure compliance with the zoning by-law;
> - the bona fides and credibilities of the applicant must be considered;
> - the applicant has stated that this store will be operated a little differently;
> - when the solicitor for the applicant and Mr. Andrews were questioned regarding qualifying their customers as wholesale, they stated they were not prepared to go any further to qualify their customers;
> - he does not believe that the measures identified by the applicant are effective enough to ensure compliance with the zoning by-law.
>
> Councillor Cass stated:
>
> the introduction of extended hours of noise and disturbance, a heavier traffic burden and moving 60-plus-foot vehicles onto Quadra Street will have an impact on a neighbourhood;
>
> - the idea that a customer becomes a wholesale buyer just on the basis that he says so is ridiculous;
> - it is up to the applicant to show they are serious in their use and observation of "wholesale"; Council has not received that commitment from the applicant;

- the fundamental problem is one of integrity and of belief; not only is the operation offensive to the neighbourhood, but the background of the company's operation elsewhere shows that when they say "wholesale" they mean "retail";
- wholesale means you are buying goods for resale, or for incorporation into some manufacturing process;
- all evidence shows this company's basic operation is not wholesale;
- until he is convinced that provisions are in place to ensure that this applicant will start off and continue as a wholesale operation, then he will not support either a Development Permit nor a business licence.

Councillor Chong stated:

- the applicant has stated that this particular location and only this location will be treated differently than all their other locations;
- if that is the case, she is concerned as to why the applicant would not be willing to agree to more effective controls with respect to retail sales if it was serious bout being a wholesale outlet;
- she is not satisfied that the proposed business will operate in compliance with the zoning by law since it is not a bona fide 100% wholesale business in any other location.

...

The motion was then PUT and CARRIED

Councillor Williams stated:

- in considering the Development Permit it is important that the building retain its unobtrusive characteristics which the applicant has achieved.

MOTION: MOVED by Councillor Williams and seconded by Councillor Garrison: "That it be recommended that Council approve the Development Permit application for 3934 Quadra Street.

Councillor Leonard stated:

- he is not going to support the Development Permit application;
- he understands in looking at the correspondence from the applicant's solicitor the points they make in terms of how limited Council's scope is, and he realizes the advice they have from staff reinforces those limitations, but successful applicants haven't only covered the letter of the law, they have attempted to work with the neighbourhood to become good neighbours;
- with other businesses, developments or subdivisions, people have moved fences, moved shrubs, moved accesses, changed parking routines, changed gates, etc. that were not within the lines of the Development Permit but were within the scope of the neighbourhood;
- the Goodwill family did agree to limit access in order to be a good neighbour when they operated the plant;
- if the Development Permit was to work for the neighbourhood, the applicant would have had a meeting with the people living on Hulford Street to discuss their concerns and to find a way to live together;
- he cannot, in good faith, support the Development Permit application because it shows no sympathy toward the residents' concerns.

Councillor Brownoff enquired:

- is it possible for the size of trucks indicated to make the turn into the driveway from Quadra Street?

The Manager, Zoning Services, stated:

- the Engineering requirements of March 1995 pointed out it is a requirement to increase the width of that access driveway on Quadra Street.

Councillor Brownoff stated:

- she will not support the Development Permit as she has concerns on how to handle the massive trucks getting in and out of the site;
- there are ways of approaching the community who are taxpayers who shop in the area, and there are ways of not approaching them; this applicant has not gone to enough extent to speak to the people who live in the area to address their concerns.

The motion was then PUT and DEFEATED

(my emphasis)

19 Following rejection of the applications, the petitioner wrote to Mr. Nation on July 26, 1996, as follows:

At the Committee of the Whole meeting on April 1, 1996, Councillor Garrison inquired whether Westfair would consider requiring customers to show a business licence, sales tax exempt number on a GST registration to verify they are a business and are purchasing for the purpose of wholesale.

Mr. Nation, Municipal Solicitor, has also provided us with details of the Knob Hill wholesale business in Scarborough which, while having a different zoning bylaw than Saanich, has implemented a similar screening process.

In response to these suggestions, Westfair proposes to implement a screening process which requires prospective customers to complete an application including name and address and provide, if available, a GST number, business licence number, Society Act registration number or other similar registration number indicating that they are a business, institution or individual capable of buying wholesale.

However, not all businesses, institutions or individuals which are valid wholesale customers under the Zoning Bylaw will have the above registrations (such as small suppliers, clubs, camps, schools, foundations, home-based businesses and others). In such cases, the applicant would be required to sign a written declaration that it is a retailer, industrial user, commercial user, institutional user or professional business user; or acting as agent or broker for such individuals or companies [in compliance with the Zoning Bylaw].

Upon satisfactory completion of the application form, the applicant should be issued a card which must be shown to an attendant at the warehouse door before entering the warehouse and purchasing products.

We believe that this proposed screening process fairly responds to the concerns of Council and residents.

We understand this proposal exceeds the requirements of

the Zoning Bylaw. We also understand that no other

Wholesaler in Saanich has been required to use a

screening process.

(my emphasis)

We look forward to moving this matter to a mutually satisfactory conclusion as expeditiously as possible.

20 Mr. D.M. Duke, the respondent's Licence Inspector, sent a memorandum to council dated August 9, 1996, with

comments from Mr. Sharp. Mr. Duke recommended issuing the business licence, and suggested that the respondent would have no trouble enforcing the provisions of the by-law:

> In reviewing the proposals from Westfair Foods Ltd. in their letter dated July 26, 1996, I would recommend those proposals be implemented and that we consider issuing the licence. Enforcement to ensure compliance would not be a problem as staff could do spot checks in conjunction with their regular inspections.
>
> (my emphasis)

21 In the same memorandum, Mr. Sharp recommended that Council consider issuing a business licence, subject to a photo identification screening process which had not been proposed by the petitioner. He reported to Council as follows:

> ADMINISTRATOR'S COMMENTS
>
> I recommend Council consider issuing a business licence subject to the applicant committing to limit access and transactions to holders of photo identification cards who have established they are wholesale customers by producing a business licence, Provincial sales tax number, registration under the Societies Act or evidence that they are an authorized purchasing agent of a government or its agencies.
>
> (my emphasis)

22 On September 5, 1996, the petitioner wrote to the respondent as follows:

> Pursuant to our telephone conversation of today's date I
>
> wish to confirm your advice that from the Planning
>
> Department's standpoint there are no matters outstanding
>
> and that the Staff Report recommending issuance of the
>
> permit still stands. Further that the concerns of the
>
> residents have been reviewed and a response provided to
>
> Council.
>
> (my emphasis)

23 On September 9, 1996, the petitioner's solicitors wrote to Mr. Nation, as follows:

> The Zoning Bylaw contains a broad definition of wholesaling as follows:
>
> > "*establishments or businesses engaged in selling merchandise to retailers, to industrial, commercial, institutional, or professional business users or to other wholesalers; or acting as agents, or brokers and buying merchandise for, or selling merchandise to such individuals or companies*".
>
> The screening process proposed by our client would meet that broad definition. Mr. Duke, who enforces the Zoning Bylaw, approved the process and also noted that it is similar to the successful screening process used by Knob Hill Wholesale Cash and Carry in Scarborough.
>
> It was you who first advised our client of the Knob Hill screening process as a model of a wholesale operation which successfully screens customers.
>
> Therefore, to answer your question, our client is prepared to commit to its proposed screening process, which is similar to the Knob Hill screening process and is approved by Mr. Duke.
>
> This is more than our client is legally required to do but they wish to cooperate with reasonable requirements and have put much thought into how to do this in a practical basis.
>
> In contrast, the screening process suggested by the Administrator presents unreasonable and wholly unnecessary restrictions. It attempts to amend the zoning by imposing requirements and restrictions that would limit the customer base to something less than the zoning allows.

Examples are:

> Any business providing a service (other than lawyers) is not required to charge provincial sales tax to their customers. Further, such businesses operating in areas that do not require a business licence would have neither business licences or PST numbers but would be required to have a GST registration number. By omitting the use of the GST number in his recommendations, the Administrator would deny access to such businesses even though they would fall under the definition of a wholesaler in the Zoning Bylaw.
>
> There are legitimate wholesale customers under the Zoning Bylaw that may not have either a business licence, GST or PST numbers. As our client has suggested in its July 26th, 1996 proposal, those might include small suppliers, clubs [such as Boy Scouts], camps, schools, foundations, home-based businesses and others. Westfair has proposed the use of a declaration to qualify such wholesale customers yet this declaration is absent in the recommendations made by the Administrator. It is this declaration which will accommodate such wholesale customers who do not have a business licence, GST or PST registrations.
>
> The Administrator proposes to restrict entry to those individuals having photo identification. The Zoning Bylaw in contrast deals with establishments, businesses, organizations, as well as individuals. The requirement for photo identification is, therefore, unnecessarily restrictive as it deals only with a portion of the permitted wholesale customers. While you have suggested to us that Costco requires pictures on its membership cards, we remind you that this is not a legal requirement imposed on them. In addition, it is our client's understanding that no other municipality in Canada requires photo identification of wholesale customers.

We cannot see any basis in the Zoning Bylaw for adding the restrictions that the Administrator proposed. The screening process contemplated by Mr. Duke is, however, responsive to the Zoning Bylaw.

Therefore, our client is willing to propose and commit to a screening process that screens customers in accordance with the Zoning Bylaw as set out in its letter of July 26th, 1996. We ask that Council consider that proposal, as approved by Mr. Duke, at their Council meeting of September 9, 1996.

(my emphasis)

24 The petitioner's applications were considered again by Council on September 9, 1996. The transcribed excerpts of the meeting from the respondent's audiotape record, "that the [business licence] application be rejected on grounds that it does not provide sufficient assurance that this will be a wholesale operation." According to the transcribed excerpts, the petitioner's development permit application was rejected on the same grounds. The approved minutes of Council state that the petitioner's application for a development permit "be rejected", and that the petitioner's application for a business licence be rejected on the grounds, "that it does not provide sufficient assurance that this will be a wholesale operation."

III. Issue

25 The issue is whether the respondent was entitled to reject the applications by the petitioner for a development permit and a business licence.

IV. Decision

26 In my opinion, by rejecting the applications on the ground that the petitioner did not provide sufficient assurance that the petitioner's business would be a wholesale operation, the respondent acted outside the scope of its legislative authority.

V. Reasons

27 In support of their position, the parties argued two competing values. On the one hand, municipal councils are statutory bodies that cannot act outside of their statutory powers, even when they are acting in good faith or in the

public interest. On the other hand, when they do act within their statutory powers, municipal councils should not be subject to second-guessing by the courts.

28 These competing values were expressed in argument regarding both the development permit and business licence applications. However, the statutory provisions and legal principles and procedures governing the issuance of development permits and business licenses are different and I will discuss them separately.

Development Permits

29 For land which has been designated under an OCP, there is a general prohibition against commencing "construction of, addition to or alteration of a building or structure" (section 976(1)(b) of the Act). The Council may issue a development permit by resolution which would override the general prohibition (section 976(2)). Therefore, the petitioner in this case must first obtain a development permit before it will be allowed to conduct the construction required to turn the bottling plant and warehouse into a wholesale grocery warehouse.

30 The granting of a development permit is not the right of the applicant. The use of the word "may" in section 976(2) makes it clear that this is a matter to be dealt with in Council's discretion. This discretion, however, is limited in section 976(2) in that the development permit process can only be done "in accordance with the applicable guidelines specified in an OCP under section 945(4)(g)". Section 945 governs the content of community plans. Section 945(4)(g), for the purposes of the case at bar, states:

> (4) "A community plan may, for the purposes of section 976, designate areas for the...
>
> (5) establishment of objectives and the provision of guidelines for the form and character of commercial, industrial or multi-family residential development,...
>
> and the plan shall, with respect to those areas...
>
> (g) specify guidelines respecting the matter by which the
>
> (i) conditions will be alleviated,
>
> (ii) revitalization will occur, and
>
> (iii) objectives of the guidelines referred to in paragraph (e) will be achieved.

31 Section 945(1) of the Act states that community plans are "general statements of the broad objectives and policies of the local government respecting the form and character of existing and proposed land use and servicing requirements in the area covered by the plan".

32 The respondent's OCP governing the area in question, includes a set of guidelines governing the Quadra-McKenzie DPA:

> Guidelines:
>
> Development permits issued in this area shall be in accordance with the following guidelines:
>
> 1. The massing and scale of new buildings should be compatible with adjacent land uses and should reflect the suburban character of the area.
> 2. Building setbacks adjacent to McKenzie Avenue and Quadra street should be determined based on the ultimate width of the right-of-way as established by the Municipal Engineer, to provide for future road widening.
> 3. Landscaping adjacent to the major roads should be designed and maintained to complement the high standard established by Saanich Center and the B.C. Telephone Company.
> 4. Freestanding signs should be compatible in size and height to the development.

5. Design plans shall meet the intent of the standards set out in the "Landscaping and Screening Guidelines for Commercial, Industrial, Multi-Family and Public Uses in Development Permit Areas" adopted by Council on December 21, 1987.

33 The petitioner argued that the respondent was not entitled by the statute to regulate the use of property through the development permit process. Only changes to the physical structure of the building are the concerns of the process, not the ways in which it will be used. Council can only consider the physical changes as they relate to the guidelines in the OCP. Considerations beyond this in deciding on their resolution would amount to a violation of the statutory restriction on Council's discretion in section 976(2).

34 The petitioner argued that it should be allowed to rely on the guidelines in the OCP in applying for a development permit. The petitioner cited Re Doman Industries and District of North Cowichan *(1980) 116 D.L.R. (3d) 358* (B.C.S.C.), in which Bouck J. stated at p. 369:

> An owner of land is entitled to know what qualifications he must comply with in order to obtain a development permit. These should be in the development permit division of the zoning by-law. They cannot reside in the various likes and dislikes of individual council members who may be elected from time to time. Once established through the device of a by-law, they may be varied or supplemented by council when the owner applies for a development permit.

35 The petitioner points to the Quadra-McKenzie DPA, as well as the correspondence between the respondent's Municipal Planner, Deputy Engineer-Design and Solicitor to establish that it has met the objectives and guidelines of the OCP. The petitioner argued that by ignoring this fact, and relying on the planned use of the building, Council exceeded its jurisdiction.

36 The basis of the respondent's argument is that voting on a resolution to grant or deny a permit is a legislative function completely within the discretion of Council, and cannot be second-guessed by the court. In support of this proposition, counsel cited the Court of Appeal's decision in Birch Builders v. Esquimalt *(1992), 66 B.C.L.R. (2d) 208*, where Hollinrake J.A. stated at p. 215:

> In my opinion, on the basis of the statement of claim as it is before us, the principles enunciated in Welbridge apply to this case. That is what the chambers judge held and with respect I agree with him. I do not think the principles enunciated by the Supreme Court of Canada in the Just case apply to such a case as this where what is under attack is what, in my opinion is the legislative function of the municipal council. The passage of the required resolution for the issuance of a development permit is a legislative function. Likewise, the failure to pass such a resolution was legislative, not operational as that concept is developed in Just.

37 The legislative nature of the resolution was considered in Bignell Enterprises Ltd. v. Campbell River, *[1996] B.C.J. No. 1735* (2 August 1996), Courtenay S3957 (B.C.S.C.). In obiter in that case, Hardinge J. was of the opinion that the decision of the respondent local government would be under a more strict standard of judicial review due to its legislative nature, and that he may not have been able to order the respondent to issue a development permit, as that would have usurped the respondent's discretion under s. 976(2).

38 The petitioner's position, as I understand it, is not that the power of Council to issue a development permit is not legislative. Rather, the argument is that the legislative function will be beyond its statutory authority under section 976(2) if it is exercised contrary to the guidelines specified in the OCP.

39 It would appear from the evidence that Council considered the development permit in this case not on the basis of the criteria in its own OCP By-law, but on the basis of the various likes and dislikes of the Councillors. The respondent attempted to argue that the decision to reject the development permit application was based on a number of other factors in the guidelines, such as traffic and neighbours' concerns. However, the evidence is clear that the decision was based entirely on the perceived use of the land. A review of the transcribed excerpts of the September 9, 1996 Council meeting demonstrates that Council considered only the issue of land use, mainly as it related to the business licence application. Council's decision was not guided by factors relevant to the guidelines in

its OCP, as required by the Act. The respondent therefore ignored the guidelines in its OCP By-Law, and in doing so exceeded its statutory jurisdiction. Council was therefore not entitled to make the decision it did based on the factors it considered, and its refusal to issue the development permit was improper.

40 That being said, it would appear that the standard for finding that the petitioners are entitled to a mandamus order is higher than that required for a declaration that the council acted outside its legislative authority. The wording in section 976(2) regarding the issuance of a development permit is clearly permissive: "...a local government may, by resolution, issue a development permit...". The decision of whether to issue a development permit is within Council's discretion, a discretion bounded by the guidelines in the OCP By-Law. The Court of Appeal in Birch Builders, supra, held that this decision was a legislative one, and Hardinge J. was of the opinion in Bignell Enterprises, supra, that this means that it would not be open to the court to compel issuance of a development permit. The most the court could do, he opined, was quash the earlier decision of Council and send the matter back to Council for further consideration.

41 The petitioner did not cite any cases where the court compelled a municipality to issue a development permit. Doman Industries, supra, the case cited by the petitioner in support of its reliance on the guidelines in the OCP, dealt with the imposition of a development permit requirement which was improper because it was discriminatory.

42 However, in my opinion, the fact that Council's discretion is limited by the Act to considerations relevant to the guidelines in the OCP, means that Council's decision is not entirely legislative. Where Council exercises its discretion beyond the limits imposed by its enabling statute, its decisions are subject to judicial review.

43 Overall, weighing the principle articulated in Doman Industries, supra, against the legislative nature of the decision to issue a permit, I think it is open to me to find that the petitioner is entitled to issuance of a development permit. In my opinion, the petitioner complied with the By-laws to such an extent that council would have no choice but to issue a permit with the proper considerations in mind.

44 That the petitioner complied with the requirements of the By-laws is evidenced by the actions and statements of Council, and the bulk of correspondence between the respondent's staff and Council. At the September 9th meeting, the grounds for the refusal of the petitioner's development permit application was not development permit concerns. Rather, the grounds for the refusal of the application was the same as for the refusal of the business licence, that is, on the basis of use, which was improper because compliance with the By-laws was no longer in issue regarding the issuance of the development permit. This is clear from the Planner's memorandum to Council dated October 19, 1995. He stressed to Council that use was not part of the development permit process and recommended that the permit be issued. Further, according to the affidavit of Mr. A. Bruce Andrews, Assistant Vice-President Property Development for the petitioner, sworn November 12, 1996, on September 5th he telephoned Mr. M. Pedneault, the respondent's Zoning Services Manager. Mr. Pedneault advised him that the respondent's Planning Department considered that there were no matters outstanding for the development permit, and that the staff report dated October 19, 1995, recommending issuance of the permit remained applicable. He also advised him that the concerns of the public had been reviewed and a response provided to Council. This conversation is evidenced by a letter from Mr. Andrews to Mr. Pedneault confirming the details of the conversation. Further, according to the transcribed excerpts of the meeting of Council held on September 9th, there was no discussion or suggestion by the members of council that the petitioner was not in compliance with the By-laws for the issuance of a development permit.

Business Licence

45 The power of a municipality to require businesses to hold licences is contained in section 498 of the Act:

> 498. Subject to the limitations contained in this Division, the council may by bylaw
>
> (a) require an owner or operator of a business to hold a valid and subsisting licence for carrying on the business.
>
> (b) fix and impose licence fees for licences; and

(c) provide for the collection of licence fees and the granting, issuing and transferring of licences.

46 The power of a municipal council to refuse a business licence application is found in section 508, the section upon which the respondents rely:

> 508. Notwithstanding this Act or the bylaws of the municipality, the council may, on the affirmative vote of at least 2/3 of the members, refuse in any particular case to grant the request of an applicant for a licence under sections 497 to 513, but the granting or renewal of a licence shall not be unreasonably refused.

47 The powers of the municipality to enforce the business licence provisions of its by-laws are found in a separate section, section 513, which provides:

> 513.(1) The council may by bylaw delegate to any official designated in the bylaw power to grant a licence where he is satisfied that the applicant has complied with the bylaws of the municipality regulating building, zoning, health, sanitation and business, and may also delegate to that official the power to suspend any licence for the period he decides if the holder
>
> (a) is convicted of an offence indictable in Canada;
>
> (b) is convicted of an offence under any municipal bylaw or statute of the Province in respect of the business for which he is licensed or with respect to the premises named in his licence;
>
> (c) has, in the opinion of the official, been guilty of such gross misconduct in respect of the business or in or with respect to the premises named in his licence that it warrants the suspension of his licence;
>
> (d) has ceased to meet the lawful requirements to carry on the business for which he is licensed or with respect to the premises named in his licence; or
>
> (e) has, in the opinion of the official, conducted his business in a manner, performed a service in a manner, or sold, offered for sale, displayed for sale or distributed to a person actually or apparently under the age of 16 years any thin, that may be harmful or dangerous to the health or safety of a person actually or apparently under the age of 16 years.
>
> (2) A person whose licence has been suspended under subsection (1) may appeal to the council, which may on the appeal confirm or set aside the suspension on the terms it thinks fit.
>
> (3) The council may revoke a licence for reasonable cause after giving notice to the licensee and after giving him an opportunity to be heard.
>
> (4) The notice and opportunity to be heard is not required for licensee who by reasonable efforts cannot be found.
>
> (5) A person who has applied for but failed to be granted a licence may appeal to the council, and section 508 applies with the necessary changes and so far as applicable.

48 The power to refuse a licence appears to confer a rather wide discretion on Council, a discretion courts have traditionally respected. The B.C. Court of Appeal held in Sunshine Valley Co-Op Society v. Grand Forks, *[1949] 1 W.W.R. 163* at p. 167:

> Whether its decision was right or wrong on the merits is not, I think, our concern. It is the prerogative of the council to make the decision one way or the other provided its discretion is exercised within the limitations imposed by law and is not activated by the indirect or improper motives or based upon irrelevant or alien grounds, or exercised without taking relevant facts into consideration.

49 However, the courts have been vigilant in ensuring that the discretion is not abused, and that the municipality does act within the limitations imposed on it by law. The scope of the municipality's discretion, and the competing values of statutory limits on a municipality's power and judicial non-interference were considered by the Supreme Court of Canada in Prince George v. Payne *(1977), 75 D.L.R. (3d) 1* at p. 4:

> Let me say, at the outset, that one might well be inclined to support Council's evident distaste with the sex business. But it is no part of a Court's task to determine the wisdom of Council's decision, assuming a power to deny the licence inhered in the Council. The Court's sole concern is whether the Council acted within the four corners of its jurisdiction. The discretion contained in s. 455 [now section 508], wide as it is, must be exercised judicially. It is not a judicial exercise of discretion to rest a decision upon an extraneous ground. The common law right of the individual freely to carry on his business and use his property can be taken away only by statute in plain language or by necessary implication.
>
> The power to refuse a licence, embodied in s. 455 of the Municipal Act of British Columbia, is undoubtably phrased in broad terms. It is limited only by the stricture that the granting or renewal of a licence shall not be unreasonably withheld. None the less, the section must be construed and applied in conformity with the Municipal Act within which the section is found and the relevant authorities.

50 The word "unreasonably" in section 508 has been held to refer to some improper or alien consideration, something which would indicate that "in law no discretion was actually exercised at all": Canadian Wire Vision Ltd. v. New Westminster (1965), 54 W.W.R. 238 (B.C.C.A.) at p. 243. One can imagine obvious examples of unreasonable criteria, such as an applicant's race or religion, or the personal business interests of a council member. However, the unreasonableness would seem to extend even to the personal tastes of the Councillors, as stated by Macfarlane J. (as he then was) in Hutfeller v. Surrey (2 October 1981), Vancouver A812679 (B.C.S.C.) at p. 5:

> Section 508 refers to the unreasonable refusal to grant a licence. The word "unreasonably" as used in that section means any indirect or improper motive or acting upon irrelevant or alien grounds. It is not part of the licencing function to consider whether the business of the applicant is one of which the council approves in general, so long as that business is lawful and is to be conducted on premises zoned for that purpose. It is some particular defect of the particular applicant which is the main relevant consideration. I agree that the particular individual and his application must be considered in the light of the operation of such businesses generally in the municipality and not in a vacuum.

51 The essence of the petitioner's argument in the case at bar is that the respondent has judged its application for a business licence on the basis of its general approval of its type of business as opposed to other relevant factors. It argued that it conducts a lawful business and the land it will operate on is zoned for its purpose. The petitioner submitted that the respondent's Councillors ignored or misconstrued the definition of "wholesaling" in the Zoning By-law and substituted their own definition, guided by their own idea of what "wholesale" was. This was evidenced by the transcribed excerpts of the Council meeting of September 9, 1996 when the application was finally rejected. This, submitted the petitioner, was an irrelevant and improper consideration by the council in refusing to issue a business licence.

52 The petitioner also submitted that the Council made their decision on zoning considerations only, as evidenced, among other things, by the respondent's statement that the licence application was refused "on the grounds that it does not provide sufficient assurance that this will be a wholesale operation". The petitioner argued that the respondent could not carry out its zoning function through the business licence process. In support, counsel cited Re Davis Industries and City of New Westminster, *[1975] 3 W.W.R. 73* where the B.C. Court of Appeal stated at p. 82:

> The factual background which I have set out at the beginning of this judgment shows that in considering and rejecting the respondent's application the licence inspector and the members of council acted under the provisions of s. 9 of the zoning bylaw which it is now conceded is invalid. In doing so council acted upon zoning rather than licensing considerations. That is not to say that zoning is an irrelevant factor when considering an application for a licence.... But while zoning may be a relevant factor it cannot be the only one and here all concerned with the respondent's application considered it only from a zoning point of view and not from a licensing point of view.

53 The respondent submitted that within its broad discretion to refuse business licences under section 508 it is entitled to consider whether the proposed business complies with the municipal zoning and permitted uses of the

land: Buck v. Courtenay *(1991), 7 M.P.L.R. (2d) 82* (B.C.S.C.). This was not, suggested the respondent, an unreasonable consideration alien to the affairs of the municipality, but a response to legitimate concerns directly related to the proper use of the land. The respondent stated that there was ample evidence to support its conclusion, and that where there is some evidence to support the decision of elected municipal representatives, the court ought to defer to the Council's decision.

54 Respondent's counsel argued that Council was entitled to determine that the application revealed that the petitioner's business was a retail, not a wholesale operation and that the concerns of the public on this issue were well founded. He referred to the evidence before Council of the proposed warehouse layout which, he argued, reflected sales of single items to individual customers, rather than the sale of merchandise to retailers or institutional purchasers. Counsel said that this layout was consistent with that of the petitioner's other operations and that Council could act in advance to reject the petitioner's application rather than wait until the petitioner commenced business. Counsel insisted that the body of evidence before Council was completely contrary to the assurances given by the petitioner.

55 The entire focus of the September 9th Council meeting was the petitioner's business licence application. From a review of the transcribed excerpts, and the approved minutes, I am satisfied that the respondent rejected both the development permit and business licence applications on the ground of use. That is, the respondent was not satisfied by the screening process proposed by the petitioner that the petitioner's operation would comply with the Zoning By-law.

56 In my opinion, the respondent exceeded its legislative authority because the business licence application was rejected completely on the ground of use. By attempting to carry out their zoning function through the business licence application process, it violated the principle stated above in Davis Industries, supra.

57 Further, a review of the evidence clearly demonstrates that the respondent, by taking the position that the petitioner did not provide sufficient assurance through its proposed screening process, in essence attached operational conditions to the grant of the business licence, something it is not authorized to do by either the Act, or any by-law.

58 It is correct that the petitioner initially proposed the screening process, although it was not required to do so by the Act or by-laws to be entitled to a grant of a business licence. However, the respondent, varied the petitioner's proposal, and, I think, acting outside its legislative authority, turned the proposal into an operational condition by insisting that the petitioner commit to its version of the screening process before a licence would be granted to the petitioner.

59 Because the respondent could not be satisfied that once in business the petitioner would comply with the respondent's by-laws, it refused the application. According to the transcribed excerpts, Acting Mayor Mika stated, "This particular corporation now has a track record in this area and it's a track area [sic] that requires us to be especially careful that they do in fact operate a wholesale operation under our bylaw and nothing else and they have not given us the assurances we need to be sure that that is what they intend to do." In supporting this position the members of Council pre-judged the issue of enforcement of the Zoning By-law. Section 513 of the Act draws a clear distinction between Council's power to grant a business licence and Council's power to suspend a licence if the holder of the licence has ceased to meet the lawful requirements to carry on the business for which he is licensed.

60 In fact, as pointed out to Mr. Nation in the petitioner's solicitors' letter dated September 9th, Council had no authority under the Act or by-laws to impose the screening process as a condition of licencing and, in any event, through the screening process proposed by Mr. Sharp, Council attempted to impose more rigorous land use constraints on the petitioner than those set out in its Zoning By-law. In my opinion, by making the screening process a condition of licencing, the respondent attempted to accomplish indirectly what it could not do directly, that is, regulate use through the business licence application process.

61 Moreover, in refusing the applications on the ground of use, the Councillors did not look to the provisions of the respondent's Zoning By-law to define wholesale operation. Rather, they refused the applications on the basis of what the Councillors thought the definition of wholesale should be. For example, according to the transcribed excerpts, the Councillors remarked [my emphasis throughout]:

> Councillor Leonard:
>
> I think that we too though, as a Council and as Councils across this country, have some work to do in the sense of the marketplace, the marketplace in terms of defining retail and wholesale is changing and municipal bylaws have not been changing. In the 20-25 years that I've been in the marketplace, it used to be fairly clear who was wholesale and even then, there was a couple who tried to be quasi wholesale and that went by the wayside and then, you know, the big box retail trend has come along and the goalposts seem to be moving, but we are still working with the same bylaws and what we're doing here in Council and our staff are doing is by working with the same bylaws, they are putting forward suggestions for additional requirements and in that way, on an ad hoc way, we're trying to set new precedents.
>
> This applicant, should Mr. Sharp's recommendations or some like them, be adopted, they wouldn't just be unique to this applicant, they would set the precedent for the next one to come along and in that way, they would be treated - the next applicant would be treated the same way that this one has, so because our bylaws in many respects haven't changed over a couple of decades, it's not unusual then that we would put forward new requirements as we see the marketplace changing, so I think in that way this applicant is being dealt with fairly and I hope they would go back to the drawing board and give some genuine effort to doing the same thing.
>
> Councillor Williams:
>
> Thank you very much Mr. Chairman. First off, I'm proud of the fact that Saanich is a precedent-setting municipality and it doesn't bother me one little bit. The issue is, I suppose, clearly wholesale and I have a whole list of arguments that I wanted to pose to Council my vision of retail or wholesale being a retailer for the past 40 years in one facet or another, but I don't believe I'm going to have to place those arguments before Council because I think Council in their wisdom has listened to the comments that have been made by may of the people within this chamber tonight.
>
> * * *
>
> I think the time has come that some municipality has to draw a line in the sand and say what really is wholesale and what is not wholesale. In my view, this request is nothing more than a mass merchandiser wanting to do retail business under the guise of a wholesale name and it's rampant in the country and I think it's time municipalities and the jurisdictions such as ourselves draw that line in the sand and decide what in fact is retail and what in fact is wholesale.
>
> I think what defines wholesale quite frankly is by what you sell and I deal with these people in Esquimalt because I'm in the retail business and I can see altogether too many people buying the same - and pound-of hot dogs. Those are not wholesale quantities.
>
> Councillor Cass:
>
> I think the previous Councillors have made some good points, I won't repeat them. I would just like to say that I have a pretty good idea of what is meant by wholesaling of goods, particularly food stuffs. We have a major proven wholesaler at the intersection of Tennison and Burlesk and it's been there for many years and we know what he does, we know how his wholesale operation operates.
>
> It's the provision and movement of goods in bulk - "goods in bulk" - "food stuffs in bulk". They're ordered by phone and delivered by truck and there's very little private motor vehicle traffic associated with this type of operation. I don't see anybody who is in the wholesale business genuinely charging wholesale prices for resale of goods can operate on the basis of having one can of baked beans or one pound of butter. I think the unit goes out, by caseload or skidload or whatever. And that being the case, I wouldn't think there would be any change.

Obviously, as Councillor Leonard has pointed out, this is not going to be wholesale in the sense that we would normally have understood it and I think that that is clear. It's clear to me anyway. It's as clear as I need it to be.

* * *

What we need to do is we need to start off with the toughest restrictions which appear to be reasonable in the full sense of the term wholesale. I have not seen those yet. I have not seen any provisions which satisfy me that they give me a sense of assurdedy (sic) that this operation is going to in fact be a wholesale operation. I see a flow of vehicles up and down Hulford Street as people do their daily shopping waving their little plastic cards around and saying I'm a wholesale buyer. It doesn't happen if you go to it, you go to genuine wholesale store, not vats and an appliance store that pretends to be wholesale which is, in fact, retial. It's previous obvious that it's a wholesale store. Its very nature shows that it's a wholesale store and the amount of traffic it generates is minimal and I do not believe that in this case we have that application in front of us and I support the motion.

Councillor Gillespie:

Thank you Mr. Chairman. As we received the letter today, its September the 9th to its solicitor from the Real Canadian Wholesale Club and it spells out very clearly we are - there is a difference of what we're trying to do in this municipality. I have had several wholesalers check out the operation in Esquimalt. They do say in the morning it is basically a wholesale operation. In the afternoon, it's pretty well a retail operation. It could never really survive if it was just a small wholesale operation in the one -0 it's a foot in the door - there's no question about it - no question. But I think my biggest concern and we have had about two hours of this, my biggest concern is parking. That's the biggest concern, I think if there was a lot of land around the back, it was going to interfere with the residents, that would be a different story. The wholesalers are providing 50 parking spots, they've got to - say they claim they have 115 - there is staff parking, I don't know how much staff is involved here, where are they going to park? - over there in lumber world. There is additional 32,000 that has to be considered, square footage, and that will certainly lean towards the retail operation. There is also the parking of the Keg Restaurant, health club and other businesses there. Council - there is no room in this area. Basically, I would say that it's a wolf in sheep clothing. [laughter] and WOLF is spelled "Wholesale of Less Food and More Retail". [laughter and applause].

Councillor Brownoff:

Thank you Mr. Chair. As an elected representative, I need to ensure that whatever development goes into an established neighbourhood doesn't adversely affect that neighbourhood. This site requires special consideration, special screening consideration due to the close proximity of an established residential area, due to the traffic volumes on Quadra Street which are already at between 20 to 22,000 vehicles a day. The amount of traffic of an operation like this if it is run as a retail business will add to that traffic volume, the vehicles turning into the driveway for delivery, we can't restrict deliveries so there will [be] an impact on the traffic in the area. Although Mr. Ledingham said that these will be special circumstances and nobody else in Canada has them. This is a special area. It's already got traffic, it's got the

> residential area. I have some really bad feelings about how the operation works in Esquimalt. I've been there, I've watched the people come and go. It's not running as a wholesale operation and I guess the last point is, Mr. Ledingham and Acting Mayor Mika asked if the July 26th letter was the proposal by the applicant and he stated it was. The letter does not have enough screening process for me to support this type of endeavour going in at this point, so I'll support the motion.

62 It is plain that in deciding to refuse the petitioner's business licence application, the members of Council ignored or misconstrued the definition of "wholesaling" in the Zoning By-law and substituted their own definitions. This is an irrelevant consideration for the refusal of the application. The definition of wholesaling in the Zoning By-law does not prohibit the sale of single items to individual customers. Further, comparisons with the petitioner's wholesale outlet in Esquimalt are quite irrelevant in that the Esquimalt store operates under the provisions of a very different by-law. In basing their decisions on these considerations instead of the proper considerations, Council "unreasonably refused" the business licence application within the meaning of section 508.

63 Therefore, by attempting to regulate zoning through the business licence application process and by attaching conditions to the business licence application to enforce the Zoning By-law in advance, the respondent exceeded its statutory jurisdiction and improperly refused the petitioner's business licence application.

64 In the case of business licences, there is ample authority to suggest that it is within the power of the court to make an order of mandamus to compel the municipality to issue a business licence when that licence was refused unreasonably. This was so ordered by the Supreme Court of Canada in Payne, supra, and by the British Columbia Supreme Court in Hutfeller, supra, and Ultimate Relaxation v. Coquitlam *(1995), 30 M.P.L.R. (2d) 245*.

VI. Conclusion

65 In the result, I find that the petitioner is entitled to declarations that the petitioner's development permit and business licence applications comply with the respondent's Zoning By-law and an order in the nature of mandamus requiring the respondent to issue a development permit and business licence to the petitioner for the operation of a wholesale grocery warehouse on the property.

66 The petitioner will have its costs of this application on Scale 3.

COHEN J.

L.P. Management Corp. v. Abbotsford (City)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Joyce J.

Heard: June 14 - 15, 2006.

Judgment: September 22, 2006.

Vancouver Registry No. S061990

[2006] B.C.J. No. 2708 | 2006 BCSC 1426 | 63 B.C.L.R. (4th) 172 | 25 C.E.L.R. (3d) 54 | 27 M.P.L.R. (4th) 282 | 152 A.C.W.S. (3d) 1138 | 2006 CarswellBC 2526

Between L.P. Management Corp., Petitioner, and The City of Abbotsford and Jim Gordon, Director or Engineering of the City of Abbotsford, Respondents

(75 paras.)

Case Summary

Administrative law — Prerogative remedies — Certiorari — Grounds for — Mandamus — To municipalities — The petitioning corporation successfully obtained judicial review of the respondent city's decision to refuse its application for a soil removal permit and the matter was remitted for consideration — The city council members had made a political decision which was not based on the requirements of the bylaw and had acted in excess of their jurisdiction.

Municipal law — Bylaws — Enforcement — The petitioning corporation successfully obtained judicial review of the respondent city's decision to refuse its application for a soil removal permit and the matter was remitted for consideration — The city council members had made a political decision which was not based on the requirements of the bylaw and had acted in excess of their jurisdiction.

Municipal law — Planning — Building or development permits — Right to obtain — The petitioning corporation successfully obtained judicial review of the respondent city's decision to refuse its application for a soil removal permit and the matter was remitted for consideration — The city council members had made a political decision which was not based on the requirements of the bylaw and had acted in excess of their jurisdiction.

The petitioning corporation, which owned a parcel of land situated within an agricultural reserve, desired to extract gravel from a portion of the property and create a larger area of viable farmland -- It presently sought judicial review of the respondent city's decision to refuse its application for a soil removal permit, claiming that the city had acted outside its jurisdiction by ignoring the requirements of the city's governing bylaw and acting on extraneous considerations -- It sought several forms of relief, including (a) a declaration that the Abbotsford Soil Removal and Deposit Bylaw, No. 1228-2003 was invalid, (b) an order in the nature of certiorari quashing the decision, (c) an order in the nature of mandamus requiring the city to issue a permit, and (d) alternatively, reconsideration of its application -- HELD: The city's decision was quashed, and the application was remitted for consideration and determination in accordance with the bylaw -- The council members made what was essentially a political decision to deny this application because the land came within a neighbourhood where the residents wanted no further gravel pits, even though the proposed operation was in an area where gravel extraction was permissible subject to obtaining a Soil Removal Permit -- They acceded to the wishes of the opponents on the basis that as democratically

elected officials they should do what the majority of their constituents wanted -- In doing so they acted outside of the provisions of the Bylaw and in excess of their jurisdiction -- The city was to base its decision on a consideration of whether or not the proposed operation would adversely affect the environment or any adjacent property, highway, watercourse, or ground water aquifer.

Statutes, Regulations and Rules Cited:

Abbotsford By-law, No. 1228-2003

Community Charter, *S.B.C. 2003, c. 26, s. 1*(2), s. 3, s. 4(1), s. 7

Judicial Review Procedure Act, *R.S.B.C. 1996, c. 241*

Local Government Act, *R.S.B.C. 1996, c. 323*

Municipal Act, R.S.B.C. 1979, c. 290, s. 930.1

Municipal Amendment Act (No. 2), 1989, S.B.C. c. 33, s. 10

Soil Removal Bylaw, No. 2266-1991

Counsel

Counsel for the petitioner: M. Andrews, Q.C.

Counsel for the respondents: J. Yardley

JOYCE J.

INTRODUCTION AND NATURE OF APPLICATION

1 The petitioner owns a parcel of land in the City of Abbotsford (the "City") located within the Agricultural Land Reserve. The petitioner wants to extract aggregate (gravel) from a portion of the property in order to create a larger area of viable farmland. In order to do so the petitioner requires approval from a number of different government agencies or departments including the Agricultural Land Commission, the Minister of Mines and the Department of Fisheries and Oceans (there is a fish bearing stream on the property). These authorities have all given their approval.

2 The petitioner also requires a Soil Removal Permit from the City. The petitioner applied for a permit in accordance with the City's governing bylaw but the City refused to grant a permit. The petitioner says that in refusing the permit the City acted unlawfully and outside its jurisdiction by ignoring the requirements of the bylaw and acting upon extraneous considerations.

3 The petitioner seeks the following relief under the ***Judicial Review Procedure Act,*** *R.S.B.C. 1996, c. 241:*

(a) A declaration that Abbotsford Soil Removal and Deposit Bylaw, Bylaw No. 1228-2003 is of no force or effect and that the bylaw that is effective is the Abbotsford Soil Removal and Deposit Bylaw No. 2266-1991.

(b) An order in the nature of certiorari quashing the decision of the City Council refusing to approve the issuance of a Soil Removal Permit to the petitioner.

(c) An order in the nature of mandamus directing the City to instruct the respondent Jim Gordon, the Director of Engineering, to issue a Soil Removal Permit for the property.

(d) In the alternative, an order directing the City to reconsider the petitioner's application for a Soil Removal Permit and to make a determination in accordance with the criteria provided for in the applicable bylaw.

(e) Costs.

FACTS

4 The plaintiff owns a 13.4 hectare parcel of land located on Ross Road in the southern part of Abbotsford, legally described as:

P.I.D. 011-196-599. Lot 2, SE 1/4, Section 23, Township 13, Except Plan RP9072 and RP11895, Plan 6497, NWD

(The "Property")

5 The Property is located within the Agricultural Land Reserve, but much of it is not suited for agricultural uses due to a rocky knoll that rises 12 metres above the farmland. The Property is currently characterized as Class 6 and 7 agricultural land. Class 7 agricultural land is defined as not arable. The petitioner proposed to turn more of the Property into Class 2 agricultural land, which is defined as land capable of producing a wide range of crops, by reducing the rocky knoll and removing it in the form of gravel. The petitioner's proposal also included establishing a 5.6 hectare Wetland Environmental Protection Reserve on the Property.

6 In accordance with its enabling legislation the City has enacted bylaws to regulate soil removal within the municipality. The bylaws require a landowner to apply for and obtain a Soil Removal Permit.

7 In 1991 the City enacted Soil Removal Bylaw No. 2266-1991 (the "1991 Bylaw"), the material parts of which read as follows:

2. In this Bylaw, unless the context otherwise requires:

"Permit"	means the written authority granted pursuant to this Bylaw for the removal of soil from or the deposit of soil and other material upon land within the Municipality;

4. Except as provided in Section 3 hereof, no person shall remove or cause or permit to be removed, soil from any land until a permit has been issued for such removal pursuant to this Bylaw, and every such removal shall conform in all respects to the regulations and requirements hereinafter set forth and the terms and conditions contained in the permit.

5. Every application for a permit pursuant to this Bylaw shall be made in writing to the Engineer in the form prescribed by Schedule "A" hereto, and shall specify the type of permit requested, either:

(a) type "A" - Annual Renewable Soil Removal Permit; or

(b) type "B" - Temporary Soil Removal or Soil or Other Material Deposit Permit.

7. Every permit pursuant to this Bylaw shall be issued by the Engineer and shall be in the applicable form prescribed by Schedule "B" hereto.

12. The Engineer may refuse to issue a permit if the proposed soil removal or soil or other material deposit operation, or the plans, data, and specifications submitted with the application do not comply with this bylaw, or if the proposed soil removal or soil or other material deposit would, in his

opinion, adversely affect the environment or any adjacent property, highway, watercourse or ground water aquifer.

23. No operation by which soil is removed or soil or other material is deposited shall encroach upon, undermine, damage or endanger any adjacent property or highway or, where a permit has been issued pursuant hereto, encroach into any setback area prescribed in the permit.

24. No person shall obstruct or damage any drainage facility, natural watercourse or ground water aquifer by removing or causing or permitting the removal of soil there from or by depositing or causing or permitting the deposit of soil or other material therein or thereon.

26. No person engaged in a soil removal or soil or other material deposit operation shall cause or permit dust, dirt or noise to escape there from so as to constitute a nuisance to any other property.

27. During and upon completion of every soil removal or soil or other material deposit operation, the owner of the lands upon which the soil removal or soil or other material deposit operation was carried out and any person engaged in such operation shall:

    (a) protect the boundaries of all adjacent lands, highways, statutory rights-of-way and utility easements from erosion or collapse; and

    (b) complete all works required by this Bylaw and any permit issued pursuant hereto, in accordance with sound engineering principles, as determined by the Engineer.

8 In addition to the provisions set out in the previous paragraph, s. 8 of the bylaw lists the information and documents that must be submitted with an application for a Temporary Soil Removal Permit and ss. 14 and 19 - 27 set out a number of regulations governing the excavation of soil.

9 The 1991 Bylaw was enacted pursuant to the authority of s. 930.1 of the ***Municipal Act***, R.S.B.C. 1979, c. 290 as amended by the ***Municipal Amendment Act (No. 2)***, 1989, S.B.C. c. 33, s. 10, which required Ministerial approval of a bylaw that imposed fees for a Soil Removal Permit and of any bylaw provision that prohibited soil removal. The City received ministerial approval of Bylaw 1991, as it had been amended to that date, on May 11, 1993, as required by s. 930.1(5).

10 In 1996, s. 12 of the bylaw was amended by giving the City, rather than the Engineer, the power to refuse a permit in the prescribed circumstances. It then read:

12. The City of Abbotsford may refuse to issue a permit if the proposed soil removal or soil or other material deposit operation or the plans, data and specifications submitted with the application do not comply with this bylaw, or if the proposed soil removal or soil or other material deposit would, in the City's opinion, adversely affect the environment or any adjacent property, highway, watercourse or ground water aquifer.

11 In 2003 the City enacted Bylaw 1228-2003 (the "2003 Bylaw"). The 2003 Bylaw repealed the 1991 Bylaw and re-enacted the same provisions with minor changes in wording. The 2003 Bylaw contained some inconsequential grammatical changes, replacing "district of Abbotsford" with City of Abbotsford, and replacing "municipality" with "city". There are no differences between the two bylaws that are of any material consequence to the petitioner's application.

12 At the time the 2003 Bylaw was enacted the legislative provision authorizing the making of such a bylaw was s. 723 of the (now titled) ***Local Government Act***, *R.S.B.C. 1996, c. 323*. This section was very similar to the earlier s. 930.1 of the ***Municipal Act***, R.S.B.C. 1979 c. 290 as amended by the ***Municipal Amendment Act (No. 2),*** 1989, S.B.C. c. 33 s. 10, which it replaced. In 2003 s. 723 read as follows:

723 (1) In this section "soil" includes sand, gravel, rock and other substances of which land is composed.

(2) A council may, by bylaw, regulate or prohibit

(a) the removal of soil from, and

(b) the deposit of soil or other material on

any land in the municipality or in any area of the municipality.

(3) A bylaw under subsection (2) may make different regulations and prohibitions for different areas.

(4) A provision in a bylaw under subsection (2) that prohibits the removal of soil has no effect until the provision is approved by the minister with the concurrence of the Minister of Energy, Mines and Petroleum Resources.

(4.1) A provision in a bylaw under subsection (2) that prohibits the deposit of soil or other material and that makes reference to quality of the soil or material or to contamination, has no effect until the provision is approved by the minister with the concurrence of the Minister of Environment, Lands and Parks.

(5) A council may, by bylaw, do one or more of the following:

(a) require the holding of a permit for,

(i) the removal of soil from, or

(ii) the deposit of soil or other material on

any land in the municipality or in any area of the municipality;

(b) impose rates or levels of fees for a permit referred to in paragraph (a);

(c) impose rates or levels of fees for the activities referred to in paragraph (a).

(6) Fees under subsection (5)(b) or (c) may vary according to the quantity of soil removed or the quantity of soil or other material deposited, and the rates or levels of fees may be different for different areas of the municipality.

(7) A bylaw under subsection (5)(b) or (c) has no effect until it is approved by the minister.

13 On June 9, 2005 the petitioner submitted an application for a Soil Removal Permit to the City's Engineer pursuant to the 2003 Bylaw, providing all of the information and reports that were required.

14 At the same time the petitioner applied for the approvals that were required of the other relevant bodies including the Agricultural Land Commission ("ALC"), the Minister of Energy, Mines and Petroleum Resources ("MEMPR") and the Department of Fisheries and Oceans ("DFO"), providing various reports in support of its applications.

15 On August 5, 2005 the ALC provided approval for the proposed project conditional on agreement that the soil extraction be conducted in accordance with a number of technical requirements set out in the approval.

16 On October 12, 2005 DFO gave its approval for the proposed soil extraction operation.

17 On November 12, 2005 MEMPR provided a draft Mines Permit granting conditional approval of the petitioner's proposed soil extraction operation, which imposed a number of operational conditions on the proposed operation.

18 Meanwhile, on October 24, 2005 Mr. Duckworth, the City's Manager of Engineering Services, provided a report to City Council regarding the petitioner's application for a Soil Removal Permit. The report advised the City Council of the ALC's conditional approval and DFO's approval. It further advised that the petitioner's environmental

consultant was working with the City's environmental staff to complete an environmental assessment, establish setbacks and develop situation control and re-vegetation plans for the Property. The report further advised that "the application meets the intent of the Soil Removal and Deposit Bylaw, and will result in reclamation consistent with adjacent properties". It recommended that the application proceed to a public meeting. While the Bylaw did not expressly require a public meeting prior to approving an application for a Soil Removal Permit it was the City Council's policy to conduct a public meeting before deciding on such an application.

19 The permit application was referred to a public information meeting on November 2, 2005, at which residents of the area raised objections to the proposal by letter, by petition and in person. In a report to City Council dated November 8, 2005, Mr. Duckworth reviewed the concerns raised at the meeting, which were:

* The applicant clear cutting trees, grubbing underbrush, and disturbing topsoil before submission of a Soil Removal Permit application;
* Erosion and sediment control and increased storm water runoff into the adjacent stream;
* Additional truck traffic on Ross road and traffic turning onto Fraser Highway;
* Mitigation of site operation dust and noise;
* Disruption of neighbourhood lifestyle;
* Hours of operation; and
* Creek and ground water protection.

20 Mr. Duckworth addressed each of the concerns and outlined the way in which the petitioner proposed to deal with them. He concluded that:

> The issues raised by nearby residents at the November 2, 2005 public information meeting ... can be mitigated by site specific conditions in the soil permit and traffic signal installation and lane improvements at the Fraser Highway/Ross Road intersection.

21 Mr. Duckworth stated that the application met the intent of the bylaw and that staff recommended that the application be approved subject to improvements in the Fraser Highway/Ross Road intersection, and the provision of onsite parking for 25 tractor and trailer units.

22 The application came before City Council on November 14, 2005 where it met with further opposition from neighbouring land owners. City Council rejected the application.

23 The petitioner then clarified and revised its proposal and on February 8, 2006 it submitted another application for a Soil Removal Permit. In the second application the petitioner proposed that it would:

* Double the proposed buffer zones around the operation;
* Limit its operation to 10 hours per day, which is less than the 14 hours per day permitted under the bylaw;
* Relocate the proposed entrance to the operation;
* Employ a full time flagger at the entrance to the Property;
* Cease gravel extraction at its nearby operation at 2050 Ross Road, so as to reduce truck traffic;
* Provide after hours onsite parking for up to 25 truck and trailer units; and
* Post security for the installation of a signal and improvement of the intersection of Fraser Highway and Ross Road.

24 In a report to City Council dated February 15, 2006 Mr. Duckworth referred to the earlier application, which he had recommended be approved and stated that:

The potential effects on the neighbourhood and the intersection of Ross Road and Fraser Highway have not changed. The project meets the technical intent of the bylaw.

25 In his report, Mr. Duckworth commented:

Staff previously recommended approval of this application. Staff cannot refuse to receive an application, unless there is a designated eligible area established, beyond which no applications would be received. Such an area is in place on Sumas Mountain. The applicant modified the application to respond to some public concerns. Technically, the application meets the intent of the bylaw to improve the agricultural capability of the property. If Council denies this application, an "eligible" area in the south west area of the City should be established to consider future applications for soil removal.

26 Mr. Duckworth therefore recommended as follows:

That the application for soil removal at 2676 Ross Road:

(a) be approved subject to receipt of written approval of the application from the Agricultural Land Commission, the Department of Fisheries and Oceans, and the Ministry of Mines and Energy; or

(b) be denied, and staff be directed to review the possibility of an "eligible area" in the south west area of the City to accommodate future applications for soil removal;

27 The matter came before City Council for consideration on February 20, 2006 at which time the Council invited further public comment. A number of citizens made representations opposing the proposal. Included as an appendix to these reasons are extracts from the transcript of the Council meeting of February 20, 2006 which highlight the objections made by the members of the public.

28 After the submissions of the applicant and those who opposed the proposal, members of Council and the Mayor expressed their opinions. Council then passed a resolution denying the application and directing City staff "to review the possibility of an "eligible area" in the south west area of the City to accommodate future applications for soil removal".

ISSUES

1. Which bylaw was in force when the petitioner made its application?
2. What is the appropriate standard of review?
3. In refusing the permit did the City properly apply the bylaw or did it act outside its jurisdiction by acting on extraneous considerations?
4. If the City acted outside its jurisdiction what is the appropriate remedy?

DISCUSSION

1. Which bylaw was in force when the petitioner made its application?

29 The petitioner says that when the 1991 and 2003 Bylaws were adopted, the City was empowered by relevant statutes to regulate or prohibit, by bylaw, the removal of soil, but that any provision that prohibited soil removal in any area required ministerial approval (s. 930.1(3) of the statute in force in 1991 and s. 723(4) of the statute in force in 2003). The petitioner also says that a bylaw that imposes fees for soil removal has no effect until it has received ministerial approval (s. 930.1(5) of the statute in force in 1991 and s. 723(7) of the statute in force in 2003).

30 The petitioner says that while the 1991 Bylaw, which included a provision for fees, received ministerial approval, the 2003 Bylaw, which included an identical provisions for fees, did not.

31 Further, the petitioner says that the 2003 Bylaw also required ministerial approval because it contains a prohibition of soil removal from Sumas Mountain, except in eligible areas.

32 The petitioner submits, therefore that the 2003 Bylaw is of no force and effect and the 1991 Bylaw governed the application.

33 It must be noted that lack of ministerial approval of a provision that prohibits soil removal affects only that provision, not the validity of the bylaw as a whole. The provision concerning Sumas Mountain is not relevant to the matters in issue in this case.

34 The City submits that it is not necessary, for the purpose of this application, for this Court to determine the validity of the 2003 Bylaw and that it should decline to do so. Alternatively, the City submits that the ministerial approval required by the 2003 Bylaw was effectively given when the 1991 Bylaw (as amended) received ministerial approval in 2003.

35 The City says the substantive terms of the 2003 Bylaw are identical to those of the 1991 Bylaw, as amended, when ministerial approval was granted in 2003. It says the differences between the two bylaws are cosmetic, not substantive nor material. The petitioner conceded that it is a matter of no consequence to the legal analysis required in this case which bylaw governed the petitioner's application for a Soil Removal Permit because the two bylaws are materially identical.

36 As it is not necessary to determine this issue in order to dispose of the petition I decline to do so. I will leave the issue to be determined, if necessary, in another case where it is of legal consequence. I will hereafter simply refer to "the Bylaw".

2. What is the appropriate standard of review?

37 The parties agree that the standard of review for determining whether the City failed to apply the criteria set out in the Bylaw and, instead, acted on other considerations thereby acting outside its jurisdiction, is correctness (***Westfair Foods Ltd. v. Saanich (District)*** *(1997), 49 B.C.L.R. (3d) 299*, *46 M.P.L.R. (2d) 104* (B.C.C.A.)). On the other hand, if the City acted within its statutory jurisdiction then the standard of review of its decision is patent unreasonableness.

3. Did the City properly apply the Bylaw or did it act outside its jurisdiction?

38 The Bylaw prescribes the criteria that the City must apply when considering an application for a Soil Removal Permit. The City cannot ignore the terms of the Bylaw and apply whatever criteria it wishes on an ad hoc basis. If it does so, it exceeds its jurisdiction. The essential question, therefore, is whether in refusing the permit, the City acted within the scope of s. 12 of the Bylaw.

39 Focusing on those parts that are material to the petitioner's application, s. 12 provides that the City may refuse a Soil Removal Permit if:

> (a) the proposed soil removal operation or the plans, data and specifications submitted with the application do not comply with the bylaw, or

(b) the proposed soil removal would, in the City's opinion, adversely affect the environment or any adjacent property, highway, watercourse or ground water aquifer.

40 The City's Engineer determined that the application met the requirements of the Bylaw in terms of providing the information that the Bylaw requires under s. 8 in support of an application. Further, the proposed operation would comply with the regulations specified in ss. 14 and 19 - 27 of the Bylaw. The City, through its Council, accepted that the petitioner's application met the requirements of the Bylaw in terms of its technical aspects. A number of the councillors gave the application a glowing review:

> ***Councillor Loewen***: "... [the petitioner] has fulfilled the requirements of the law in terms of application procedures related to the application, and I might add that he is to be commended for the thoroughness of his application ..."
>
> ***Councillor Harris***: "... we can't just consider the factual information and whether or not an application such as this meets the bylaw requirements. I appreciate that they do."
>
> ***Councillor Gill***: "Mr. Carston Noftle presented a good case, a very solid case ..."
>
> ***Councillor Ross***: "... I do feel that they have presented a really good proposal here"
>
> ***Councillor Smith***: "I applaud the Applicant. I think they did everything they could possibly have done. I don't think they could have gone any further or offered to mitigate anything more."

41 The petitioner submits that the ground of refusal set out in the second part of s. 12 of the Bylaw does not give the City a general, unfettered discretion. Rather, there are many provisions contained in other parts of the Bylaw, both with respect to substantive regulation and with respect to the provision of information that provide guidance with respect to the criteria referred to in the second ground for refusal. The petitioner submits that s. 12 sets out objective criteria that the City is to take into account. If they are not met the City may refuse the permit. If they are met and the application otherwise complies with the requirements of the Bylaw the City must issue the permit.

42 The petitioner says this case is analogous to ***Westfair Foods v. Saanich (District)*** *(1997), 30 B.C.L.R. (3d) 305*, *38 M.P.L.R. (2d) 202*, appeal dismissed *49 B.C.L.R. (3d) 299*, where the petitioner sought a development permit and business licence from the District Council to develop and use its property as a wholesale grocery warehouse. The zoning permitted use of the property for wholesale distribution and incidental retail sales. The permit application did not seek any use that was not permitted by the definition of "wholesaling" as set out in the bylaw. The District Council refused to grant the permit and licence based on its belief that the petitioner intended to operate a retail grocery facility. The chambers judge concluded that the District Council exceeded its jurisdiction by basing its decision on improper and irrelevant considerations and granted an order in the nature of mandamus compelling the Council to issue the permit and business license.

43 In dismissing the appeal the court said at paras. 23 - 24:

> Saanich says that Council believed issuance of a development permit on Westfair's application would change the use of the land from one permitted, namely a wholesale grocery warehouse, to one which was not permitted, namely a retail grocery outlet. To refuse the issuance of a permit on that basis is a decision which Council is authorized to make by the legislation, but in doing so it is bound to apply the criteria established by the zoning bylaw and Official Community Plan. Saanich does not dispute that on paper Westfair's application is for a wholesale grocery warehouse, but says, based primarily on investigation of Westfair's operations in the neighbouring municipality of Esquimalt, that what is presented as a wholesale operation would, in reality, be a retail operation.
>
> In reaching that conclusion, it is clear from the minutes of Council's meetings, that Council did not test the development permit application against the definition of wholesaling contained in the zoning bylaw. Rather, Council directed its attention to the investigation and report concerning Westfair's operation in Esquimalt, and to its belief that such an operation would not conform to councillors' subjective beliefs as to what "wholesaling" meant.

44 The court held at para. 26 that the chambers judge was correct in reaching the following conclusion:

> It would appear from the evidence that Council considered the development permit in this case not on the basis of the criteria in its own OCP By-law, but on the basis of the various likes and dislikes of the Councillors. The respondent attempted to argue that the decision to reject the development permit application was based on a number of other factors in the guidelines, such as traffic and neighbours' concerns. However, the evidence is clear that the decision was based entirely on the perceived use of the land. A review of the transcribed excerpts of the September 9, 1996 Council meeting demonstrates that Council considered only the issue of land use, mainly as it related to the business licence application. Council's decision was not guided by factors relevant to the guidelines in its OCP, as required by the Act. The respondent therefore ignored the guidelines in its OCP By-law, and in doing so exceeded its statutory jurisdiction. Council was therefore not entitled to make the decision it did based on the factors it considered, and its refusal to issue the development permit was improper.

45 The petitioner says a substantial volume of material was provided to the Engineer concerning the criteria referred to in the Bylaw, including the criteria set out in the second part of s. 12. The Engineer reviewed the material and considered and analyzed the various objections from nearby property owners and the mitigation measures proposed by the petitioner and concluded that the application met the intent of the Bylaw.

46 The petitioner submits therefore, that the City did not reject the application on the ground that it did not meet the objective criteria of the Bylaw, but rather on the ground that it was opposed by a significant number of people who did not want another gravel pit operation in their neighbourhood at any time under any circumstances. The petitioner submits that the City made its decision, not on the basis of the considerations provided for in the Bylaw, but on the basis of extraneous considerations, namely the opinion of the Council members that they should not impose another gravel pit operation on the citizens of that neighbourhood against their will. The petitioner submits that in doing so the City exceeded its jurisdiction.

47 The City submits that the petitioner alleges bad faith in the municipal law sense when it asserts that the City acted on the basis of irrelevant considerations, and that the petitioner has a heavy onus to prove bad faith. Counsel for the City refers to ***MacMillan Bloedel v. Galiano Island Trust Committee*** *(1995), 10 B.C.L.R. (3d) 121*, *126 D.L.R. (4th) 449* (B.C.C.A.) in which at issue was the legality of four bylaws enacted by the Galiano Island Trust Committee that reduced the ability of certain land owners to use their lands for residential purposes. The trial judge concluded that the Trust Committee's true intentions were to slow down the conversion of lands to residential use, to effect a change in logging practices, and eventually the acquisition or preservation of park lands without expropriation; whereas its stated intentions were to maintain the practice of forestry on the island, and to protect its water supply. The trial judge held that because the trustee's true intentions were not the same as their expressed intentions they had acted in bad faith in enacting the bylaws for an ulterior purpose. On appeal it was held that even though the true intentions were different from the stated intentions, the trustees' true intentions came within the scope of the legislation under which the trustees were empowered to act and that the bylaws were not illegal.

48 Southin J.A. in giving her minority judgment stated at para. 134:

> The burden of proving that a municipal body is acting contrary to the public interest or from an improper or sinister motive or "in bad faith and through partiality", is on those who make such charges (see ***Kuchma v. Rural Municipality of Tache***, *[1945] S.C.R. 234*, *[1945] 2 D.L.R. 13*).

49 Finch J.A., with whom Wood J.A. concurred, described at paras. 153 - 155 the various situations which the words "bad faith" can be used to describe. He said:

> The words bad faith have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal, and renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact.

> Bad faith, however, is also used to describe the exercise of power by an administrative body, that is beyond the scope or the ambit of the powers delegated to that body by the legislature. In those cases the exercise of powers is sometimes described as unauthorized, or beyond the scope, or outside the limit of the delegated power. It is an act that is ultra vires. Frequently, allegations of bad faith include both the aspect of illegality in the first sense, and in the sense of ultra vires. To the extent that the allegation focuses on the way the delegated power was exercised, or on the conduct of the administrative body, there is an issue of fact. In those cases where powers are said to have been exceeded, however, there is another issue. That is the scope, or the amplitude, of the powers delegated by the legislature. That issue invariably requires an interpretation of the empowering statutes, and that raises an issue of law.
>
> So it is an oversimplification to assert, as does the respondent, that bad faith is a finding of fact. [emphasis added]

50 The petitioner therefore bears a heavy onus of proving that the City Council acted in bad faith. In the case at bar, bad faith will be taken to mean that City Council acted beyond the scope of the powers delegated to it, or that it exceeded its jurisdiction.

51 The City submits that in order to determine the extent of its jurisdiction, consideration must be given to the following provisions of the ***Community Charter***, *S.B.C. 2003, c. 26*, which show an intention to give broad powers to a local government:

> 1.(2) ... the Provincial government recognizes that municipalities require
>
> (a) adequate powers and discretion to address existing and future community needs,
>
> ...
>
> 3. The purposes of this Act are to provide municipalities and their councils with
>
> (a) a legal framework for the powers, duties and functions that are necessary to fulfill their purposes,
>
> (b) the authority and discretion to address existing and future community needs, and
>
> (c) the flexibility to determine the public interest of their communities and to respond to the different needs and changing circumstances of their communities.
>
> 4.(1) The powers conferred on municipalities and their councils by or under this Act or the *Local Government Act* must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.
>
> 7. The purposes of a municipality include
>
> (d) fostering the economic, social and environmental well-being of its community.

52 The City may have broad powers under its enabling legislation to enact bylaws, including those that regulate or prohibit soil removal, that address, in an expansive way, the needs and interests of its community and well-being of its citizens. However, when the City has enacted a bylaw for that purpose, as it has done by the 1991 Bylaw and the 2003 Bylaw, it must then act within the confines of the Bylaw and is not free to consider, on an ad hoc basis, matters that do not properly fall within the considerations provided for in the Bylaw.

53 So, the question remains, did the City take into consideration matters that are not within the Bylaw?

54 The City submits that the citizens who spoke out against issuing the permit at the February 20th meeting raised legitimate concerns that came within the matters described in s. 12, namely the impact of the proposed operation on the local neighbourhood, including its adverse effect on the environment, adjacent properties, highways and watercourses. The City submits it was entitled to accept and act upon those concerns in refusing the permit. The City says its decision in this regard was not patently unreasonable and ought to stand.

55 The City says the transcript reveals that the nearby residents raised concerns about the impact of the petitioner's proposed operation in relation to numerous factors including noise, dust, traffic, vibrations, soil erosion and impact on watercourses. In particular:

* Mr. Balakshin, who lives across the road from the Property expressed his concerns of noise, dust and truck traffic;
* Ms. Weatherby expressed her concerns relating to the operations effect on wildlife, traffic safety issues, water contamination, flooding, and risk to fish and other water creatures;
* Mr. Koetsch who resides on property directly adjacent to the Property spoke of truck traffic creating safety concerns as well as noise and dust;
* Ms. Dixon, who resides near the property expressed concerns about noise, dust and the danger created by increased truck traffic;
* Mr. Nareg spoke of the noise of extra traffic as well as soil erosion and the threat of diesel oil spills;
* Mr. Liddle raised concerns of soil erosion and noise resulting from the proposed operation;
* Mr. Rinke spoke of the potential for pollution of the aquifer, increased traffic, truck noise, and pollution from leaking oil;
* Dr. Bradley raised concerns about cutting trees, erosion and harm to fish;
* Mr. Horton was concerned about the amount of truck traffic and the risk to pedestrians;
* Ms. Goodall was concerned with the amount of truck traffic, noise, pedestrian safety and dust;
* Mr. Francis raised concerns relating to the impact on the neighbourhood caused by dust and noise;
* Mr. Weatherby raised concerns relating to wildlife and drainage;
* Ms. Rasmus spoke of dust, the effect of vibration on the stability of the land near her house, erosion and landslides.

56 These complaints relate to factors that fall within the matters that the City has to consider by virtue of s. 12 of the Bylaw. The petitioner submits it addressed these concerns through various mitigation measures that it proposed. The Engineer was of the opinion that they had been satisfactorily addressed. However, the City submits that while the opinion of the Engineer is clearly relevant to the City's decision it cannot be determinative of it. The City was entitled to hear from the residents directly and make its own decision whether or not to refuse the application.

57 The City submits the petitioner's real complaint is not that the City did not consider s. 12 but how it applied that section in the application that was before it. The City says that is a decision that can only be reviewed if it was patently unreasonable.

58 The petitioner argues that the City did not apply s. 12 and make any judgment as to whether or not the requirements of the Bylaw had been met. The petitioner says the City ignored the Bylaw and simply decided to accede to the will of those residents who oppose any gravel extraction in their neighbourhood. The petitioner submits the City decided, in effect, to prohibit any gravel removal in that part of the City regardless of whether or not the application met the statutory requirements. The petitioner says the City did not consider the merits of the application because the merits did not matter; no gravel removal would be permitted within that neighbourhood because the neighbours had endured enough gravel pits already.

59 The petitioner submits that the City exceeded its jurisdiction when it failed to decide the application on the basis of the statutory requirements and acted instead simply upon the will of the opposing residents. Further, the

petitioner says that the City's resolution amounts in effect to a prohibition of gravel removal from a specified area, and that is something the City can only do through a bylaw that has received approval by the minister responsible.

60 The petitioner submits that the comments made by the members of council reflect their determination not only to deny this permit application even though they believed it to be an excellent application but to prohibit any gravel extraction in the area, now or any time in the future.

61 In deciding whether the City applied s. 12 or ignored it and simply acted upon the desire of the neighbours to prohibit any further gravel extraction in their neighbourhood I have considered particularly the following comments of the council members:

Councillor Loewen

p. 67

33 ... [The applicant] wishes to extract gravel from his
34 property and has fulfilled the requirements of the
35 law in terms of application procedures related to
36 the application, and I might add that he is to be
37 commended for the thoroughness of his application

38 and so I commend him for that.

p. 68

1 And so I ask myself: How do I make a
2 decision on this? And I find there are three
3 considerations that I contemplate. The first is

4 the context of the application, that is, how does

5 this application fit within the context of

existing land use and plans, that is, if any, and is it compatible with the existing land use?

The second question, consideration, what impact will this land use have on the immediate neighbourhood and including traffic flow? And I think quite clear, from what we've heard tonight, that the impact will be both great and it will be negative.

Thirdly, will this application enhance or detract from the existing community aesthetics? And in the immediate future, certainly it will not enhance, however, I will concede that in the long run it may enhance the aesthetics.

And so when I consider those three points I find myself in a position where I'm unable to support this application.

Councillor Harris

p. 69

A landowner's right is a given right. However, I'm not sure it's quite that simplistic. ...

If it was as simple as a bylaw and the meeting of the requirements of a bylaw, I'm not even sure that we would really have to have a council of community representatives.

...

I think as council we are elected to represent the people and to make decisions that are fair and just and based on legalities such as bylaws, but we can't just consider the factual information and whether or not an application such as this meets the bylaw requirements. I appreciate that they do.

However, there's a community of people that live in this neighbourhood and I think the comment was made that a gravel extraction operation in our city probably wouldn't be welcomed by anyone living in the area, but the significant aspect

of this area is that these people have had to deal with gravel extraction for anywhere from 20 to 30 years. And, if nothing else, I can't -- I can't believe that we could force them to endure even what seems to be a very small amount of time in five years what they've been enduring for almost a lifetime. It just really doesn't seem fair to me and I -- again, if you gave me that application in another area of the community, it's a wonderful application and it's justified, but you put it on Ross Road, after all that's gone on for the last 20 years ...

p. 70

I do have some concerns about the water course and about the creek, but generally it comes down to this is just beyond what we could expect a neighbourhood to endure over and above the fact that you had to endure

19 the emotion that was tied up with the application

20 for the subdivision. That was not very long ago

21 either. So you've really had your fair share

22 and I just can't support it, as good an

23 application as it may be ...

Councillor Caldwell

p. 72

21 ... you've certainly convinced me tonight that

22 there's very -- the best of neighbours, very

23 colourful friends in your neighbourhood. 130 have

24 signed the petition.

25 I'm sorry, I just cannot support this north

26 of Simpson Road.

Councillor Gill

p. 73

13 ... the residents next door

14 north of the property will be suffering the most

of any other if the proposal is gone and moved forward to continue on ...

... there's one thing that's catching (phonetic) here tonight and it's very important to understand and you must stand behind it at all times, there's a strong sense of community here, community from Bradner Road, Bradner area.

And also this is a too high a price for the neighbourhood to pay, as I hear. And that is true, they have suffered with all of the gravel extraction in that area for the last 30, 40 years and the coming to the end where they think they could have peace and quiet and then adding another five years to that, I mean, it may not be bad to add five years, but adding five years after living

through it for 30, 35 years, I think that is just

too much of a price to pay.

p. 74

I think it's time the neighbourhood have a

peace and quiet and I'm sorry, Mr. Carston, but I

think I am going to have to reject your proposal.

Councillor Gibson

p. 74

Unfortunately, with all the good points that

have been made by the Applicant, and I applaud

them 100 percent, I think the Applicant was cogent

p. 75

and did an excellent point of presenting the case;

however, there's 120 people here and democracy

being what it is, as Councillor Gill said a moment

ago, it's all about community. ...

... if there were only two or three people here dissenting, I would be happy to see this proceed frankly because I believe it's going to be better for the land when it's finished after five years. It's going to be more like farmland. It is going to be farmable.

The problem is, and it's from my heart to yours, I think it is going to be tough to endure five years of gravel mining in your neighbourhood.

I agree with that. But, you know, it's too bad in a way because the property would make better farmland after five years and the downside for all

18 you folks is that you just don't want to suffer

19 through that for five years.

23 But based on democracy being what it is ...

29 ... I will also not be supporting this

30 tonight.

Councillor Ross

p. 76

14 ... I have

15 a concern about the environment as well and I am

16 confident that the Applicant has, to the best of

17 his ability, done whatever he possibly could,

18 you know, to address a lot of the concerns of the

19 community.

27 ... I do feel that

28 they have presented a really good proposal here.

29 But, as has been said, you know, this is a real

30 community here and it's tough to argue with that,

31 people who will take the time and care about their

32 community and stick together. That's tough to

33 argue against.

Councillor Smith

p. 77

9 ... I

10 applaud the Applicant. I think they did

11 everything they could possibly have done. I don't

12 think they could have gone any further or offered

13 to mitigate anything more. It was a very good

14 presentation, but, you know, as I sat here and

15 listened to these fine people and I thought if I

16 lived in this neighbourhood I would be out there

17 with them and I couldn't deny them in my heart.

18 I mean, quite apart from the pragmatic issues

19 that we have to deal with, we need gravel, we need

20 royalties, we need industry and yet if I lived in

21 that neighbourhood I would be right there.

22 And so in the final analysis, I can't support

23 it either.

Mayor Ferguson

p. 77

43 ... when all is said

44 and done, we as a council ...

46 ... we're here

47 tonight to represent the people. The engineers,

p. 78

1 all the experts are here to tell us the technical

2 side of the argument, but we are here in my mind

3 to listen to the requirement of the people that

live in the area, and I understand that. And I think with that decision I think the council tonight is making the right decision under the circumstances. But they were both well put together and it was just one of those things that we have to represent the people. That's who we are elected to represent.

62 Counsel for the petitioner submits that if one looks at what the council members said and asks why they decided as they did there is only one reasonable conclusion: they decided this neighbourhood had had enough of gravel pits and would not have to endure any more.

63 In my view, it is clear that the Engineer determined and the City accepted that the petitioner's application complied with the technical requirements of the Bylaw, thus meeting the first portion of s. 12. The issue then, is whether the City's rejection of the application was made pursuant to the second part of that section, i.e. based on the City's opinion that the proposed operation would "adversely affect the environment or any adjacent property, highway, watercourse or groundwater aquifer".

64 I am satisfied that the persons who opposed the application and spoke against it at the meeting were "adjacent property" owners within the meaning of s. 12 of the Bylaw. I do not think that the term adjacent property, as it is used in s. 12 should be confined to an adjoining property.

65 It is further my opinion that the persons who opposed the application raised matters that fell within the wording of the second part of s. 12 of the Bylaw that the City was required to consider in accordance with the Bylaw. They spoke of potential effects of the proposed operation and matters that, in their view, would adversely affect the environment and their properties (dust, noise), the highway (traffic and safety issues), and watercourses and the aquifer. However, they also raised objections and spoke of matters that did not fall within s. 12, such as problems they had with the petitioner and the method in which they were going about their second application. These matters should not alter the outcome of the council's decision as it was admitted several times over that the petitioner met all the technical requirements of the Bylaw.

66 Counsel for the City submits that in considering the statements made by members of council, the task for this court is to determine whether they directed their minds to the legal requirements applicable to the case rather than "minutely dissecting" them in a search for error: ***Sunnyside Neighourhood Pub Ltd. v. British Columbia (Minister of Consumer & Corporate Affairs)*** *[1984] B.C.J. No. 125* (S.C.) at para. 19.

67 Considering the remarks of the council members in that way, I am satisfied that they did not put their minds to the merits of the objections that could be said to fall within the matters for consideration under s. 12 of the Bylaw,

nor did they weigh those objections in light of the mitigation measures proposed and come to a conclusion as to whether in fact there would be an adverse effect. They made what was essentially a political decision to deny this application because the land came within a neighbourhood where the residents wanted no further gravel pits, even though the proposed operation was in an area where gravel extraction was permissible subject to obtaining a Soil Removal Permit. They acceded to the wishes of the opponents on the basis that as democratically elected officials they should do what the majority of their constituents wanted. In doing so they acted outside of the provisions of the Bylaw and in excess of their jurisdiction.

68 Accordingly, I conclude that the decision of the City must be quashed.

4. If the City acted outside its jurisdiction what is the appropriate remedy?

69 The final issue then is whether to remit the matter back to the City to consider it in accordance with the Bylaw or whether the petitioner is entitled to an order compelling the City to issue a permit.

70 Counsel for the petitioner submits that the City has already determined that the application met the provisions of the Bylaw but rejected it anyway. He submits that this is a case, like ***Westfair Foods***, where the court should make an order in the nature of mandamus compelling the City to issue a permit.

71 In ***Westfair Foods*** *(1997), 30 B.C.L.R. (3d) 305*, *38 M.P.L.R. (2d) 202* (B.C.S.C.) the City Council denied a development permit not on the basis of the criteria set out in its Official Community Plan Bylaw, but on the basis of the various likes and dislikes of the councillors. The learned chambers judge concluded that it was open to him to find that the petitioner was entitled to issuance of a development permit. He found that the petitioner "complied with the By-laws to such an extent that council would have no choice but to issue a permit with the proper considerations in mind" (at para. 43).

72 In the present case, while I have concluded that the City failed to apply the criteria set out in its Bylaw and denied the application on the basis of extraneous considerations, I am not prepared to say that it would have no choice but to issue a permit if it considered the matter in accordance with the provisions of s. 12 of the Bylaw. That section not only provides that the City may refuse a permit if the proposed operation does not meet the technical requirements of the Bylaw, which I find the City has found it does. It also provides the City with a discretion to deny a permit if, in its opinion, the operation would adversely affect the environment or any adjacent property, highway, watercourse or ground water aquifer. That is the part of the Bylaw which I have found the City failed to consider. The petitioner invites the court to undertake that consideration and to determine, based on the favourable opinion of the Engineer concerning the technical aspects of the application and the mitigation measures proposed that their proposed operation will not have an adverse effect.

73 In my view, there are matters falling within the second branch of s. 12 which require consideration and it is the obligation of the City to undertake that consideration. This court should not usurp the City's role.

74 Accordingly, there will be an order quashing the resolution of the City, and remitting the application to the City for consideration and determination in accordance with the Bylaw. More particularly, the City is to base its decision on a consideration of whether or not the proposed operation would adversely affect the environment or any adjacent property, highway, watercourse or ground water aquifer. It is to decide that question taking into account the opinions of neighbouring property owners concerning only matters that come within s. 12 of the Bylaw and the factual basis for those opinions as well as the mitigation measures proposed by the applicant. It must not make its decision merely on the basis that any opponents or councillors do not wish any more gravel extraction operations in that part of the City of Abbotsford.

75 The petitioner is entitled to its costs of this proceeding.

JOYCE J.

* * * * *

Appendix

Excerpts from the Transcript of the City of Abbotsford

Council Meeting

February 20, 2006

Mr. Noftle (petitioner's representative)

p. 6

19 And we understand that not every
20 person in the neighbourhood is going to be an
21 expert on given issues, but they are certainly
22 and are within their rights to have concerns.
47 All works done on this site to date or to be

p. 7

1 done on the site have been designed and are
2 monitored by qualified professional experts and
3 they meet or exceed all pertinent regulations.

p. 10

44 So again we want to stress, and I don't want
45 to overstress it, but I believe our clients have
46 done everything in their power to mitigate for the
47 neighbourhood the issue of truck traffic which has

p. 11

been a major issue, noise and dust and whatnot for that site.

Now, there is nowhere that I know of in Abbotsford where gravel is being extracted where it doesn't conflict with a neighbourhood. Of course it conflicts with a neighbourhood. The very nature of industry, and it's not just this industry, council over the years have had to deal with all sorts of farming conflicts with neighbouring properties. We understand that. It's the nature of somebody using the land for the intended purpose.

p. 13

Now, if council would look at Item Number 12, as far as we understand this bylaw, this is the only reason for an application for soil removal to be denied. Read it carefully and I think, if you understand it in the context in which it was written, what it says is actually very clear. It essentially says you may refuse to issue a permit

if the proposal -- I'll shorten it down here --
or the plans, data submitted with the application

do not comply with the bylaw.
Clearly we do in every sense of the word and
exceeded.
Or if the proposed soil removal, which is a
physical act of removal, or the physical soil or
other material deposit which is again a physical
act would in the city's opinion adversely affect
the environment which we are not doing, in fact,
we are improving the environment in the area
or any adjacent property, which we are not doing,
highway, water course or ground water aquifer.
In short, this application does not impede
on this bylaw and, in fact, I suppose if one were
to approach it legally, one could assume that the
city has no right to reject this application based
on that bylaw.

p. 14

So I would encourage council to recognize
that the only objections to this and no matter
how many e-mails and no matter how many times

it's been said or repeated, the only real
objection to this is coming from the neighbourhood

p. 15

and the few residents, not the 200 who received
the letters, but the few residents who live
adjacent or nearby to the north will be impacted,
and we acknowledge that and we believe we have
done all we can to help.

Mr. Balakshin (a member of the public)

p. 16

I say it's time to draw a line in the sand
and gravel here in Abbotsford and it should be
at Simpson Road. It's my understanding that all
the gravel pits in West Abbotsford are south of
Simpson Road. Why should the gravel pits area be
extended north into the residential areas?

p. 17

They talk about five years. Well, that will
be five years of noise, dust, truck traffic. I
live right across from this development.

Ms. Weatherby (a member of the public)

p. 20

I am, however, exceptionally opposed to the soil removal application for 2676 Ross Road. I ask myself why, what is the big deal? After all, it's only five years? But it is a big deal, a huge deal because the neighbourhood has already endured the gravel mining industry and all of its ramifications for around 65 years. Now we are asked to endure this

p. 21

one at 2676 Ross Road. Next we will be asked to endure one at 29969 Simpson. And who knows where this will go from here?

My fear is that mining in this area will never stop until the whole community is raped, poisoned, flattened and all of our wonderful wildlife and citizens are pushed out.

Another great concern for me is health and safety.

At work and at play, health and safety is

non-negotiable.
I would like the same stance taken for our
roads and environment, the community and
residents. Health and safety are non-negotiable.
Please, for our health and safety, vote to decline
this soil removal application.
Yes, another gravel pit is a big deal because
of all the traffic and traffic safety issues it
brings to our roads.

p. 22

In
order to make the roads safe for all road users,
please say "no" to all applications north of
Simpson Road for gravel mining.
During gravel extraction the top layer of
soils need to be stripped off in order to access
the gravel. Without the soil and the clay layer
to act as a filter and barrier, the whole dynamics
of the surrounding ecosystem and water table is
re-configured, leaving the creek and our well
water vulnerable to contamination.
Without the gravel to act as a holding tank,
there is a strong risk of flooding.

38 With the gravel pit will come silt water,

39 leaving sand deposits that help clog things up.

p. 23

2 The salmon, trout and other water creatures

3 will suffer and so will our wells. Please, for

4 the wildlife and the environment, do not bargain

5 our safety and say "no" to this application.

6 Maybe put a moratorium on gravel mining

7 north of Simpson Road and leave the place for

8 wildlife.

18 Please, so nature's environment is not

19 compromised, deny any and all soil removal

20 applications north of Simpson Road.

p. 24

20 I feel having a gravel pit in the middle of my

21 community would weaken the binds that tie these

22 people together and you ultimately weaken the city

23 as a whole.

David Koetsch (a member of the public)

p. 26

I reside at 2786 Ross Road. My family and I own this property. It is at the very top left corner of the screen there. We are directly adjacent to the property. If this permit were to be approved, we would have 100 percent of the traffic generated going past our house and also around, beside and behind our house. Safety for our two young children and other pedestrians is a concern to us. Noise and dust will be in our face for much of the project duration.

Monica Dixon (a member of the public)

p. 28

I reside at 2778 Ross Road, right under and beside the property in the upper left-hand corner. Trees don't stop dust and if you put up a barrier it's still not going to stop the dust that attacks houses and clothes and pets and gets inside even if the windows are closed.

p. 29

Gravel pits, as I was given, creates noise from trucks, loaders, crushers, conveyor belts, backup warning lights daily. Dirt builds up on the roads and the pit entrance every time it rains. Dust and dirt, not to mention the dirt on the road when picked up by truck tires are hurdled through car windshields which has happened to several of our cars, just lovely. And I don't think that the elderly people here deserve another pit to deal with.

p. 30

Please, please, and I can't stress this to you enough, there is nothing gained by the surrounding community due to another profit mongering gravel pit. They're loud, they're noisy, they're dusty and they produce horrible danger on the road.

Mr. Nareg (a member of the public)

p. 30

38 I invested over $200,000
39 in Pepin Estate. I bought two lots on Ross Road
40 for my family to live in for investment purposes,
41 but my family and I were unaware of the gravel pit
42 being proposed in neighbourhood.

p. 31

2 Everything from the noise of the extra
3 traffic to erosion of the soil to the spilling of
4 the diesel oil coming into the wells, there is
5 real threats to this neighbourhood and if we would
6 have known that there was a possibility of the
7 gravel pit coming on our place of investment, we
8 wouldn't have bought these lots.

Mr. Liddle

p. 31

13 My wife and I are the
14 owners of the property at 29919 Simpson Road.
33 We resent the fact that we are being asked to
34 circle the wagons once again. We were as thorough
35 as I thought we could be at the last open house
36 and the council meeting of November the 14th.
46 I hope council will

47 defeat this proposal and establish a precedent

p. 32

1 against gravel mining north of Simpson Road.

p. 33

3 Since the clearing, the soil has been eroding
4 and sloughing towards the creek and following the
5 Applicant's unsuccessful application in November,
6 he has applied some erosion control measures. The
7 point is that good engineering practice is only
8 being applied after they've been caught and not
9 as a matter of policy.

p. 34

33 We
34 understand there is a need for aggregate. The
35 proponent will benefit in his pocket book. The
36 city will benefit with royalties and the city at
37 large will benefit by the infrastructure this
38 activity will support. The problem is that those
39 benefits are at the expense of the quality of life
40 of we, the downstream and adjacent, residents.

p. 35

I hope that council will defeat this proposal and establish a precedent against gravel mining north of Simpson Road.

Mr. Rinke (a member of the public)

p. 38

Another thing, a lot of people have been addressing is the trucks leaving the pit. How about addressing the issue of the trucks coming into the pit?

p. 40

I thank you for your time and I say "absolutely no" to any gravel pits and I wish you seriously consider putting the stops to them in the future.

Let's call it quits right now. Say no more pits north of Simpson Road. Get it over with, stop it because they're going to come back,

p. 41

they're going to keep coming back and back again.

Dr. Bradley (a wildlife biologist and friend of Ms. Weatherby)

p. 41

Contrary to what Mr. Noftle has claimed before council today, my opinion is, based on my field inspection, that there is a violation of the Fisheries Act.

p. 42

... Several of these trees have been felled into the wetland itself, as Terri Lynn mentioned, and left there. There has also been bulldozer or backhoe activity within the buffer zone where shrubs, bushes and grass cover have been removed and a track has been cut.

In conclusion, it is my professional opinion that the tree removal and heavy equipment activity have resulted in several violations of the Fisheries Act and an environmental impact.

Mr. Horton (a member of the public)

p. 46

Like we're going to have 100 gravel trucks coming north on Ross Road.

p. 47

29 See, nobody else has talked about our
30 children walking to school on Ross Road.

p. 48

45 The city should listen to
46 common sense, put the gravel pits where the least
47 amount of houses are, like Lefever Road, 16th

p. 49

1 Avenue south or Sumas Mountain where there's no
2 shortage of gravel. This application is not good
3 for our growing neighbourhood.

Mr. Hamm (a member of the public)

p. 49

35 With the
36 addition of Pepin Brook, this firmly cements this
37 area as a residential area. Residential areas do
38 not have industrial operations like gravel pits.
39 Please reject this application.

Mr. Fulton (a member of the public)

p. 51

I would really like to see any gravel pits and things like this definitely stay south of 16th Avenue. That would really be nice, but anyway, that's all I had to say.

Ms. Goodall (a member of the public)

p. 51

I appreciate that the Applicant has the right to re-submit his modified application. However, the community is unanimously opposed to anymore gravel operations in our neighbourhood (period). It really would not matter what modified plan was submitted, our fervent opposition to this plan remains. I have nothing against the Applicant personally. However, to impose another gravel pit on this community is overkill.

I support Jim Duckworth's recommendation and his report to council where he states that the application for soil removal at 2676 Ross could be denied and that staff be directed to review the possibility of an eligible area in the southwest area of the city to accommodate future applications for soil removal.

I would like to further recommend that all

future soil removal for the purposes of gravel extraction be limited to south of Simpson Road. The proposed development is completely surrounded by rural residential properties. One person should not be able to upset and negatively impact an entire neighbourhood. This neighbourhood has had to tolerate years of gravel

p. 52

extraction by this company and we have had enough. We do not want anymore gravel pits encroaching north of Simpson.

Ross Road is already a very busy rural road. It cannot tolerate another five years of gravel operations. We have all mentioned whether it's five, 600. Who cares at this point? But as that subdivision moves along, there will be five to 600 more vehicles making daily trips along Ross Road. It's saturated.

p. 53

Also of concern are the impacts of the gravel operations that affects the environment. I am

not satisfied by the assurances of the Applicant's environmental consultant. I believe we do not need to take those risks in the first place.

Ms. Baker-Hamm (a member of the public)

p. 54

Please remember that no matter whether the developers and spokesperson speak last or first, no matter what spin they put on this gravel pit application, the heart of the matter is that a gravel pit does not belong in our quiet residential neighbourhood. Please say "no", once again, to this gravel pit.

Mr. Francis (a member of the public)

p. 54

[Mr. Noftle] pointed out that the two applications have already been approved by the engineering department and that is correct, but they have been approved on a technical merit only and they do not contain nor do they have to contain any reference to the effect that these gravel pits have on the population.

He also said that we live in a democracy, which is perfectly true, but it seems to me that on November the 14th we had a perfectly democratic vote here, it was unanimous and the gravel pit was turned down. What's happened to democracy in this case? What part of the word "no" do they not understand?

p. 58

The engineer's report closely follows the application and I'll skip through most of it for a matter of saving time here.

And the interesting things in this report is on the last page under Analysis:

[As read]

"Staff cannot refuse to receive an application unless there is a designated eligible area established beyond which no application shall be received (phonetic). Such an area is in place on Sumas Mountain."

42

43 Well, I would say why cannot we have such
44 an area where this application is taking place?

p. 59

31 ... the crux of the matter is that the
32 residential areas and gravel pits are not
33 compatible and that's what we have to emphasize.
34 We're not talking about a gravel pit and gravel
35 trucks and dust and so on; we're talking about
36 the effect it has on the area and the fact that
37 we have a residential area there.
41 ... No matter what
42 changes may be made, a gravel pit is still a
43 gravel pit. Dust and noise does not diminish
44 their impact on the area and gravel trucks will
45 still present problems on the roads.

J. Weatherby (a member of the public)

p. 60

29 And as far as environment goes, yeah, they

talk about the red lake frog, but you know there's an awful lot of more stuff in along that creek. There's quite a few kinds of owls and night birds of many kinds, a lot of things that don't come out in the daylight. And, you know, that is a really risky piece of ground there through where that creek goes and if anything ever happened there, that culvert off of Simpson would be blocked up.

Ms. Rasmus (a member of the public)

p. 61

... my problem is even with that buffer I'm sure that the noise and the dust are still going to affect me and with my allergies this is going to make life absolutely unbearable. I'm also worried about the vibrations when the machinery is working. I'm wondering if it's going to weaken the stability of the steep hill that is right behind my house, possibly causing damage to the foundation of the house and possibly causing erosion and runoff and land slides because how long would it take to put the buffer zone in before they start doing the work? And I also feel that it will affect mental

36 and physical health of everybody around the area.

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