IN THE MATTER OF *ZONING BY-LAW NO. 4404* AND AMENDMENTS THERETO

AND IN THE MATTER OF PERMIT #PL-2020-0335

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**WRITTEN BRIEF**
**OF THE MUNICIPAL CORPORATION OF THE CITY OF YELLOWKNIFE FOR THE DEVELOPMENT APPEAL BOARD HEARING TO BE HEARD ON May 29, 2021**

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## A. QUESTION TO BE DECIDED

The question to be decided by the Development Appeal Board (DAB) is whether Permit #PL-2020-0335 was properly issued.

## B. APPLICABLE LEGISLATION

***Zoning By-law No. 4404***

***Section 1.6 – Definitions***

"conditionally permitted use" means a use listed in a conditionally permitted use table that may be permitted by Council after due consideration is given to the impact of that use upon neighboring land and other lands in the City, subject to section 3.4;

"Council" means the Council of the City of Yellowknife;

"Development Appeal Board" or "Board" means the Development Appeal Board established by Council in accordance with Section 30 of the *Community Planning and Development Act;*

"Development Officer" means a person appointed pursuant to Section 2.2 of this by-law;

"development permit" means a document authorizing a development issued pursuant to this by-law;

"permitted uses" means a use listed in a permitted use table that shall be approved with or without conditions provided the requirements and regulations of this by-law are satisfied;

"similar use" means development deemed by Council to be similar in nature to a permitted or conditionally permitted use;

"special care facility" means a building or portion thereof wherein specialized care is provided to occupants in the form of supervisory, nursing, medical, counselling, home making services, or other services related thereto, but this does not include a child care facility;

***2.2 Development Officer***

(1) The office of the Development Officer is established by this by-law.

(2) The person or persons to fill the office of the Development Officer shall be appointed by resolution of Council.

(3) The Development Officer shall:

a. Receive and process all development permit applications;
b. Keep and maintain for inspection by the public during office hours, a copy of this by-law, as amended, and ensure that copies are available to the public at a reasonable charge;
c. Keep a register of all development permit applications, decisions thereon and rationale;
d. Make decisions on all development permit applications for those uses listed as Permitted Uses;
e. Make decisions on any application for home based businesses pursuant to the provisions of Section 7.2(6);
f. Refer all applications for Conditionally Permitted Uses, and all applications requesting a variance in accordance with Sections 3.5 to Council for decision;
g. Refuse an Application for a Development Permit for a use or development that is not listed as a Permitted or Conditionally Permitted Use;
h. Refer to the Capital Area Development and Program Committee, all development permit applications in accordance with Capital Area Development Scheme By-law No. 3934;
i. Be the authority for all purposes of this by-law and the *Community Planning and Development Act*, except where responsibility is given to the Planning Administrator or Council;
j. As authorized by this by-law, issue decisions and post a notice for all development permit applications and state terms and conditions as authorized by this by-law.

***2.4 Council***

(1) Council shall:

(a) Make decisions and state any terms and conditions for development permit applications for those uses listed as Conditionally Permitted Uses;

***3.3 Application for a Development Permit***

(1) An Application for a Development Permit shall be made to the Development Officer on the prescribed form and shall be signed by the applicant or his agent.

***3.4 Discretion***

(1) In making a decision on an Application for a Development Permit for a Permitted Use, the Development Officer:
   (a) Shall approve, with or without conditions, the application if the proposed development conforms with this by-law, or;
   (b) Shall refuse the application if the proposed development does not conform to this by-law, unless a variance has been authorized pursuant to Section 3.5.

(2) In making a decision on an Application for a Development Permit for a Conditionally Permitted Use, Council:
   (a) May approve the application if the proposed development meets the requirements of this by-law, with or without conditions, based on the merits of the application, the *Community Planning and Development Act,* by-law or approved plan or policy affecting the site, or;
   (b) May refuse the application even though it meets the requirements of this by-law, or;
   (c) Shall refuse the application if the proposed development does not conform to this by-law, unless a variance has been granted pursuant to Section 3.5.

(3) In reviewing an Application for a Development Permit for a Conditionally Permitted Use, Council shall have regard to:
   (a) The circumstances and merits of the application, including, but not limited to:
      (i) The impact on properties in the vicinity of such factors as airborne emissions, odors, smoke, traffic and noise, sun shadow and wind effects;
      (ii) The design, character and appearance of the proposed development, and in particular whether it is compatible with and complementary to the surrounding properties, and;
      (iii) The treatment provided to site considerations including landscaping, screening, parking and loading, open spaces, lighting and signs.
   (b) The purpose and intent of the General Plan and the applicable Area Development Plan adopted by the City.
   (c) The purpose and intent of any non-statutory plan or policy adopted by the City.

(4) Notwithstanding any provisions or requirements of this by-law, Council may establish a more stringent standard for a Conditionally Permitted Use when Council deems it necessary to do so.

(5) A development permit may be issued on a temporary basis for a period specified by the Development Officer or Council as required by this by-law.

(6) For the purposes of this section, if a proposed use of land or building is not listed as a Permitted or Conditionally Permitted Use in this by-law, Council may determine that such a use is similar in character and purpose to a use permitted in that zone and may allow the development as a Conditionally Permitted Use.

***3.7 Development Permit Process***

(1) The Development Officer may refer an Application for a Development Permit to any City department, external agency or adjacent landowner for comment and advice. Where an adjacent landowner is referred an Application for a Development Permit for a Permitted Use, it shall be with the approval of the applicant.

***Section 3.7(2) as amended by By-law No. 4914 October 24, 2016***

(2) Upon receipt of a complete Application for a Development Permit for a use listed as a Conditionally Permitted Use, the Development Officer shall require the applicant to send a written notice to all owners and lessees of land within 30 metres of the boundary of the subject property, or to a greater circulation area specified by the Development Officer. The notice shall indicate the location and nature of the development proposal, copies of relevant drawings and a location and date to submit comments

***3.8 Development Permit Conditions***

(1) As a condition of development permit approval, the Development Officer may require that the applicant enter into a Development Agreement with the City

(4) Subject to this by-law, the *Community Planning and Development Act,* and any statutory plan approved pursuant to the Act, Council may attach whatever conditions it considers appropriate to a development permit for a Conditionally Permitted Use, including but not limited to the following:

i) Noise attenuation;
ii) Smoke and odor attenuation;
iii) Special parking provisions;
iv) Location, appearance and character of building;
v) Retention of natural terrain and vegetation features, and
vi) Ensuring that the proposed development is compatible with surrounding land uses.

***3.9 Notice of Decision***

(1) A decision of the Development Officer or Council on an Application for a Development Permit shall be in writing and sent to the applicant.

(2) If An Application for a Development Permit is refused, the reason for the refusal shall be stated in the decision.

(3) An official of the City shall conspicuously post a notice of decision on the prescribed form, of an approved Application for a Development Permit, on the property for which the application has been approved.
(6) A development permit issued does not come into effect until 14 days after the date of notice of decision.
(8) If a Development Permit has been refused, either by the Development Officer, Council or the Development Appeal Board, the Development Officer will not accept another application for a permit for the same property, for the same or similar use, by the same or any other applicant, during the period of six months after the date of refusal, unless the applicant can demonstrate, to the satisfaction of the Development Officer, that the new application addresses the reasons for the refusal.

### 3.10 Development Appeal Process

(1) (b) A person claiming to be affected by a decision of the Development Officer or Council made under this by-law may appeal to the Development Appeal Board pursuant to Section 62 of the *Community Planning and Development Act*, by serving written notice of appeal to the Secretary of the Board within 14 days after the day the application for the development permit is approved.

### *3.11 Development Appeal Board*

**Section 3.11 (1) as amended by By-law No. 4913 Oct 24, 2016**
(1) The Development Appeal Board is hereby established in accordance with the Section 30 of the *Community Planning and Development Act*.
(2) The Development Appeal Board shall:

(e) consider each appeal having due regard to the circumstances and merits of the case and to the purpose, scope and intent of the General Plan, Area Development Plan, and any Council approved plans or policies, and to this by-law;

(3) The Development Appeal Board may:
(a) in determining an appeal, confirm, reverse or vary the decision appealed from and may impose conditions or limitations that it considers proper and desirable in the circumstances; and

### *3.12 Amending an Effective Development Permit*

(1) An Effective Development Permit may be amended by the Planning Administrator provided that:

(a) The request complies with all applicable regulations of this by-law;
(b) The amendment is directly related to the uses and conditions of the Effective Development Permit;
(c) There is no change in use.

(2} All changes that do not meet the criteria set out in subsection (1) require a new development permit, pursuant to Part 3 of this By-law.

(3) All amendments to Effective Development Permits must be provided in writing and sent to the applicant

## C. SUBMISSION

### *I. Approval of Development Permit Application PL-2020-0335 (the "Permit")*

1. Pursuant to Sections 2.2(3)(a) and 3.3(1) of Zoning By-law No. 4404, all development permit applications must be submitted to the Development Officer.

2. On December 2, 2020, the City of Yellowknife (City) received an application for a Development Permit (PL-2020- 0335) for a Conditionally Permitted Use (Special Care Facility) at Lot 43, Block 62, Plan 4252 (5710 50th Avenue) (the "Permit").

3. Section 114 of Council Procedures By-law No. 4975 establishes the Governance and Priorities Committee (GPC) as a standing committee of Council. GPC is advisory in nature and has the responsibility to analyze all matters referred to them by Council or the City Manager. It allows for discussion, debate and public participation [**TAB 1**].

4. In keeping with City procedures and practice, the Permit was brought before GPC by means of a Memorandum to Committee dated January 25, 2021 [See TAB 5 of Development Officer's Report] as required by Section 2.4 of the Zoning By-law.

5. On January 25, 2021 GPC heard from members of the public and the Developer. GPC was also provided with a summary of public comments received with respect to the Permit [See TAB 5 of Development Officer's Report].

6. Minutes of the GPC Meeting on January 25, 2021 [**TAB 2**] specifically outline that members considered development permit details (Page 5 of the GPC Report) including a brief summary of the development's alignment with the applicable factors outlined in Section 3.4 (3)(a) and advised that any conditions recommended by Council would apply to the development permit.

7. The Permit was brought to GPC on February 1, 2021 for further debate and discussion. GPC received written and oral submissions from various Appellants and considered the development permit details further [see GPC Report for February 1, 2021 at **TAB 3**] and recommended that Council approve the Conditionally Permitted Use (Special Care Facility) at Lots 43 and 44, Block 62, Plan 4252 (5710 50th Avenue).

8. On February 8, 2021 Council approved Motions #0025-21 and 0026-21 to allow the Permit to issue.

9. It is the City's position that Council properly approved the Permit.

### *II. Statutory Interpretation – Broad and Purposive*

10. In examining Zoning By-law No. 4404 the DAB must follow the modern principle of statutory interpretation, articulated by Elmer Driedger and endorsed by the Supreme Court of Canada whereby "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". [Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. At page 1 and *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 S.C.R. 27 at para. 21. at **TAB 4**]

11. Section 4 of the *Cities, Towns and Villages Act* specifically requires that the general legislative powers of a municipal corporation to make bylaws be interpreted broadly (**TAB 5** - Section 4, *Cities, Towns & Villages Act*, SNWT 2003, c.22].

12. Council's role is to provide policy direction and it is responsible for developing and evaluating the plans, policies and programs of the municipal corporation; making the bylaws and resolutions of the municipal corporation; and (c) ensuring that the powers, duties and functions of the municipal corporation are appropriately carried out. (**TAB 6** - see Section 12(1) of the *Cities, Towns and Villages Act)*

13. This modern approach, consistent with the fundamental principles of statutory interpretation, requires the DAB to look at the wording of Zoning By-law No. 4404 in its entire context, including the words used, the purpose and scheme of by-law as a whole. [**TAB 7** - See *Bayshore Shopping Centres Ltd. v. Nepean (Township)*, [1972] S.C.R. 755 at para. 9].

14. The purpose of a community plan is "to provide a policy framework to guide the physical development of a municipality" and it must describe future land uses in the City. [**Tab 8** Sections 3 & 4 of *Community Planning and Development Act*, SNWT 2011, c.22]

15. Council approved Community Plan By-law No. 5007 on July 27, 2020 pursuant to Motion #0122-20. The Community Plan designates the subject property as Downtown—Central Residential. The proposed Special Care Facility, with a predominately residential use, is considered an infill project and is in keeping with the intentions of the land designation.

16. Further, the 2020 Community Plan identifies the 50+ years of age cohort as the fastest growing segment of the population and it is anticipated that the proposed facility will play a key role in ensuring that this demand is met.

17. The purpose of a Zoning By-law "is to regulate and control the use and development of land and buildings in a municipality in a manner that conforms with a community plan" [**TAB 9** - Section 12, *Community Planning and Development Act*]. It is the City's submission that Council's decision to approve the Permit conforms with the Community Plan and clearly indicates Council's intention to permit the proposed development on the subject property.

18. The Appellants ask the Board to find that council merely approved the conditionally permitted use and inappropriately delegated the ultimate decision on the application to the Development Officer. This strict interpretation of the bylaw is not supported when the bylaw is read broadly and in the entire context of the City's by-laws, plans, and policies. The City submits that Council, in approving the conditionally permitted use, considered the Permit application on its merits and merely left administrative matters to the Development Officer to finalize as part of the prescribed permitting process pursuant to Zoning By-law No. 4404.

## III. Delegation of Authority

19. The City submits that Council exercised its authority appropriately.

20. If the DAB determines that any part of Council's decision was a delegation of authority to the Development Officer, it is the City's submission that the Development Officer's decision was merely administrative in nature and as such a valid delegation.

21. In *Walsh v. Hamilton (City)* [2008] O.J. No. 2645 [**TAB 10**] the Ontario Superior Court of Justice held that administrative, non-discretionary decisions may be delegated.

> The delegation of an administrative action is one of the exceptions to the maxim against subdelegation, *delegatus non potest delegare* [at paragraph 22]

22. Once Council approved the Permit, the Development Officer was required to issue the Permit upon finalization of traffic concerns in accordance with City and accepted traffic industry standards, a regular and customary practice exercised by development officers.

23. It is the City's submission that the Development Officer was required to follow the criteria established in the Zoning By-law and apply accepted transportation standards to the Permit (Council Motion #0025-21 and #0026-21). If the Developer met the criteria established by the Zoning By-law and Council, then the Development Officer was required to issue the Permit. The Development Officer had no authority or discretion to require additional criteria outside of the Permit and Council-imposed conditions.

## IV. Natural Justice and Procedural Fairness

24. The City agrees that for public input to be meaningful, a municipal council must disclose information to be considered by it in coming to its decision.

25. As stated by the court in *Hastings Park Conservancy v. Vancouver (City), [2006] B.C.J. No. 1912* [**TAB 11**]*,* **"**it is necessary that interested members of the public have the opportunity to examine in advance of a public hearing not only the proposed bylaws but also reports and other documents that are material to the approval, amendment or rejection of the bylaws by local government".

26. The duty of fairness is dependant on the circumstances of each case. With respect to the current Permit, the City provided information regarding the principal terms of the Permit, including the technical studies, public comments, and development criteria.

27. Furthermore, members of the public, including the Appellants, were able to submit written comments and to actively present and participate in GPC and Council meetings where the Permit was discussed on January 25, 2021, February 1, 2021 and February 8, 2021.

28. Pursuant to Zoning By-law No. 4404, the Appellants were also provided the opportunity to appeal the Permit once the Notice of Decision was posted.

29. It is the City's submission that the Appellants have been provided with all information relevant to the Permit and have had numerous opportunities to voice concerns to Council and, as such, the City has not breached its duty of procedural fairness.

30. It is clear from Council's motions to approve the Permit that Council considered all the required factors outlined in Section 3.4 of Zoning By-law No. 4404.

## V. Notice of Decision

31. Upon approval of an Application for Development by Council, a notice of decision must be posted on site by an official of the City [section 3.9 of Zoning By-law No. 4404].

> An official of the City shall conspicuously post a notice of decision on the prescribed form, of an approved Application for a Development Permit, on the property for which the application has been approved

32. On April 16, 2021 the Notice of Decision was posted for the Permit and an appeal was filed.

33. The Notice of Decision was made available to the public and included all information pertinent to the Permit.

## VI. What remedies can the DAB order?

34. The remedies available to the DAB are outlined in Section 3.11 of Zoning By-law No. 4404.

35. The DAB may only reverse, confirm or vary the Permit and may impose conditions or limitations that it considers proper and desirable in the circumstances.

## D. REQUESTED FINDING

36. The City requests that the DAB dismiss the Appeal and confirm the Permit.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 19th day of May, 2021.

**THE MUNICIPAL CORPORATION OF THE CITY OF YELLOWKNIFE**

Per: Kerry Thistle
Kerry L. Thistle
Solicitor for the City of Yellowknife

**DOCUMENTS**

**THE MUNICIPAL CORPORATION OF THE CITY OF YELLOWKNIFE**
**SPEAKERS LIST**

1. Libby Macphail, BA Urban & Regional Planning
   Planner, Planning and Development
   City of Yellowknife

2. Kerry Thistle LLB
   Director, Economic Development & Strategy/City Solicitor
   City of Yellowknife

## DOCUMENTS

| | |
|---|---|
| TAB 1 | Council Procedures By-law No. 4975 – Section 114 and 117 |
| TAB 2 | GPC Report for January 25, 2021 |
| TAB 3 | GPC Report for February 1, 2021 |
| TAB 4 | *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, [1998] 1 RCS 27, [1998] SCJ No 2, [1998] ACS no 2 |
| TAB 5 | Section 4, *Cities, Towns & Villages Act*, SNWT 2003, c.22 |
| TAB 6 | Section 12(1) of the *Cities, Towns and Villages Act,* SNWT 2003, c.22 |
| TAB 7 | *Bayshore Shopping Centres Ltd. v. Nepean (Township)*, [1972] S.C.R. 755 |
| TAB 8 | Sections 3 & 4 of *Community Planning and Development Act*, SNWT 2011, c.22 |
| TAB 9 | *Section 12, Community Planning and Development Act S.N.W.T. 2011,c.22* |
| TAB 10 | *Walsh v. Hamilton (City)* [2008] O.J. No. 2645 |
| TAB 11 | *Hastings Park Conservancy v. Vancouver (City), [2006] B.C.J. No. 1912* |

(4) If there are an equal number of votes for and against a motion, the motion is defeated.

**Secret Ballot Prohibited**

112. No vote shall be taken in Council by ballot or by any other method of secret voting, and every vote so taken is of no effect.

**Errors in Good Faith**

113. Where a Member, immediately after casting his or her vote, states to the Presiding Officer that he or she has made an error in good faith, the matter may be resubmitted for a vote with a resolution of Council.

## PART 7 – COMMITTEES OF COUNCIL

**Establishment of Standing Committees**

114. (1) The Governance and Priorities Committee is hereby established.

(2) The Mayor shall chair the Governance and Priorities Committee. The Mayor shall be counted in the determination of quorum and has all the rights and privileges of the other committee members including, in accordance with section 107, the right to make motions and vote.

**Terms of Reference**

115. The terms of reference for the standing committees of Council shall be as prescribed in Schedule D attached to and forming part of this by-law.

**Quorum**

116. A quorum for all standing committees of Council shall be a majority of the Members who comprise the committee.

**Duties of Standing Committees**

117. (1) All committees of Council are advisory in nature.

(2) Committees have the responsibility to analyze all matters referred to them by Council or the City Manager and submit recommendations to Council on ways and means of addressing these matters.

CITY OF YELLOWKNIFE

# GOVERNANCE AND PRIORITIES COMMITTEE REPORT

**Monday, January 25, 2021 at 12:05 p.m.**

Report of a meeting held on Monday, January 25, 2021 at 12:05 p.m. via videoconference. The following Committee members were in attendance:

Chair: Mayor R. Alty,
Councillor N. Konge,
Councillor S. Morgan,
Councillor J. Morse,
Councillor C. Mufandaedza,
Councillor S. Payne,
Councillor R. Silverio,
Councillor S. Smith, and
Councillor R. Williams.

The following members of Administration staff were in attendance:

S. Bassi-Kellett,
E. Bussey,
D. M. Gillard,
C. Greencorn,
P. Grismer,
G. Littlefair,
K. Thistle,
G. White,
S. Woodward, and
S. Jovic.

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| Item | Description |
|---|---|
| 1. | (For Information Only)<br>There were no disclosures of pecuniary interest. |
| 2. | (For Information Only)<br>Committee heard a presentation from Mr. Daryl Dolynny, CEO of Avens; Thomas Milan, Project Manager; Kenny Ruptash, a representative of Nahanni Construction Ltd.; and Kelly Hayden, Board Member. They noted that the Avens Pavilion project started several years |

ago but was put on hold due to the lack of funding. They noted that they have received CMHC Seed Funding which allowed them to complete a Needs Study for the Avens Pavilion. They further noted that they received a letter of Intent from CHMC in July 2020 indicating that the GNWT funding will be available in November 2020. They applied for permitting in December 2020. They noted that 2021 will be a design and construction year and affordable housing will be available in 2022. They noted that the Needs Study told them that there is a significant lack of adequate, accessible and affordable housing available to NWT seniors and that subsidized (affordable) independent and supportive living units are in the highest need in the Northwest Territories. They further noted that Avens already offers a portion of the continuum of care for seniors, but it could offer more support to the community by providing independent living and supportive living. They noted that the Avens Pavilion project will seek to improve upon concerns and issues identified in the Needs Study.

(For Information Only)

3. Committee heard a presentation from Hermina Joldersma regarding considerations for approval of a Conditionally Permitted Use (Special Care Facility) at Avens (5710 50th Avenue) for a Seniors Independent & Supportive Living Facility. Ms. Joldersma noted that her main concern about the proposed development is vehicle access. Ms. Joldersma further noted that the drawing circulated for this development shows that the only vehicle access to the development will be via the alley. Ms. Joldersma stated that the alley is stretched beyond physical capacity by the vehicle and service traffic from the 24 unit Granite Condominium and that there is no way that the alley can accommodate more vehicles. Ms. Joldersma further stated that that the alley is too narrow, there is major flooding in the alley every spring and the intersection of the alley with Franklin Avenue is already unsafe and it will become exponentially more so if more vehicles are allowed to enter and exit via Franklin Avenue.

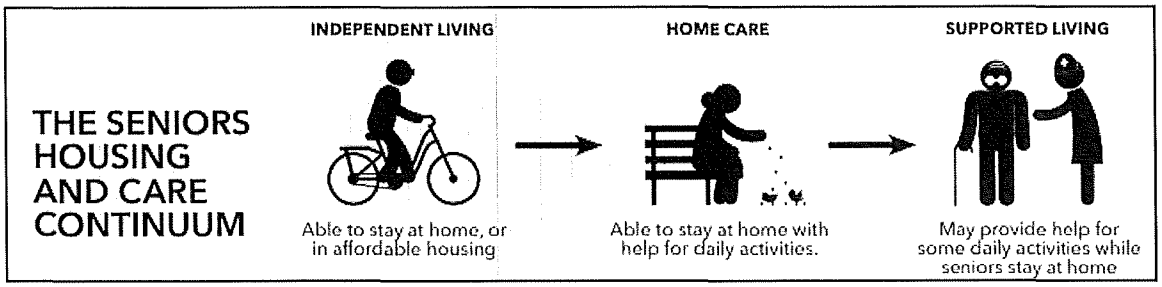
(For Information Only)

4. Committee accepted for information a memorandum regarding considerations for Approval of a Conditionally Permitted Use (Special Care Facility) at Avens (5710 50th Avenue) for a Seniors Independent & Supportive Living Facility.

Committee noted that on December 2, 2020, the City of Yellowknife (City) received an application for a Development Permit (PL-2020-0335) for a Conditionally Permitted Use (Special Care Facility) at Lot 43, Block 62, Plan 4252 (5710 50th Avenue).

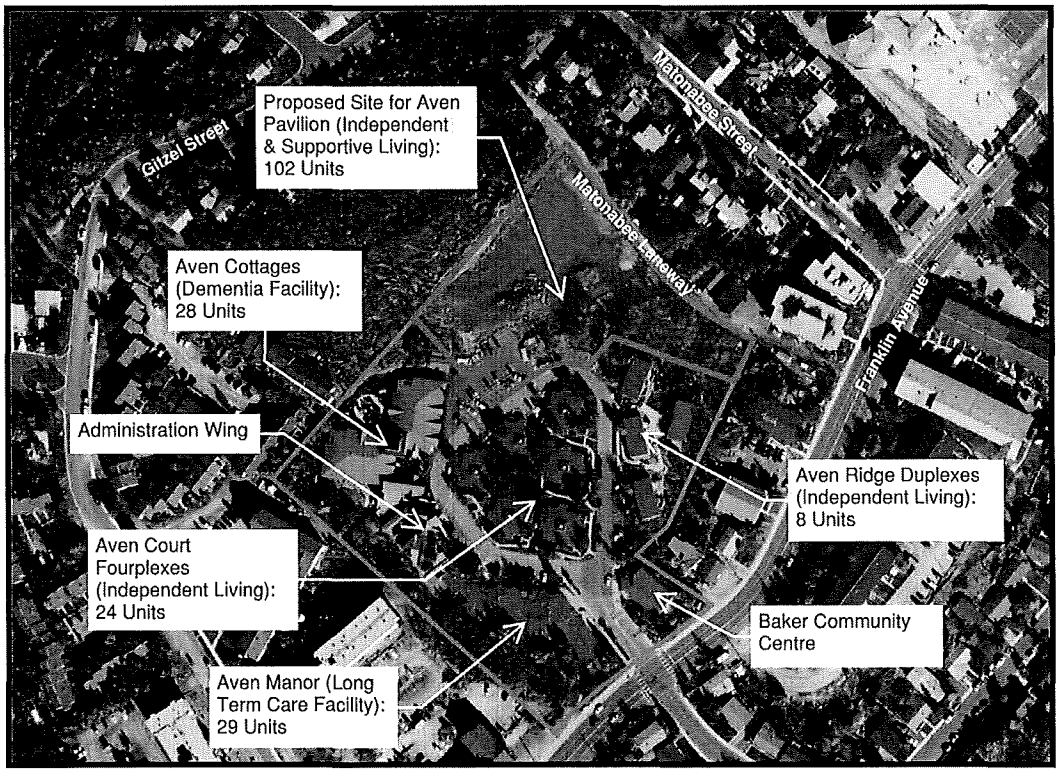
The proposed 102 unit Special Care Facility is a mix of independent housing and supportive living, intended to fill gaps in affordable seniors housing that exist in Yellowknife and the NWT more broadly. The proposed facility is funded by the Canada Mortgage and Housing Corporation, the Government of the Northwest Territories, as well as by Avens directly. The facility is designed to transition to more acute levels of care as seniors age. The self-contained bedroom suites can be altered to become supportive living units or seniors can easily access living and care scenarios in other Avens facilities, as demonstrated in Figure #1 below.

Figure #1: The different levels of seniors housing and care scenarios
(Source: Avens 2019 Annual Report).




Transitional housing units that can be adapted to meet senior's needs is in alignment with "Aging-in-Place" principles—which is defined as when health and social supports are in place in order for seniors to live safely and independently in the community for as long as they wish and are able to. Figure #2 below provides a point of reference of the development.

Figure #2: Subject Property




Committee noted that Council's policies, resolutions or goals include:

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|---|---|
| Council Goal #4 | Driving strategic land development and growth opportunities. |
| Objective #4.1 | Diversify development options. |
| Objective #4.2 | Promote development across the City. |

Committee noted that applicable legislation, by-laws, studies or plans include:

1. *Community Planning and Development Act* S.N.W.T. 2011, c.22;
2. Community Plan By-law (2020) No. 5007;
3. Zoning By-law No. 4404, as amended.

Committee noted the following considerations:

Legislative

The City is granted the authority to control land uses by way of a Zoning By-law under Section 12 of the *Community Planning and Development Act*.

2020 Community Plan

The subject land is designated in the 2020 Community Plan as Downtown—Central Residential, which is identified as a transition area between the high-density downtown core and other area designations like the Recreation Hub and Old Town. The area is lower density residential, but due to easy access to services located in the downtown, it is suitable for higher density residential through infill. The proposed Special Care Facility, with a predominately residential use, is considered an infill project and the proposed development is in keeping with the intentions of the land designation.

The 2020 Community Plan identifies the 50+ years of age cohort as the fastest growing segment of the population and this group is choosing to stay in the North instead of retiring to southern provinces, as previous generations have chosen. As this population continues to age, they will be looking to transition to smaller housing units and supportive living scenarios within Yellowknife. The proposed facility will play a key role in ensuring that this demand is met and that seniors housing is adequate, affordable, and suitable.

Zoning By-law No. 4404

Section 2.4(1)(a) of the Zoning By-law states that Council shall:

*"Make decisions and state any terms and conditions for development permit applications for those uses listed as Conditionally Permitted Uses."*

Zones within the Zoning By-law list the land uses that are permitted on an applicable parcel of land. In addition, zones may also list a series of Conditionally Permitted Uses (discretionary uses) that may be permitted by Council after due consideration is given to the impact of the use upon neighbouring parcels of land and other lands in the City.

The subject property is zoned Residential—Medium Density (R3). The purpose of the zone is to provide areas for medium density residential development with a mixture of residential buildings. The surrounding area includes multi-family and multi-attached dwellings, single detached dwellings, and parks and natural space. The proposed Independent/Supportive Living Facility is considered a "Special Care Facility" in the Zoning By-law as it provides supervisory, nursing, and home-making services to occupants. The level of care ranges from independent living with each unit having a washroom and kitchen area to supportive living where assistance is provided for daily activities such as housekeeping, meals in the cafeteria or nursing care.

Section 3.4 (3)(a) of the Zoning By-law states that, in reviewing an application for a Development Permit for a Conditionally Permitted Use, Council shall have regard to the circumstances and merits of the application, including, but not limited to:
*"i) The impact on properties in the vicinity of such factors as airborne emissions, odors, smoke, traffic and noise, sun shadow and wind effects;*
*ii) The design, character and appearance of the proposed development, and in particular whether it is compatible with and complementary to the surrounding properties, and;*
*iii) the treatment provided to site considerations including landscaping, screening, parking and loading, open spaces, lighting and signs."*

Traffic and Site Access

The proposed development plan demonstrates a significant shift towards the use of the "Matonabee Laneway" as a main point of access for parking and delivery rather than the 57th Street "Avens campus loop". Administration has identified operational concerns with the proposed site access. Delivery trucks and garbage trucks will have difficulty circulating in the area under current conditions. As well, the "Matonabee Laneway" does not meet the emergency access standards set by the National Building Code. Laneway mitigation measures, such as widening, paving and directional signage may not be adequate to address these operational concerns. Due to this, Administration is currently scoping an alternative where access to the site is created through the introduction of a new roadway from Gitzel Street that aligns with Albatross Court.

The applicant has submitted a draft Traffic Impact Study that has been preliminarily reviewed by Administration. A finalized study and site circulation plan is required before the development permit is approved. The results of the final Traffic Impact Study will be utilized to ensure mitigation measures are identified to any adverse impacts to traffic flow.

Development Permit Details

As per Section 3.4 (2) & (4) of the Zoning By-law, Council can discuss and recommend conditions when approving applications for Conditionally Permitted Uses, and may establish a more stringent standard for a Conditionally Permitted Use when deemed necessary to do so. The chart below provides a brief summary of the development's alignment with the remaining applicable factors outlined in Section 3.4 (3)(a):

| Consideration | Alignment |
|---|---|
| Parking and Loading | Parking and loading requirements have been met, with 88 parking stalls provided, and 2 loading spaces provided. |
| Sun Shadow Effects | The applicant has submitted a Sun Shadow Study, which demonstrates minor shadowing impacts in the spring, summer and fall months during the evening hours. The proposed structure meets height and rear & side yard setback requirements for the R3 Zone. |

| | |
|---|---|
| Design, Character & Appearance | The building design and appearance is residential in nature, and utilizes various siding colours and materials, gabled roof types, double-hung windows and residential doors. |
| Landscaping | All residual area on the lot is required to be landscaped in accordance with Section 7.1 (2) of the Zoning By-law. The developer has submitted a landscaping plan that demonstrates compliance with this requirement. |
| Lighting | The applicant has demonstrated a commitment that lighting will be arranged so that no direct rays or light are projected to adjacent properties in accordance with Section 7.1 and 9.1 of the Zoning By-law. |

Any conditions recommended by Council will be applied to the development permit. Finalized plans and studies will be approved by the Development Officer as part of the last steps of the development permit process.

Neighbourhood Notification

The *Community Planning and Development Act* and Section 3.7 (2) of the Zoning By-law specify that all property owners within 30 metres of land under consideration for a Conditionally Permitted Use must be provided notice.

Owners and lessees of land within 30 metres of the subject property received a letter prepared by staff advising of the proposed facility, a detailed site plan, building elevations, and the results of a sun shadow study. The owners and lessees in the neighbourhood requested additional time to consider the application and the applicants have requested more time to engage and provide relevant documentation directly.

A community session was held by the applicant regarding the development on January 19, 2021 at 7:30 p.m. The session was well attended by nearby neighbours of the site. Administration attended to provide more details on the conditionally permitted use development permit process, and the Avens project team discussed the proposed expansion plans and studies in detail, as well as answered questions. The deadline for comment has been extended from January 13, 2021 until January 28, 2021 at 9:00 a.m. The chart below provides a summary of the comments that were submitted and received by 4:30 p.m. January 13, 2021.

| Summary of Public Comments | Staff Response |
|---|---|
| Traffic impacts due to use of "Matonabee Laneway" as primary access | A draft Traffic Impact Study was submitted by the Developer as a requirement of the development permitting process. Administration has provided a response to this study in order to ensure off-site vehicular circulation is considered, potential points of conflict are identified, and mitigations are proposed. A finalized study is a requirement of the |

| | |
|---|---|
| | development permit process. |
| Concerns about laneway condition due to inadequate drainage | A final Traffic Impact Study will give consideration for paving the laneway to accommodate the increased trip generation, at cost to the developer. Paving will also require that drainage along the laneway is adequate so as to not create standing water. |
| Classification of proposed development as "Special Care Facility" is inappropriate | The proposed development can be classified as a "Special Care Facility" as the facility contains supportive living and independent living scenarios, dependent on Senior's needs. Each independent living unit can be transitioned to a supportive living unit, to better adapt to the demands of the 50+ cohort. As seniors age, they can access higher levels of care without having to move from their self-contained unit. |

Committee noted that this matter will be discussed at the next Governance and Priorities Committee meeting on February 1, 2021.

(For Information Only)

5. Councillor Silverio left the meeting at 1:29 p.m.

(For Information Only)

6. Committee recessed at 1:30 p.m. and reconvened at 1:40 p.m.

7. **Committee read a memorandum regarding whether to enter into a Memorandum of Understanding with the Mineral Industry, as represented by the NWT and Nunavut Chamber of Mines.**

Committee noted that the City of Yellowknife Economic Development Strategy 2020-2024 was adopted for information on April 27, 2020. The Strategy recognized the mineral industry as a key economic sector and recommended that the City of Yellowknife recognize the importance of the industry to the economy of the Government of the Northwest Territories and Yellowknife, feature the mineral industry as a key sector in investment attraction activities, work to capture for Yellowknife more of the benefits associated with the mineral industry in the NWT and Nunavut, and advocate for improvements in the investment climate for mineral exploration and development in the Northwest Territories. Entering into a Memorandum of Understanding with the Mineral Industry, as represented by the NWT and NU Chamber of Mines, signifies the City's commitment to work with the Mineral Industry on key areas of mutual interest.

Committee noted that Council's policies, resolutions and goals include:
GOAL #1: Growing and diversifying our economy

| | |
|---|---|
| Objective 1.3 | Refresh and implement a Yellowknife Economic Development Strategy. |
| Council Motion #0064-20 | That Council adopt for information the City of Yellowknife Economic Development Strategy 2020-2024. |

Committee noted that applicable legislation, by-laws, studies or plans include:
Economic Development Strategy 2020-2024.

Committee noted the following consideration:
Partnerships
The City's Economic Development Strategy emphasized the importance of forming a partnership with the Mineral Industry to promote further development of the industry. The Memorandum of Understanding provides a roadmap for how the City and the Mineral Industry will work together to work on common areas of interest.

Committee noted that the Economic Development Strategy 2020-2024 recognized that the mineral industry generates significant economic activity related to exploration, remediation, purchase of products and services, construction, and employee spending. As such, it is imperative that the City work with the Mineral Industry to promote further development of the mineral industry into the future.

Entering into the Memorandum of Understanding will contribute to establishing a cooperative relationship for the purpose of proactively promoting the economy of the city and the region and seeking opportunities to encourage and enhance economic development.

**Committee recommends that Council direct the Mayor and City Administrator to enter into a Memorandum of Understanding with the Mineral Industry, as represented by the NWT and Nunavut Chamber of Mines.**

**MOVE APPROVAL**

8. **Committee read a memorandum regarding whether to approve a recommendation from the Fire Hall Study in order to address the adequacy of Fire Station No. 1 in supporting Yellowknife Fire Division (YKFD) operations.**

Committee noted that YKFD operations are now beyond the current capacity of the existing Fire Hall. Today's staff complement has doubled since the Fire Hall first opened in 1990. Yellowknife's population has seen steady growth beyond the approximately 15,000 it was at that time. Commercial and residential infrastructure have also expanded significantly over this period. These increases have resulted in more calls for service for YKFD and an expanded area of coverage. Responding to a greater call volume over a larger area requires increased capacity; the existing Fire Hall cannot properly support a broader scope for the organization or the equipment needed to provide for increased capacity.

The condition of the existing Fire Hall and its ability to support building functions also need to be addressed so YKFD can effectively respond to calls for service. These factors can affect YKFD response times in meeting performance benchmarks in the National Fire Protection Association (NFPA) 1710 Standard governing the organization and deployment of fire suppression, emergency medical response and special operations.

There are also NFPA recommendations for equipment and materials storage, decontamination, occupational health and safety (OHS), and health and wellness that need to be addressed in the approved Fire Hall renovation/expansion project.

A Fire Hall expansion in 2011 provided improvements to the facility, including heating and ventilation. The Public Safety Communications Centre (PSCC) was incorporated into the Fire Hall in 2015 and this added pressures on the facility's capacity to effectively support all operations. Adding the PSCC function and staffing increases in career firefighters in 2017/2018 absorbed the benefits from the 2011 renovation project.

Generally, the configuration of the Fire Hall can support YKFD meeting performance benchmarks for response times on many emergency calls, but does not support OHS needs, functional areas for YKFD personnel; as well it does not meet storage and decontamination needs, nor is there adequate space for vehicles and apparatus. Currently the Fire Hall includes these building functional areas:

1. Building systems: Mechanical and electrical systems
2. Apparatus bays: Staging of firefighting and emergency medical response vehicles
3. Apparatus bay support and vehicle maintenance: Industrial spaces for cleaning, maintaining, and storing vehicles and other firefighting equipment
4. Administrative and training areas: Offices, PSCC facilities, and training/conference room
5. Residential areas: Dormitory rooms, day room/kitchen, and residential support areas (e.g., bathrooms, fitness spaces)

Overall OHS requirements are guided by the WSCC Firefighter Code of Practice (NT and NU) and NFPA Standards on uniform code requirements, firefighter health and safety, and infection control. Furthermore, fire apparatus is larger, and there is now more firefighting equipment in the Fire Hall. The needs for storage, decontamination and OHS, as well as compliance with the adopted NFPA 1710 Standard, are important considerations in planning the design for a Fire Hall improvement project.

In 2020, the City of Yellowknife retained Dillon Consulting to conduct a Fire Hall Study to inform decision-making on the most feasible option for improving or replacing the Fire Hall. Existing facility gaps and future facility/fire service needs were considered as a part of the Study's analysis and research in developing four options, which were:

1A. Retain current structure, undertake renovation and expansion project, or
1B. Demolish existing building and replace with new construction, and

2. Consider Satellite Fire Hall, and/or
3. Consider third Fire Hall in the future

After analyzing the Fire Hall Study's options and consulting with YKFD management, Administration is recommending Option A (renovation/addition) as being the most practical solution to address the facility's spatial and functional requirements. This recommendation considered YKFD's Level of Service commitments, its capacity, and current response times to emergency calls. Option A was determined to be the most fiscally responsible approach for addressing the facility's needs and supporting YKFD being able to maintain an acceptable level of community fire protection.

Administration selected Option 1A over Option 1B as the first Fire Hall improvement initiative. The current Fire Hall has been able to support adequate response times to a majority of community risks, encompassing the downtown core, Kam Lake industrial area, and the highest concentrations of residential development. But the building's condition is substandard and any future development in the community which expands the fire protection coverage area may jeopardize YKFD's ability to maintain response times to an acceptable level. If this occurs, consideration can be given to whether Options 2 and/or 3 are required to address a reduction in YKFD's ability to meet acceptable emergency response benchmarks. The following Decision Matrix illustrates the ratings from this analysis.

**DECISION MATRIX**

(1=low / 5=high)

| | OPTION | DESCRIPTION | CAPITAL COSTS | O&M COSTS | COST | ADDRESS SPATIAL NEEDS - STAFF | ADDRESS SPATIAL NEEDS– VEHICLES, APPARATUS | ADDRESS SPATIAL NEEDS - PSCC | ADDRESS OHS PRESSURES | OPERATIONAL FEASIBILITY | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1A | RENOVATION/ EXPANSION | Address current building shortfalls plus expand | $3.2M | | 4 | 5 | 5 | 5 | 5 | 5 (capital plan) | 29 |
| 1B | RECONSTRUCTION | Demolish and rebuild – need interim space | $6.7M | Cost of Interim space | 2 | 5 | 5 | 5 | 5 | 2 (need interim space during demo/ construction) | 24 |
| 2 | YZF AIRPORT BLDG | Seek small space for YKFD at YZF; Still need to address FH deficiencies | $225K Plus FH deficiencies | | 4 | 4 | 2 | 2 | 1 | 2 (GNWT decision – airport considerations) | 15 |
| 3 | 3RD FIRE HALL | New firehall in Niven area. Still need to address FH deficiencies | $2.8M Plus FH deficiencies | Staffing implications | 2 | 5 | 5 | 5 | 3 (new will but existing won't) | 2 (staffing implications) | 22 |

Committee noted that Council's policies resolutions and goals include:
GOAL #2: Delivering efficient and accountable government.
Objective #2.3 Confirm clear service level standards for key City programs and services.

During 2021 Budget deliberations Committee requested that $185,000 of the $251,000 for the Fire Hall Renovations/Showers be conditional on release of the Fire Hall Study.

Committee noted that applicable legislation, by-laws, studies or plans include:
1. City of Yellowknife Fire Hall Building Study, July 2020;

2. City of Yellowknife YKFD Level of Service, September 2020; and
3. City of Yellowknife Fire Division Master Plan, October 2016.

Committee noted the following considerations:

Budget

According to the Fire Hall Study, the cost to renovate and expand the existing facility, considering adopted NFPA Standards, is projected to be $3,200,000. This Class D estimate will be included in Budget 2022 for planning purposes, but further work is still needed to refine the requirements and costs prior to work on the project commencing. The scope of the project will be considered further to include essential components including a fire training building (a smoke house), as well as a back up generator to ensure back-up emergency power to the facility.

This refinement is normally accomplished through a detailed facility design, which is usually budgeted at an expected cost of approximately 15% of the Class D estimate, which in this case is $480,000. Therefore, Administration will include a design budgetary allotment in Budget 2022 for this project. Budget 2021 includes a conditional allocation of $185,000 for Fire Hall renovations based upon release of the Fire Hall Study. These funds can be re-directed towards the design work in Budget 2022.

Consultation

In determining the preferred option from the Fire Hall Study, Public Safety worked with YKFD Chief Officers and staff from Public Works & Engineering and Planning & Development.

Legislative

The activities of the City of Yellowknife are guided by the *Cities, Towns and Villages Act* (*CTV* Act) of the Northwest Territories which grants legislative powers to municipal governments. The City of Yellowknife Emergency Response and Fire Protection Services By-law No. 4502, as amended, guides YKFD service delivery.

Public Safety Communications Center

The current PSCC facility has no provision for basic staff amenities, and additional electronic equipment now occupies space. The PSCC space is inadequate for the Supervisor and on-duty Operator(s). Enhancement of a space within the Fire Hall needs to accommodate PSCC, if that function is to remain within the Fire Hall.

Committee noted that the existing facility and building systems are not adequate to meet YKFD requirements in providing the level of emergency services expected by the community. A Fire Hall Study was needed to inform deliberations to determine whether re-design or replacement of the existing structure is the most feasible option based upon established Levels of Service and acceptable response times.

(For Information Only)

9. Councillor Williams left the meeting at 2:18 p.m.

(For Information Only)

10. Committee continued its discussion regarding whether to approve a recommendation from the Fire Hall Study in order to address the adequacy of Fire Station No. 1 in supporting Yellowknife Fire Division (YKFD) operations.

**Committee recommends:**

1. **That Council accept the Fire Hall Study for Information.**
2. **That Council approve Option 1A (renovation/expansion of existing Fire Hall) from the Fire Hall Study as the most feasible for addressing requirements to improve the facility's condition and its building functions.**
3. **That Council direct Administration to bring forward a capital request to implement a Fire Hall renovation/expansion project as part of Budget 2022.**

**MOVE APPROVAL**

11. The meeting adjourned at 2:25 p.m.

CITY OF YELLOWKNIFE

# GOVERNANCE AND PRIORITIES COMMITTEE REPORT

**Monday, February 1, 2021 at 12:05 p.m.**

Report of a meeting held on Monday, February 1, 2021 at 12:05 p.m. via videoconference. The following Committee members were in attendance:

Chair: Mayor R. Alty,
Councillor N. Konge,
Councillor S. Morgan,
Councillor J. Morse,
Councillor C. Mufandaedza,
Councillor S. Payne,
Councillor R. Silverio,
Councillor S. Smith, and
Councillor R. Williams.

The following members of Administration staff were in attendance:

S. Bassi-Kellett,
D. M. Gillard,
C. Greencorn,
J. Hunt-Poitras
G. Littlefair,
R. Lok,
K. Thistle,
G. White,
S. Woodward, and
S. Jovic.

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| Item | Description |
|---|---|
| | (For Information Only) |
| 1. | There were no disclosures of pecuniary interest. |
| | (For Information Only) |
| 2. | Committee heard a presentation from Colin Baile, an adjacent property owner, regarding an application for a Development Permit for a Conditionally Permitted Use (Special Care Facility) at Avens (5710 50th Avenue) for a Seniors Independent & Supportive Living Facility |

and Council's jurisdiction and responsibilities. Mr. Baile noted that adjacent landowners have several significant concerns about the proposed development and the profound negative impact it will have on the use, enjoyment and value of the neighbourhood residential properties. Mr. Baile further noted that they are in support of Avens' development of its campus; however he noted the following concerns with application deficiencies and negative impacts to the neighbouring properties: Non-compliance with Zoning By-law No. 4404; Safety and undue traffic volume increase to Matonabee Street and Matonabee Street Alley; Negative impact caused by shadow; Drainage of surface runoff water; Light and noise pollution; Adjacent properties privacy; and Impact on market value of adjacent properties.

(For Information Only)

3. Committee heard a presentation from Marilyn Malakoe, an adjacent property owner, regarding an application for a Development Permit for a Conditionally Permitted Use (Special Care Facility) at Avens (5710 50th Avenue) for a Seniors Independent & Supportive Living Facility. Ms. Malakoe noted that she supports the goals of Avens, a community for seniors. Ms. Malakoe further noted she supported the 2013 Avens Pavilion, a 60 bed facility. Ms. Malakoe stated that the current design for the 2021 Avens Pavilion appears to have sacrificed the safety and well-being of seniors and citizens who use the surrounding neighbourhood. Ms. Malakoe further stated that the decision to have nearly all of the vehicle access to the Avens Pavilion through the Matonabee Street alleyway creates a danger of injury or loss of life. Ms. Malakoe advised that the alleyway will not accommodate emergency vehicles or the level of traffic or parking for the 102 independent seniors; as such it should not be the main access to the Pavilion. Ms. Malakoe further advised that the 2021 Avens Pavilion should be redesigned and located near the other buildings of the campus. Ms. Malakoe also stated that both the front and the rear of the 2021 Avens Pavilion should be accessed exclusively from the main internal road of the Avens campus.

(For Information Only)

4. Committee heard a presentation from Judy Murdock, an adjacent property owner, regarding an application for a Development Permit for a Conditionally Permitted Use (Special Care Facility) at Avens (5710 50th Avenue) for a Seniors Independent & Supportive Living Facility. Ms. Murdock noted that she supports the Avens mission and expansion of its campus. Ms. Murdock noted concerns with excessive and dangerous usage of a one-lane alley and the drainage of surface runoff water in her back yard.

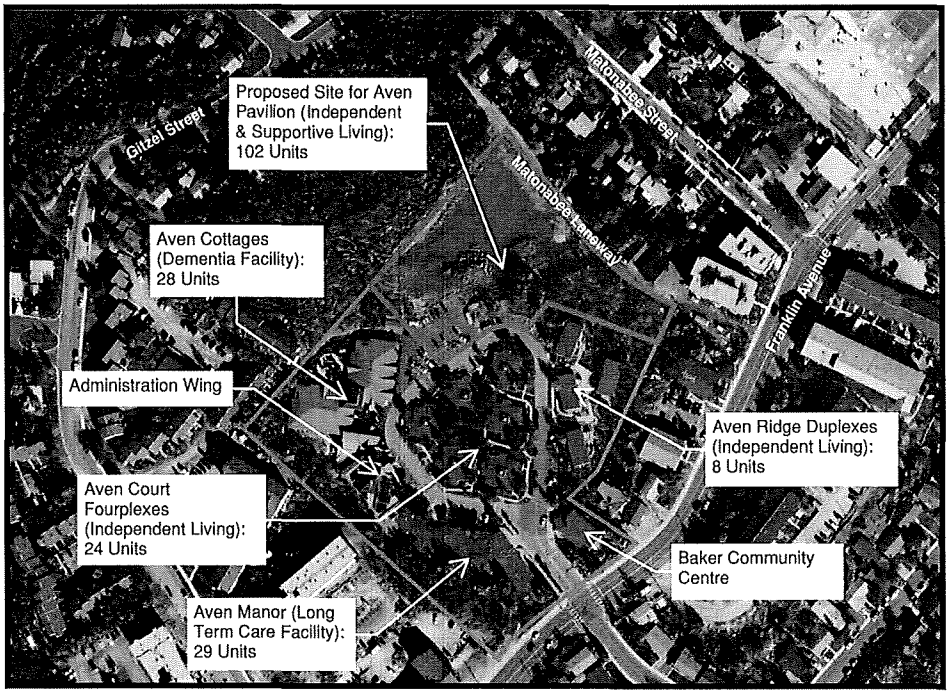
5. Mr. Daryl Dolynny, CEO of Avens; Thomas Milan, Project Manager; Kenny Ruptash, a representative of Nahanni Construction Ltd.; and Kelly Hayden, Board Member were in attendance to answer questions.

6. **Committee read a memorandum regarding whether to approve a Conditionally Permitted Use (Special Care Facility) at Avens (5710 50th Avenue) for a Seniors Independent & Supportive Living Facility.**

Committee noted that on December 2, 2020, the City of Yellowknife (City) received an application for a Development Permit (PL-2020-0335) for a Conditionally Permitted Use (Special Care Facility) at Lot 43, Block 62, Plan 4252 (5710 50th Avenue).

The proposed 102 unit Special Care Facility is a mix of independent housing and supportive living, intended to fill gaps in affordable seniors housing that exist in Yellowknife and the NWT more broadly. The proposed facility is funded by the Canada Mortgage and Housing Corporation, the Government of the Northwest Territories, as well as by Avens directly. The facility is designed to transition to more acute levels of care as seniors age. The self-contained bedroom suites can be altered to become supportive living units or seniors can easily access living and care scenarios in other Avens facilities.

Transitional housing units that can be adapted to meet senior's needs is in alignment with "Aging-in-Place" principles—which is defined as when health and social supports are in place in order for seniors to live safely and independently in the community for as long as they wish and are able to. Figure #1 below provides a point of reference.




Committee noted that Council's policies, resolutions or goals include:

| | |
|---|---|
| Council Goal #4 | Driving strategic land development and growth opportunities. |
| Objective #4.1 | Diversify development options. |
| Objective #4.2 | Promote development across the City. |

Committee noted that applicable legislation, by-laws, studies or plans include:

1. *Community Planning and Development Act* S.N.W.T. 2011, c.22;
2. Community Plan By-law (2020) No. 5007;
3. Zoning By-law No. 4404, as amended; and
4. Land Administration Bylaw No. 4596, as amended.

Committee noted the following considerations:

Legislative

The City is granted the authority to control land uses by way of a Zoning By-law under Section 12 of the *Community Planning and Development Act*.

2020 Community Plan

The subject land is designated in the 2020 Community Plan as Downtown—Central Residential, which is identified as a transition area between the high-density downtown core and other area designations like the Recreation Hub and Old Town. The area is lower density residential, but due to easy access to services located in the downtown, it is suitable for higher density residential through infill. The proposed Special Care Facility, with a predominately residential use, is considered an infill project and the proposed development is in keeping with the intentions of the land designation.

The 2020 Community Plan identifies the 50+ years of age cohort as the fastest growing segment of the population and this group is choosing to stay in the North instead of retiring to southern provinces, as previous generations have chosen. As this population continues to age, they will be looking to transition to smaller housing units and supportive living scenarios within Yellowknife. The proposed facility will play a key role in ensuring that this demand is met and that seniors housing is adequate, affordable, and suitable.

Zoning By-law No. 4404

Section 2.4(1)(a) of the Zoning By-law states that Council shall:
*"Make decisions and state any terms and conditions for development permit applications for those uses listed as Conditionally Permitted Uses."*

Zones within the Zoning By-law list the land uses that are permitted on an applicable parcel of land. In addition, zones may also list a series of Conditionally Permitted Uses (discretionary uses) that may be permitted by Council after due consideration is given to the impact of the use upon neighbouring parcels of land and other lands in the City.

The subject property is zoned Residential—Medium Density (R3). The purpose of the zone is to provide areas for medium density residential development with a mixture of residential buildings. The surrounding area includes multi-family and multi-attached dwellings, single detached dwellings, and parks and natural space. The proposed Independent/Supportive Living Facility is considered a "Special Care Facility" in the Zoning By-law as it provides supervisory, nursing, and home-making services to occupants. The level of care ranges from independent living with each unit having a washroom and kitchen area to supportive living where assistance is provided for daily activities such as housekeeping, meals in the cafeteria or nursing care.

Section 3.4 (3)(a) of the Zoning By-law states that, in reviewing an application for a Development Permit for a Conditionally Permitted Use, Council shall have regard to the circumstances and merits of the application, including, but not limited to:

*"i) The impact on properties in the vicinity of such factors as airborne emissions, odors, smoke, traffic and noise, sun shadow and wind effects;*
*ii) The design, character and appearance of the proposed development, and in particular whether it is compatible with and complementary to the surrounding properties, and;*
*iii) The treatment provided to site considerations including landscaping, screening, parking and loading, open spaces, lighting and signs."*

Traffic and Site Access

The proposed development plan demonstrates a significant shift towards the use of the "Matonabee Laneway" as a main point of access for parking and delivery rather than the 57th Street "Avens campus loop". Administration has identified operational concerns with the proposed site access. Delivery trucks and garbage trucks will have difficulty circulating in the area under current conditions. As well, the "Matonabee Laneway" does not meet the emergency access standards set by the National Building Code. Administration is working with the developer to identify an option that ensures access meets City Standards and negative impacts on neighbouring properties created by traffic from the development is mitigated.

Development Permit Details

As per Section 3.4 (2) & (4) of the Zoning By-law, Council can discuss and recommend conditions when approving applications for Conditionally Permitted Uses, and may establish a more stringent standard for a Conditionally Permitted Use when deemed necessary to do so. The chart below provides a brief summary of the development's alignment with the remaining applicable factors outlined in Section 3.4 (3)(a):

| Consideration | Alignment |
|---|---|
| Parking and Loading | Parking and loading requirements have been met. Of the 88 total parking stalls provided, 71 parking stalls will be built new, and 17 stalls will be existing. 2 loading spaces are provided. |
| Sun Shadow Effects | The applicant has submitted a Sun Shadow Study, which demonstrates minor shadowing impacts in the spring, summer and fall months during the evening hours. The proposed structure meets height and rear & side yard setback requirements for the R3 Zone. |
| Design, Character & Appearance | The building design and appearance is residential in nature, and utilizes various siding colours and materials, gabled roof types, double-hung windows and residential doors. |
| Landscaping | All residual area on the lot is required to be landscaped in accordance with Section 7.1 (2) of the Zoning By-law. The developer has submitted a landscaping plan that demonstrates compliance with this requirement. |

| | |
|---|---|
| | |
| Lighting | The applicant has demonstrated a commitment that lighting will be arranged so that no direct rays or light are projected to adjacent properties in accordance with Section 7.1 and 9.1 of the Zoning By-law. |

Any conditions recommended by Council will be applied to the development permit. Finalized plans and studies will be approved by the Development Officer as part of the last steps of the development permit process.

Neighbourhood Notification

The *Community Planning and Development Act* and Section 3.7 (2) of the Zoning By-law specify that all property owners within 30 metres of land under consideration for a Conditionally Permitted Use must be provided notice.

Owners and lessees of land within 30 metres of the subject property received a letter prepared by staff advising of the proposed facility, a detailed site plan, building elevations, and the results of a sun shadow study. The owners and lessees in the neighbourhood requested additional time to consider the application and the applicants have requested more time to engage and provide relevant documentation directly.

A community session was held by the applicant regarding the development on January 19, 2021 at 7:30 p.m. The session was well attended by nearby neighbours of the site. Administration attended to provide more details on the conditionally permitted use development permit process, and the Avens project team discussed the proposed expansion plans and studies in detail, as well as answered questions. The deadline for comment has been extended from January 13, 2021 until January 28, 2021 at 9:00 a.m. The chart below provides a summary of the comments that were submitted and received by the deadline.

| Summary of Public Comments | Staff Response |
|---|---|
| Traffic impacts due to use of "Matonabee Laneway" as primary access | A draft Traffic Impact Study was submitted by the Developer as a requirement of the development permitting process. Administration has provided a response to this study in order to ensure off-site vehicular circulation is considered, potential points of conflict are identified, and mitigations are proposed. A finalized study is a requirement of the development permit process. |
| Concerns about laneway condition due to inadequate drainage | A final Traffic Impact Study will give consideration for paving the laneway to accommodate the increased trip generation, at cost to the developer. Paving will also require that drainage along the laneway is adequate so as to not create standing water. |
| Classification of proposed development as "Special Care Facility" is inappropriate | The proposed development can be classified as a "Special Care Facility" as the facility contains supportive living and independent living scenarios, dependent on Senior's needs. Each independent living unit can be transitioned to a supportive living unit, to better adapt to the demands of the 50+ cohort. As seniors age, they can access higher levels of care without having to move from their self-contained unit. |
| Concerns that the Pavilion does not meet Density requirements for the R3 Zone | The City has received a proposed subdivision from the applicant that adjusts the interior lot line to accommodate the development. Approval of the subdivision by the GNWT will be a condition of the development permit. |
| Privacy and Noise Concerns | The proposed structure meets height and rear & side yard setback requirements for the R3 Zone. The Noise Bylaw controls noise within the City of Yellowknife, and specifies quiet hours between the hours of 11:00 pm to 7:00 am. |

Committee noted that pursuant to the Community Plan, the proposed infill development is suitable for the Downtown—Central Residential Designation and will play a key role in ensuring the 50+ age group has housing that is adequate, affordable, and suitable into the future. The proposed Special Care Facility supports Aging-in-Place principles by ensuring that as occupants age, their needs will be met. The Zoning By-law allows for a Special Care

Facility as a Conditionally Permitted use in the Residential Medium Density (R3) Zone. Administration will work with the developer during the remainder of the development permit process to ensure access to the proposed development meets City standards and traffic impacts are mitigated.

(For Information Only)

7. Councillor Silverio left the meeting at 1:12 p.m.

(For Information Only)

8. Committee continued its discussion regarding a memorandum regarding whether to approve a Conditionally Permitted Use (Special Care Facility) at Avens (5710 50th Avenue) for a Seniors Independent & Supportive Living Facility.

(For Information Only)

9. Committee recessed at 1:35 p.m. and reconvened at 1:45 p.m.

(For Information Only)

10. Committee continued its discussion regarding a memorandum regarding whether to approve a Conditionally Permitted Use (Special Care Facility) at Avens (5710 50th Avenue) for a Seniors Independent & Supportive Living Facility. Committee noted that Administration has identified operational concerns with the proposed site access and is working with the developer to identify an option that ensures that the access meets City Standards and mitigates any negative impact on neighbouring properties that may be caused by traffic from the development.

**Committee recommends that Council approve the Conditionally Permitted Use (Special Care Facility) at Lots 43 and 44, Block 62, Plan 4252 (5710 50th Avenue).**

**MOVE APPROVAL**

11. **Committee read a memorandum regarding whether to select properties to auction for tax arrears, when to hold the auction, and what minimum price to establish for each property.**

Committee noted that the *Property Assessment and Taxation Act (PATA)* states that properties on the Tax Arrears List may be offered for sale at a public auction, and that the auction date and minimum sale prices must be set by Council.

Council Motions #0091-00, #0039-02, and #0161-02 established the City's Tax Auction policy, which further stipulates that the City will sell property at public auction when taxes are two years in arrears and if auctioning maximizes the amount of taxes the City is able to collect, and that the City will bid the minimum price on property offered at a tax auction if the property remains unsold after a previous auction.

When property taxes are in arrears, the assessed owners of these properties are notified of the balance of taxes owing on the Interim Tax Notices sent each January, the Final Tax Notices sent each June, and Statements of Account sent throughout the year.

Based on the *PATA* provisions and City policy, properties with tax arrears for the 2019 taxation year are now subject to auction.

The City followed the notification procedures specified in *PATA* to ensure assessed owners of these properties are advised of the arrears status and tax sale provisions by:

- Posting the 2019 tax arrears list at City Hall on March 31, 2020;
- Sending a registered letter notifying the assessed owner(s) of the arrears and tax sale provisions on April 28, 2020;
- Posting the tax arrears list at City Hall, YKCA, Multiplex, Fieldhouse and Pool on May 30, 2020;
- Publishing the tax arrears list in the Yellowknifer on July 24, 2020; and
- Notifying parties with an interest registered against the property on July 30, 2020.

Assessed owners who remained in arrears were offered installment payment plans on April 28, 2020 and reminded of the offer on subsequent notices. If they did not enter into a payment plan, the property was added to the Tax Auction List in Appendix A.

A property can be removed from the Tax Auction List if the City receives payment of the property tax arrears and related expenses or if the assessed owner enters into a payment plan with the City before the public auction.

Committee noted that Council's policies, resolutions or goals include:
On March 27, 2000, Council adopted the following policy:

Motion #0091-00 That the City sell property at public auction, in accordance with the *Property Assessment and Taxation Act*, when taxes are two years in arrears.

On January 28, 2002, Council adopted the following policy:

Motion #0039-02 That the City bid the minimum price on property offered at a tax auction if the property remained unsold after a previous auction.

On April 8, 2002, Council amended the above policy to state:

Motion #0161-02 That the City sells property at the public auction, in accordance with the *Property Assessment and Taxation Act*, when the taxes are two years in arrears and if auctioning of the property maximizes the amount of taxes the City is able to collect.

Committee noted that applicable legislation, by-laws, studies or plans include:

1. *Property Assessment and Taxation Act*, R.S.N.W.T. 1988, cP-10; and
2. *Cities, Towns, and Villages Act,* S.N.W.T. 2003, c22.

Committee noted the following considerations:

Legislative

The *Property Assessment and Taxation Act* prescribes the tax auction process, including notification, conduct of the auction, and transfer of the property. The City has followed the notice requirements and the City's solicitor conducts the auction and property transfers.

Council decides, by resolution, which properties, if any, it wishes to offer for sale at public auction. Council sets, by resolution, the date of the auction and the minimum sale price of each property.

Procedural Considerations

It is Council policy to sell property at public auction, in accordance with the *Property Assessment and Taxation Act*, when the taxes are two years in arrears. Taxpayers with arrears less than $100 have not been included.

Under section 97.3(3) and (4) of the *Property Assessment and Taxation Act*, after entering into an installment payment agreement, the City is authorized to proceed with the sale of the taxable property if the assessed owner fails to comply with the terms of the agreement.

As part of the tax auction process, the taxpayer can redeem the property within 30 days of the auction by paying the tax arrears.

The City may bid on and purchase a property that is offered for sale so long as the purchase falls within the circumstances that the City is able to acquire property under the *Cities, Towns and Villages Act.* No municipal council member, officer or employee may purchase, on his or her own behalf, any taxable property offered for sale, unless the Minister of Finance has given prior approval.

Committee noted that the City adheres strictly to *PATA* provisions in respect to all taxation practices, including the tax arrears collection process. This helps minimize tax arrears, reduces the City's provision for bad debts, and works towards ensuring the tax burden is borne as equitably as possible.

The recommendation follows the same principles as applied in previous years: when taxpayers know the exact conditions under which a tax auction will be held, property taxes are more likely to be paid and/or arrears payment plans to be signed before the tax auction process starts. This is evident in the numbers from the last five years:

| *Tax Year* | *2015* | *2016* | *2017* | *2018* | *2019* |
|---|---|---|---|---|---|
| # of Properties on the Initial Tax Auction List | 18 | 16 | 16 | 13 | 28 |
| # of Properties on the Tax Auction List on the Auction Date | 3 | 3 | 2 | 2 | 5 |
| # of Properties Auctioned and Sold | 1 | 1 | 0 | 0 | 1 |

**Committee recommends that, in accordance with the *Property Assessment and Taxation Act*, Council direct Administration to auction the properties listed in Appendix A at City Hall at 9:00 a.m. (MST) on Friday, June 11, 2021, and to set the minimum price for each property at 50% of the assessed value listed for that property.**

Appendix A

Tax Auction List

| Municipal Address | Legal Description | | | 2019 Total Arrears | 2021 Assessed Value | Minimum Auction Price |
|---|---|---|---|---|---|---|
| | Lot | Block | Plan | | | |
| 5018 49 ST #604 | UNIT 29 | | C-2157 | $165.21 | $119,890 | $59,945 |
| 5125 50 ST | 13 | 37 | 65 | $367.19 | $919,570 | $459,785 |
| 208 NIVEN DR | 112 | 308 | 4541 | $500.71 | $48,530 | $24,265 |
| 324 BELLANCA AVE | UNIT 193 | | 4729 | $626.24 | $272,720 | $136,360 |
| 417 NORSEMAN DR | UNIT 60 | | 4729 | $1,034.29 | $167,920 | $83,960 |
| 5012 54 ST | 34 | 60 | 2437 | $1,080.94 | $483,160 | $241,580 |
| 5612 50 AVE #304 | UNIT 11 | | C-2655 | $1,145.44 | $120,500 | $60,250 |
| 5600 52 AVE #405 | UNIT 48 | | C-4065 | $1,222.96 | $129,000 | $64,500 |
| 58 MANDEVILLE DR | 35 | 541 | 1978 | $1,638.22 | $299,760 | $149,880 |
| 163 ENTERPRISE DR | 12 | 536 | 2094 | $1,834.29 | $863,010 | $431,505 |
| 644 ANSON DR | UNIT 33 | | 4729 | $2,131.23 | $141,900 | $70,950 |
| 582 CATALINA DR | UNIT 80 | | 4729 | $2,490.56 | $185,280 | $92,640 |
| 542 CATALINA DR | UNIT 100 | | 4729 | $2,654.66 | $53,310 | $26,655 |
| 164 BORDEN DR | 13 | 558 | 2071 | $2,734.87 | $289,620 | $144,810 |
| 136 DEMELT CRES | 13 | 551 | 3826 | $3,145.55 | $332,540 | $166,270 |
| 1 CAMERON RD | 8 | 533 | 1991 | $3,358.84 | $377,960 | $188,980 |
| 262 BORDEN DR | 3 | 562 | 2072 | $4,057.01 | $296,210 | $148,105 |
| 326 BELLANCA AVE | UNIT 192 | | 4729 | $4,079.86 | $201,250 | $100,625 |
| 5504 50A AVE | 16 | 105 | 483 | $4,616.04 | $293,770 | $146,885 |
| 627 WILLIAMS AVE #200 | UNIT 7 | | C-4438 | $4,757.24 | $211,200 | $105,600 |
| 558 CATALINA DR | UNIT 92 | | 4729 | $4,774.79 | $77,360 | $38,680 |
| 187 MAGRUM CRES | 30 | 564 | 2391 | $4,791.99 | $321,070 | $160,535 |
| 159 WILKINSON CRES | 55 | 561 | 2264 | $4,879.44 | $389,020 | $194,510 |
| 638 ANSON DR | UNIT 36 | | 4729 | $5,387.47 | $98,810 | $49,405 |

| Municipal Address | Legal Description | | | 2019 Total Arrears | 2021 Assessed Value | Minimum Auction Price |
|---|---|---|---|---|---|---|
| | Lot | Block | Plan | | | |
| 322 BELLANCA AVE | UNIT 194 | | 4729 | $6,909.00 | $89,560 | $44,780 |
| 883 BIGELOW CRES | UNIT 6 | | C-2007 | $7,070.69 | $284,440 | $142,220 |
| 12 HORDAL RD | 6 | 546 | 1665 | $7,144.10 | $274,390 | $137,195 |
| 132 CURRY DR #B | 21 | 503 | 1578 | $7,533.89 | $551,280 | $275,640 |
| 308 BELLANCA AVE | UNIT 201 | | 4729 | $8,160.78 | $143,620 | $71,810 |
| 213 WOOLGAR AVE | 7 | 510 | 1080 | $10,278.92 | $384,710 | $192,355 |
| 616 ANSON DR | UNIT 47 | | 4729 | $12,878.10 | $156,710 | $78,355 |
| 356 OLD AIRPORT RD #A | 4 | SUBD 1 | 515 | $13,248.49 | $1,459,790 | $729,895 |
| 4815 54 AVE | 8 | 89 | 482 | $13,853.10 | $330,840 | $165,420 |
| 639 ANSON DR | UNIT 20 | | 4729 | $17,003.71 | $132,440 | $66,220 |
| 632 ANSON DR | UNIT 39 | | 4729 | $20,114.14 | $193,600 | $96,800 |
| 106 TALTHEILEI DR | 6 | 537 | 2094 | $26,240.33 | $749,090 | $374,545 |
| 104 TALTHEILEI DR | 7 | 537 | 2094 | $28,883.55 | $581,860 | $290,930 |

**MOVE APPROVAL**

(For Information Only)

12. Councillor Smith left the meeting at 2:01 p.m.

(For Information Only)

13. Committee accepted for information the Minutes of the Community Advisory Board on Homelessness meetings of December 3 and December 10, 2020.

14. The meeting adjourned at 2:02 p.m.

# Rizzo & Rizzo Shoes Ltd. (Re)

Supreme Court Reports

Supreme Court of Canada

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

1997: October 16 / 1998: January 22.

File No.: 24711.

**[1998] 1 S.C.R. 27** | *[1998] 1 R.C.S. 27* | *[1998] S.C.J. No. 2* | *[1998] A.C.S. no 2*

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, appellants; v. Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, respondent, and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, party.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

## Case Summary

**Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.**

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the Employment Standards Act ("ESA") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to severance, termination or vacation pay under the ESA. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40a of the ESA suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's Interpretation Act provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large

and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the ESA and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40a to be inapplicable in bankruptcy situations is incompatible with both the object of the ESA and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbitrarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the Employment Standards Amendment Act, 1981 exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the ESA is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40a are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the ESA. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the Bankruptcy Act for termination and severance pay in accordance with ss. 40 and 40a of the ESA. It was not necessary to address the applicability of s. 7(5) of the ESA.

## Cases Cited

Distinguished: Re Malone Lynch Securities Ltd., *[1972] 3 O.R. 725*; Re Kemp Products Ltd. *(1978), 27 C.B.R. (N.S.) 1*; Mills-Hughes v. Raynor *(1988), 63 O.R. (2d) 343*; referred to: U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of) *(1989), 76 C.B.R. (N.S.) 86*; R. v. Hydro-Québec, *[1997] 1 S.C.R. 213*; Royal Bank of Canada v. Sparrow Electric Corp., *[1997] 1 S.C.R. 411*; Verdun v. Toronto-Dominion Bank, *[1996] 3 S.C.R. 550*; Friesen v. Canada, *[1995] 3 S.C.R. 103*; Machtinger v. HOJ Industries Ltd., *[1992] 1 S.C.R. 986*; Wallace v. United Grain Growers Ltd., *[1997] 3 S.C.R. 701*; R. v. TNT Canada Inc. *(1996), 27 O.R. (3d) 546*; Re Telegram Publishing Co. v. Zwelling (1972), 1 L.A.C. (2d) 1; R. v. Vasil, *[1981] 1 S.C.R. 469*; Paul v. The Queen, *[1982] 1 S.C.R. 621*; R. v. Morgentaler, *[1993] 3 S.C.R. 463*; Abrahams v. Attorney General of Canada, *[1983] 1 S.C.R. 2*; Hills v. Canada (Attorney General), *[1988] 1 S.C.R. 513*; British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of) *(1996), 40 C.B.R. (3d) 25*; R. v. Z. (D.A.), *[1992] 2 S.C.R. 1025.*

## Statutes and Regulations Cited

Bankruptcy Act, R.S.C., 1985, c. B-3 [now the Bankruptcy and Insolvency Act], s. 121(1). Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2). Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40a(1) [rep. & sub. ibid., s. 5(1)]. Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7). Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2. Interpretation Act, R.S.O. 1980, c. 219 [now *R.S.O. 1990, c. I.11*], ss. 10, 17. Labour Relations and Employment

Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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Christie, Innis, Geoffrey England and Brent Cotter. Employment Law in Canada, 2nd ed. Toronto: Butterworths, 1993. Côté, Pierre-André. The Interpretation of Legislation in Canada, 2nd ed. Cowansville, Que.: Yvon Blais, 1991. Driedger, Elmer A. Construction of Statutes, 2nd ed. Toronto: Butterworths, 1983. Ontario. Legislature of Ontario Debates, 1st sess., 32nd Parl., June 4, 1981, pp. 1236-37. Ontario. Legislature of Ontario Debates, 1st sess., 32nd Parl., June 16, 1981, p. 1699. Sullivan, Ruth. Driedger on the Construction of Statutes, 3rd ed. Toronto: Butterworths, 1994. Sullivan, Ruth. Statutory Interpretation. Concord, Ont.: Irwin Law, 1997.

APPEAL from a judgment of the Ontario Court of Appeal *(1995), 22 O.R. (3d) 385*, *80 O.A.C. 201*, *30 C.B.R. (3d) 1*, *9 C.C.E.L. (2d) 264*, *95 C.L.L.C. par. 210-020*, *[1995] O.J. No. 586* (QL), reversing a judgment of the Ontario Court (General Division) *(1991), 6 O.R. (3d) 441*, *11 C.B.R. (3d) 246*, *92 C.L.L.C. par. 14,013*, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and Kathleen Martin, for the appellants. Raymond M. Slattery, for the respondent. David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto. Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto. Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

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The judgment of the Court was delivered by

**IACOBUCCI J.**

**1** This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

**2** Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

**3** Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

**4** In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the Employment Standards Act, R.S.O. 1980, c. 137, as amended (the "ESA"). On August

23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the ESA.

**5** The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

**6** The relevant versions of the Bankruptcy Act (now the Bankruptcy and Insolvency Act) and the Employment Standards Act for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "BA"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "ESA") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. --

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the Employment Standards Act.

40. -- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40a . . .

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2.--(1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the Bankruptcy Act (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the Bankruptcy Act (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, *R.S.O. 1990, c. I.11*

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. Ontario Court (General Division) *(1991), 6 O.R. (3d) 441*

**7** Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the BA. Relying on U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of) *(1989), 76 C.B.R. (N.S.) 86* (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the ESA such that liability for such payments would arise on bankruptcy as well.

**8** In addressing this question, Farley J. began by noting that the object and intent of the ESA is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the ESA is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

**9** Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the ESA.

**10** Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the BA. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the BA.

**11** Even if bankruptcy does not terminate the employment relationship so as to trigger the ESA termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the ESA. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

**12** Farley J. also considered s. 2(3) of the Employment Standards Amendment Act, 1981, S.O. 1981, c. 22 (the "ESAA"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the ESA. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

B. Ontario Court of Appeal *(1995), 22 O.R. (3d) 385*

**13** Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing

upon the language of the termination pay and severance pay provisions of the ESA. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40a(1)(a) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the ESA, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

**14** In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited Re Malone Lynch Securities Ltd., *[1972] 3 O.R. 725* (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the ESA termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon Re Kemp Products Ltd. *(1978), 27 C.B.R. (N.S.) 1* (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40a does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

**15** Regarding s. 7(5) of the ESA, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the ESAA. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40a.

**16** Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

## 4. Issues

**17** This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA?

## 5. Analysis

**18** The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40a of the ESA, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40a(1a) begins with the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

**19** The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the ESA termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve

employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the ESA.

**20** At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

**21** Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: R. v. Hydro-Québec, *[1997] 1 S.C.R. 213*; Royal Bank of Canada v. Sparrow Electric Corp., *[1997] 1 S.C.R. 411*; Verdun v. Toronto-Dominion Bank, *[1996] 3 S.C.R. 550*; Friesen v. Canada, *[1995] 3 S.C.R. 103*.

**22** I also rely upon s. 10 of the Interpretation Act, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

**23** Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

**24** In Machtinger v. HOJ Industries Ltd., *[1992] 1 S.C.R. 986*, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also Wallace v. United Grain Growers Ltd., *[1997] 3 S.C.R. 701*). It was in this context that the majority in Machtinger described, at p. 1003, the object of the ESA as being the protection of ". . . the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

**25** The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the ESA requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the

absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, Employment Law in Canada (2nd ed. 1993), at pp. 572-81.)

**26** Similarly, s. 40a, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In R. v. TNT Canada Inc. *(1996), 27 O.R. (3d) 546*, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in Re Telegram Publishing Co. v. Zwelling (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

**27** In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, supra, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, Construction of Statutes, supra, at p. 88).

**28** The trial judge properly noted that, if the ESA termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

**29** If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the ESA would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

**30** In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the ESA to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the ESAA introduced s. 40a, the severance pay provision, to the ESA. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

> 2. . . .
>
> (3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the Bankruptcy Act (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of

> the Bankruptcy Act (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

**31** The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40a was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the ESA. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., R. v. Vasil, *[1981] 1 S.C.R. 469*, at p. 487; Paul v. The Queen, *[1982] 1 S.C.R. 621*, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

**32** In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

**33** I find support for my conclusion in the decision of Saunders J. in Royal Dressed Meats Inc., supra. Having reviewed s. 2(3) of the ESAA, he commented as follows (at p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

**34** This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the ESA. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . .
>
> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.
>
> (Legislature of Ontario Debates, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.
>
> (Legislature of Ontario Debates, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

**35** Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in

the interpretation of legislation. Writing for the Court in R. v. Morgentaler, *[1993] 3 S.C.R. 463*, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

**36** Finally, with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., Abrahams v. Attorney General of Canada, *[1983] 1 S.C.R. 2*, at p. 10; Hills v. Canada (Attorney General), *[1988] 1 S.C.R. 513*, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the ESA, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

**37** The Court of Appeal's reasons relied heavily upon the decision in Malone Lynch, supra. In Malone Lynch, Houlden J. held that s. 13, the group termination provision of the former ESA, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the ESA then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

**38** Two years after Malone Lynch was decided, the 1970 ESA termination pay provisions were amended by The Employment Standards Act, 1974, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 ESA eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the Malone Lynch decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 ESA have no application to a bankrupt employer. For this reason, I do not accept the Malone Lynch decision as persuasive authority for the Court of Appeal's findings. I note that the courts in Royal Dressed Meats, supra, and British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of) *(1996), 40 C.B.R. (3d) 25* (B.C.S.C.), declined to rely upon Malone Lynch based upon similar reasoning.

**39** The Court of Appeal also relied upon Re Kemp Products Ltd., supra, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the ESA. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on Mills-Hughes v. Raynor *(1988), 63 O.R. (2d) 343* (C.A.), which cited the decision in Malone Lynch, supra, with approval.

**40** As I see the matter, when the express words of ss. 40 and 40a of the ESA are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see R. v. Z. (D.A.), *[1992] 2 S.C.R. 1025*). I also note that the intention of the Legislature as evidenced in s. 2(3) of the ESAA, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim ESA

termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the ESA, namely, to protect the interests of as many employees as possible.

**41** In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the ESA. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the BA for termination and severance pay in accordance with ss. 40 and 40a of the ESA. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the ESA.

**42** I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the ESA underwent another amendment. Sections 74(1) and 75(1) of the Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the Interpretation Act directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

**43** I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

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**End of Document**

Exception

(2) A lease or an agreement to purchase is not to be considered to be a long-term financial commitment under subsection (1) if the payments made under the lease or agreement are nominal or are not made from the general revenues of the municipal corporation.

(2) Un bail ou une convention d'achat n'est pas réputé constituer un engagement financier à long terme si les paiements y afférents sont nominaux ou sont faits sur les recettes générales de la municipalité.

Exception

Purposes of municipal corporation

**3.** Municipal corporations are established for the following purposes:

(a) to provide good government to the residents of the municipality;

(b) to develop and maintain a safe municipality;

(c) to provide the services, products and facilities required or allowed by this or any other enactment or considered by council to be necessary or desirable for all or part of the municipality.

**3.** Les municipalités sont constituées aux fins suivantes :

a) gérer sainement les affaires publiques au profit des personnes qui résident dans leur territoire;

b) établir et maintenir un territoire sûr;

c) fournir les services, les produits et les installations qu'exige ou qu'autorise la présente loi ou tout autre texte ou que leur conseil estime nécessaires ou utiles à l'ensemble ou à une partie de leur territoire.

Fins des municipalités

General bylaw powers

**4.** (1) The general legislative powers of a municipal corporation to make bylaws are to be interpreted as giving broad authority to council to govern the municipality in whatever way council considers appropriate, within the jurisdiction given to a municipal corporation under this or any other enactment, and to address issues not contemplated at the time this Act is enacted.

**4.** (1) Les pouvoirs généraux attribués aux municipalités relativement à la prise de règlements municipaux ont pour effet de donner aux conseils la latitude voulue pour administrer le territoire des municipalités de la manière qu'ils estiment indiquée, dans les limites de la compétence qui est conférée aux municipalités par la présente loi ou tout autre texte, et pour régler les questions non régies par la présente loi au moment de son édiction.

Pouvoirs généraux relatifs à la prise de règlements municipaux

Power under other Acts

(2) The power to make a specific bylaw under any other enactment is to be interpreted as giving supplementary authority to council to govern in accordance with the general legislative powers of a municipal corporation under this Act.

(2) Le pouvoir de prendre des règlements municipaux déterminés sous le régime de tout autre texte a pour effet de conférer des pouvoirs supplémentaires aux conseils afin que ceux-ci puissent exercer leurs activités de gestion en conformité avec les pouvoirs généraux attribués aux municipalités sous le régime de la présente loi relativement à la prise de règlements municipaux.

Pouvoirs conférés sous le régime d'autres textes

## PART 1
## INCORPORATION

## PARTIE 1
## CONSTITUTION EN PERSONNE MORALE

Public notice of establishment of municipal corporation

**5.** (1) The Minister may, on his or her own initiative or at the request of at least 25 residents who, on the date of the request, would otherwise be eligible under section 17 of the *Local Authorities Elections Act*, to vote in an election, cause public notice to be given in the area of the proposed municipality that the Minister intends to establish a municipal corporation in that place.

**5.** (1) De sa propre initiative ou à la demande d'au moins 25 résidents qui, à la date de celle-ci, seraient par ailleurs habiles à voter à une élection en vertu de l'article 17 de la *Loi sur les élections des administrations locales*, le ministre peut faire communiquer dans le territoire projeté de la municipalité un avis public indiquant qu'il a l'intention de constituer une municipalité à cet endroit.

Avis public de la constitution d'une municipalité

Content of public notice

(2) The public notice must state the proposed

(a) name and status of the municipal corporation;

(b) boundaries of the municipality; and

(2) L'avis public indique :

a) le nom et le statut projetés de la municipalité;

b) les limites proposées du territoire de la

Contenu de l'avis public

Status of mayor and councillors

(2) When a charter community, city, hamlet, town or village changes its status, the mayor and councillors continue in office until their successors take office.

(2) Si le statut d'une collectivité à charte, d'une cité, d'un hameau, d'une ville ou d'un village change, le maire et les conseillers demeurent à leur poste jusqu'à ce que leurs successeurs entrent en fonction.

Situation du maire et des conseillers

Request to vary boundaries

**11.** (1) Council may request the Minister to vary the boundaries of the municipality.

**11.** (1) Le conseil peut demander au ministre de modifier les limites du territoire de la municipalité.

Demande de modification des limites

Variation of boundaries

(2) The Minister, on the recommendation of the Executive Council, may, by order, vary the boundaries of a municipality and provide for any transitional matters that may be necessary.

(2) Sur la recommandation du Conseil exécutif, le ministre peut, par arrêté, modifier les limites du territoire de la municipalité et prendre toute mesure transitoire nécessaire à cette fin.

Modification des limites

Effect of variation of boundaries

(3) If the boundaries of a municipality are varied, all bylaws apply to the municipality as varied from the date the order made under subsection (2) takes effect.

(3) Si les limites du territoire de la municipalité sont modifiées, tous les règlements municipaux s'appliquent au nouveau territoire de la municipalité à partir de la date à laquelle l'arrêté visé au paragraphe (2) prend effet.

Effet de la modification des limites

## PART 2
## ADMINISTRATION

### Councils

## PARTIE 2
## ADMINISTRATION

### Conseil

Role of council

**12.** (1) The powers and duties of a municipal corporation shall be exercised and performed by council, unless otherwise provided in this Act.

**12.** (1) Sauf disposition contraire de la présente loi, le conseil exerce les attributions de la municipalité.

Rôle du conseil

Duties of council

(2) Council is responsible for

(a) developing and evaluating the plans, policies and programs of the municipal corporation;

(b) making the bylaws and resolutions of the municipal corporation; and

(c) ensuring that the powers, duties and functions of the municipal corporation are appropriately carried out.

(2) Le conseil est chargé :

a) d'élaborer et d'évaluer les plans, les directives ainsi que les programmes de la municipalité;

b) d'adopter les règlements municipaux et les résolutions de la municipalité;

c) de faire en sorte que les attributions de la municipalité soient exercées comme il se doit.

Fonctions du conseil

Performance of functions

**13.** (1) Council may perform its functions by either resolution or bylaw, unless required by this or any other enactment to act by bylaw.

**13.** (1) Le conseil peut exercer ses fonctions par résolution ou par règlement municipal, sauf si la présente loi ou tout autre texte l'oblige à agir par règlement municipal.

Exercice des fonctions

Delegation

(2) Subject to this Act, council may, by bylaw, delegate any of its powers, duties or functions under this or any other enactment to

(a) a committee of council;

(b) a board or commission established by the municipal corporation; or

(c) the senior administrative officer.

(2) Sous réserve des autres dispositions de la présente loi, le conseil peut, par règlement municipal, déléguer les attributions que lui confère celle-ci ou tout autre texte :

a) à un de ses comités;

b) à une régie ou à une commission constituée par la municipalité;

c) au directeur général.

Délégation

Exceptions

(3) Council may not delegate

(a) the power or duty to make bylaws or

(3) Le conseil ne peut déléguer :

a) le pouvoir ou l'obligation d'adopter des

Exceptions

# Bayshore Shopping Centre Ltd. v. Nepean (Township)

Supreme Court Reports

Supreme Court of Canada

Present: Fauteux C.J. and Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

1972: March 10 / 1972: March 30.

**[1972] S.C.R. 755** | *[1972] R.C.S. 755*

Bayshore Shopping Centre Limited, Appellant; and The Corporation of the Township of Nepean and William Bourne and March Ridge Developments Limited, Respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

## Case Summary

**Municipal law — Zoning by-law — Proposed shopping centre — Individual components included within permitted uses — Whether "shopping centre" a permitted use although not listed.**

The individual respondent, the building inspector of the respondent municipality, had been on the point of granting to the appellant a building permit for the erection of a shopping centre upon certain lands when the respondent development company commenced an action against the municipality alleging that the by-laws of the municipality applicable to the lands in question did not permit the erection of a shopping centre. Therefore the building inspector and the municipality refrained from issuing the building permit. The appellant thereupon served notice of application for an order of mandamus compelling such issuance and named as respondents to that application not only the building inspector and the municipality but also the development company. The application, which was opposed by the development company only, was granted by the chambers judge. On appeal, the Court of Appeal allowed the appeal and quashed the order. An appeal to this Court ensued.

The one vital issue upon the appeal was the true construction of By-law 39-62 of the respondent municipality and the determination of whether, upon the proper construction of the said by-law, the appellant was entitled to have the respondent building inspector and the respondent municipality issue to it a building permit or building permits for the construction of the shopping centre in accordance with its application for such permits.

Held: The appeal should be allowed and the order of the judge of first instance restored.

In the zoning by-law in question there was no mention of "shopping centre" in a permitted uses section of any zone but there was set out as permitted uses in Commercial-Regional C1 Zone the words "retail store", "a service shop" and "department store". The Court was of the opinion that the words "retail store" "service shop" and "department store" would as generic terms cover a shopping centre when there were no words in the permitted uses sections of the by-law to make a distinction between these words and a "shopping centre". The omission of the words "shopping centre" in all the permitted use sections of the by-law far from indicating the intention of the Council to prohibit the erection of such structures indicated that in its view they were already covered in the three different permitted uses referred to above.

The final words of the definition of "retail store", i.e. "but does not include any other retail outlet otherwise classified or defined in this by-law", were regarded as clear indication that the Council intended to include within the definition not only a "retail store" but all retail outlets which were not otherwise classified or defined. A shopping centre was nothing but a group of "retail outlets".

The presence of the words "planned shopping centre" in a section of the by-law applying to all zones and respecting required parking facilities did not indicate that a shopping centre was "otherwise classified". The suggestion that the inclusion of the words "planned shopping centre" in the parking requirement was preparatory for some future amendments which might permit such alleged presently prohibited structures was not accepted.

## Cases Cited

Thomas C. Watkins Ltd. v. Cambridge Leaseholds Ltd. et al., 1966 S.C.R. v; Oshawa Wholesale Ltd. et al. v. Canadia Niagara Falls Ltd. et al., *1972 1 O.R. 481*, distinguished.

APPEAL from a judgment of the Court of Appeal for Ontario allowing an appeal from an order of Keith J., directing the issue of a building permit. Appeal allowed.

D.K. Laidlaw, Q.C., for the appellant. Walter D. Baker, Q.C., for the respondents, William Bourne and Township of Nepean. W.B. Williston, Q.C., and L.H. Mandel, for the respondent, March Ridge Developments Ltd.

Solicitors for the appellant: McCarthy & McCarthy, Toronto. Solicitors for the respondents, Township of Nepean and William Borne: Bell, Baker, Thompson & Oyen, Ottawa. Solicitors for the respondent, March Ridge Developments Ltd.: Thompson, Rogers, Toronto.

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The judgment of the Court was delivered by

**SPENCE J.**

**SPENCE J.**:— This is an appeal of Bayshore Shipping Centre Limited from the judgment of the Court of Appeal for Ontario pronounced on December 15, 1971. By that judgment the Court of Appeal for Ontario had allowed an appeal from the order of Keith J., pronounced on November 12, 1971, directing the respondents William Bourne and the Corporation of the Township of Nepean to issue to the appellant as building permit for the erection of a shopping centre upon the lands in question. The said Bourne, the building inspector of the Township of Nepean, had been on the point of granting such a permit when the respondent, March Ridge Developments Limited, commended an action against the respondent township of Nepean alleging that the by-laws of that municipal corporation applicable to the lands in question did not permit the erection of a shopping centre. Therefore the respondents Bourne and the Township of Nepean refrained from issuing the building permit for which the appellants had applied. The appellant thereupon served notice of application for the said mandamus compelling such issuance and named as respondents to that application not only the said Bourne and Township of Nepean but the said March Ridge Developments Ltd. The respondents Bourne and Township of Nepean have never opposed the issue of the permit nor of an order of the Court directing that they do so issue the said permit and have taken such position before Keith J., the Court of Appeal for Ontario and this Court. The respondent March Ridge Developments Ltd. has opposed the issuance of the permit and the appellant's application throughout. Keith J., giving no written reasons for his disposition, granted the appellant's application and refused this respondent's application for a stay of execution. The Court of Appeal for Ontario in a unanimous judgment pronounced on December 15, 1971, allowed the respondent March Ridge Developments Ltd.'s appeal from the order of Keith J. and quashed his order. The appeal to this Court ensued.

All counsel before this Court agreed that the one vital issue upon the appeal was the true construction of By-law 39-62 of the respondent Township of Nepean and the determination of whether, upon the proper construction of the said by-law the appellant was entitled to have the respondents Bourne and the Township of Nepean issue to it a building permit or building permits for the construction of the shopping centre in accordance with its application for such permits. Other issues had been canvassed before Keith J. and the Court of Appeal for Ontario but in this Court

all counsel ignored such other issues and confined their submissions to the one issue of the true construction of the said By-law 39-62.

It was the initial submission of counsel for the appellant that the Court of Appeal for Ontario fell into error in believing that the construction of the said By-law 39-62 could be governed by the judgment of the same Court similarly constituted in Oshawa Wholesale Ltd. et al. v. Canadia Niagara Falls Ltd. et al. which had been argued immediately before the appeal in the present case and which is now reported in *[1972] 1 O.R. 481*. That appeal also dealt with an application to compel the issuance of a building permit for a shopping centre. The decision and that in the present case were the latest in a few appeals to the Court of Appeal for Ontario, at least one of which came to this Court which need to be mentioned upon this point.

In Thomas C. Watkins Ltd. v. Cambridge Leaseholds et al. [1966] S.C.R. v.], the learned judge of first instance had granted a mandamus directing the issue of a building permit for the erection of a department store. The majority of the Court of Appeal for Ontario dismissed an appeal from that order but McGillivray J.A. in dissenting reasons would have allowed the appeal and quashed the order upon the basis that the zoning by-law in question had set out five different commercial zones and in only one of them had listed as a permitted use a department store although retail stores were listed as permitted uses in all five zones. The application before the Court was for a department store in one of the other four zones. McGillivray J.A. said in his reasons:

> It is reasonable to believe that by making these two items separate and distinct in the by-law there are to bear a different connotation and that the term "retail store" is not sufficiently comprehensive to include department store.

Upon appeal to this Court argued on June 10, 1966, the appeal was allowed in an oral judgment in which this Court expressly adopted the dissenting reasons of McGillivray J.A.

A not dissimilar issue came before Houlden J. in the Oshawa Wholesale Ltd. case, an action to have declared void a building permit already issued for erection of what was termed by an expert witness a "sub-regional shopping centre". The zoning by-law in question never listed as a permitted use a "sub-regional shopping centre" or even a shopping centre without descriptive adjectives, but did permit "local shopping centre". These words were defined in the by-law to mean "a group of smaller related stores situate for direct service within a residential neighbourhood unit". Houlden J. in lengthy and very carefully considered reasons dealt with many issues not her relevant and held that the by-law having specifically permitted one type of shopping centre, and it the smallest one according to the expert opinion which he accepted, could not be interpreted to permit a much larger shopping centre under the permitted uses entitled "retail stores" or "supermarkets". Houlden J. therefore gave judgment for the plaintiff making a declaratory order that the building permit was null and void. The appeal by the developer to the Court of Appeal for Ontario I have already referred to and is the judgment thereon which that court adopted in deciding the appeal in the present case against the present appellant Bayshore Shopping Centre Ltd. In his oral reasons Aylesworth J.A. did not merely adopt the reasons of Houlden J. although the learned justice in appeal did point out the very limited permitted use of "local shopping centre". Aylesworth J.A. went much further and relying on the evidence of the expert witness and upon reference to shopping centres in one American decision and by Roach J.A. in Re Hamilton & Dominion Stores Ltd. [[1962] O.W.N. 227.], neither of which dealt with zoning by-laws, held a shopping centre was a "distinct and separate use not within the terms of the by-law in question ...". Despite the very broad character of the statement in the rationale for the decision, I agree with counsel for the appellant that the judgment in the Oshawa Wholesale case given upon a by-law having the unique feature which I have outlined cannot be taken to have determined the interpretation of the quite different provisions of By-law 39-62 in question in this present case.l

Therefore I turn to the interpretation of the by-law in question. This is By-law 39-62 of the Township of Nepean enacted on June 11, 1962, as amended. This by-law is a general zoning by-law concerning the northern part of the township by the provision of which persons are prohibited from using any land or erecting any building or structure expect in conformity with the provisions of the by-law. The lands as to which Bayshore as agent for the registered owner Ivanhoe Corporation, applied for the building permit, and which were situate at the intersection of Provincial Highway 7 (Richmond Road) and Bayshore Drive in the Township of Nepean are within the area zoned in the by-law as COMMERCIAL-REGIONAL C1 ZONE. That zone is the most comprehensive of the commercial zones dealt

with in the by-law and if any shopping centre is permitted in the northern part of Nepean Township permission for the erection and use must be found in the permitted used listed under this Commercial-Regional C1-Zone.

The by-law in ss. 7:1:1 and 7:1:2 provides in part for the permitted used in C1 Zone as follows:

COMMERCIAL-REGIONAL C1 ZONE

7:1:1 Permitted Uses:

A retail store, a service shop and a departmental store for the conducting of any retail business. A commercial and public garage, a clinic, a commercial school, a custom workshop, dry cleaning distributing station and a tailor's shop. A Church, a library, a business office, an eating establishment, funeral home and chapel and a place of amusement. A hotel, a tavern and a public house. An automobile service station, subject to the provision of Section 5:10. (By-law No. 63-63)

. . .

7:1:2 Zone Requirements:

For uses other than for automobile service stations

(By-law No. 63-63)

Lot Area (Minimum) Nil

Lot Frontage (Minimum) Nil

Lot Coverage (Minimum) a) Commercial 80% b) on 2nd Storey 50% of lot

Height (Maximum) 60 ft.

Front Yard (Minimum) 75 ft.

Side Yard (Minimum) Nil

Except where a Commercial Zone abuts a Residential Zone, a 20 foot side yard shall be required on the side that so abuts.

Rear Yard (Minimum) 20% of lot depth

but not necessarily more than 30 feet nor less than 20 feet.

Off-street parking--See Sections 5:17 and 5:18

Off-street loading-- see Sections 5:19(a)

A retail store is defined in s. 2.87 as:

> 2.87 "Retail Store" shall mean a building or part of a building where goods, wares, merchandise, substances, articles or things are offered or kept for sale at retail and includes storage on or about the store premises of limited quantities of such goods, wares, merchandise, substances, articles, or things sufficient only to service such stores but does not include any retail outlet otherwise classified or defined in this By-law:

A service shop is defined in s. 2.92 as:

> 2.92 "Service Shop" shall mean a building or part of a building where services are provided such as barber's shop, a ladies hairdressing establishment, a shoe shine shop and other similar services;

and a Department Store is defined in s. 2.26 as:

> 2.26 "Department Store" shall mean the use of an enclosed building in which various types of commodities are kept for retail sale in separate parts of the one building on two or more floors;

It is not necessary to cite the many other definitions which appear in By-law 39-62. There was filed as an exhibit in the examination of C.J. Magwood, the secretary of Bayshore upon his affidavit a document entitled "Confidential Memorandum for Institutional Investors Bayshore" and counsel for the appellant cited parts of that document to illustrate what was to compose the proposed shopping centre. I quote several paragraphs thereof:

THE PROJECT

Introduction

Bayshore Shopping Centre ("Bayshore") will be a regional shopping centre located in the Ottawa Metropolitan Area. Bayshore will consist of department stores operated by The T. Eaton Company Limited ("Eaton's") and Hudson's Bay Company Limited ("The Bay"), a Steinberg's Food Store and Miracle Mart Department Store operated by Steinberg's Limited "(Steinberg's"), and a two-level air conditioned mall serving approximately 100 additional stores. It will have a unique multi-level parking facility with approximately 3,200 parking spaces, of which more than half will be under cover for shopping convenience; each parking level will have direct access to one of the two main shopping levels.

The Site

Bayshore will be located on a 23.4 acre site, approximately 7 miles west of Ottawa's central business district, in the north-west quadrant of the interchange at Richmond Road (Highway 7) and the Queensway, two major arterial roads in the western portion of the Ottawa Metropolitan Area. The map on page 4 shoes the location of Bayshore in relation to the City of Ottawa and surrounding communities and shows access routes to Bayshore from these communities.

The Company will purchase the site on or about October 31, 1971 from Ivanhoe Corporation in accordance with and subject to conditions set out in an option agreement dated June 14, 1971.

A small shopping centre now operating on a portion of this site is to be demolished to make room for Bayshore. Existing zoning regulation permit the development and construction of Bayshore as planned and adequate municipal services are available.

It will be seen that the various components of the proposed shopping centre fall within the three definitions I have quoted. Counsel for the appellant has submitted that no component of the proposed shopping centre could fail to be

within the permitted used outline in s. 7:1:1 quoted above and at the same time be an appropriate unit for shopping centre. After perusal of the permitted uses I agree with this submission.

There still remains for determination whether a shopping centre is within these permitted uses even if every component of the proposed shopping centre would be within one of them. I find little assistance from decisions which purport to indicate the philosophic attitude which the Court should adopt in construing zoning by-laws. No authority need be cited for the proposition that a man's property is his own which he may utilize as he deems fit so long as in such utilization he does not commit nuisance, entrap the unwary or act in breach of statutory prohibitions, and therefore by-laws restrictive of that right should be strictly construed. Yet it has been said that modern zoning provisions have been enacted to protect the whole community and should be construed liberally having in certain the public interest: R. v. Brown Camps Ltd. [ *[1970] 1 O.R. 388.*]; Re Bruce and City of Toronto et al. [ *[1971] 3 O.R. 62.*], at p. 67. But such statements usually ere made when the Court was considering an application to permit the encroachment into a residential zone of some building which it was residential zone of some building which it was alleged would seriously affect the amenities of life of the residents thereof. In this case the lands in question are situate in a general commercial zone and every component of the proposed shopping centre would be the proper subject-matter of a building permit as a permitted use under the By-law 39-62. I therefore approach the interpretation and application of the by-law without acknowledging any compulsion to consider its provision either strictly or liberally.

It must be noted, and it is of prime importance, that nowhere in the permitted use sections of By-law 39-62 do the words "shopping centre" either alone or accompanied by any adjective appear. This situation contrasts strongly with that which was present in Thomas C. Walkins Ltd. v. Cambridge Leaseholds Ltd. et al., supra, where a permit was sought for the erection of a department store in a C1 Zone where it was not a listed permitted use but in C5 Zone a department store was so listed. It also contrasts with the Oshawa Wholesale case where a permit was sought for a "sub-regional shopping centre" in a zone where it was no a permitted use but in another zone there was listed as a permitted use a "local shopping centre". In view of such express reference elsewhere in the permitted uses sections of the by-law and its omission in the zone as to which the application for permit was made, the term "retail store" could not be held to cover in the former case, a "department store" and in the latter, a "sub-regional shopping centre". In the present case there is no mention of "shopping centre" in a permitted uses section of any zone but there is set out as permitted uses in the C1 Regional-Commercial Zone the words "retail store", "a service shop" and department store". McGillivray J.A., in his reasons in the Cambridge leaseholds case, which this Court as I have pointed out, adopted said:

> There can be little doubt, and counsel for the appellant, I believe, agrees, that as a generic term "retail store" would include a department store which is concerned with retail business, but the review of the various sections of the act manifest the intention, in my opinion, of making a distinction between a department store and retail store.

Applying the same analysis I am of the opinion that the words "retail store" "service shop" and "department store" would as generic terms cover a shopping centre when there are no words in the permitted uses sections of the by-law to make a distinction between these words and a "shopping centre"--a distinction which McGillivray J.A. found in the Cambridge Leaseholds case. I have reached the conclusion that the omission of the words "shopping centre" in all the permitted use sections of the by-law far from indicating the intention of the Council to prohibit the erection of such structures indicated that in its view they were already covered in the three different permitted uses to which I have referred.

The final words of the definition of "retail store" are significant:

> but does not include any other retail outlet otherwise classified or defined in this by-law (the italicizing is my own).

I regard these words as clear indication that the Council intended to include within the definition not only a "retail store" but all retail outlets which were not otherwise classified or defined. Certainly a shopping centre is nothing but a group of "retail outlets".

Counsel for the respondent March Ridge Developments Ltd. however, submits that a "shopping centre" is otherwise "classified". He agrees the words were not "defined" in the by-law but he points to the provision of s. 7:1:2 ... "off-street parking--See Section 5:17 and 5:18" and cites s. 5:17 the schedule of which reads in part as follows:

SCHEDULE

| Type of Nature of Building or Structure | Minimum Required Parking Facilities |
|---|---|
| 6. A retail store, service store, or other similar establishment, a planned shopping centre or department store | 1 parking space for each 180 square feet of floor area |

It must be noted that s. 5:17 is in a part of the by-law entitled SECTION 5 GENERAL PROVISIONS TO ALL ZONES which part covers very many provisions but does not deal with permitted uses. Secondly, as I have stressed before, there has been no mention of a shopping centre in any permitted uses section and to provide parking regulations for a use which was prohibited seems not only surplusage but contradictory. I am quite unable to accept the suggestion that the inclusion of the words "planned shopping centre" in the parking requirement was preparatory for some future amendments which might permit such alleged presently prohibited structures. Surely the wise time to make such requirements would be when the use were permitted. I am therefore not ready to agree that the presence of these words "planned shopping centre" in s. 5:17 indicate that shopping centre was "otherwise classified". The meaning I attach to those words is "otherwise in the By-law a permitted use".

On the other hand, I regard the presence of the words "planned shopping centre" in s. 5:17 as a clear indication that Council had shopping centres in mind when it enacted By-law 39-62 and believed the permitted uses "retail store", "service store" and "department store", as well as a "business office" "an eating establishment" and "an automobile service station", sufficient to authorize a permit for a shopping centre. Council however realized that a shopping centre presented special parking problems. It might well be that the parking appropriate to many retain stores, service stores and department stores all in one group sharing a common great parking area and that the parking requirement should be one referring to the total floor area and not limited to the floor area of each retail store, service store or department store. The Council therefore enacted the provision as to parking requirements found in s. 5:17.

I have found nothing in the By-law 39-62 which would prevent one lot, in this case almost twenty-four acres, being put to various permitted uses. All types of permitted uses may utilize one lot and in fact various permitted uses may occupy the same building although it would appear that a department store must occupy its own building.

Maxwell on Interpretation of Statutes, 12th ed. at p. 264, cites authority, if any need be cited for the proposition that one may have regard to the conduct of those who were responsible for the creation of a provision to ascertain their understanding of its meaning. This By-law 39-62 was, as I have said, enacted on June 11, 1962. Even if we may not take judicial notes of the many shopping centres which have been erected in Nepean Township since that date we have the evidence of the secretary of the appellant that there exists today on the very lands which are the subject of the application for building permit for a shopping centre, a much smaller one which had been erected since 1962. Therefore it is apparent that the Council which enacted By-law 39-62 and the building inspector who acted under its direction, have always believed that a shopping centre was a permitted use on Regional-Commercial Zone C-2. In confirmation of this I note that counsel for Nepean Township filed a factum on this appeal and submitted.

> By-law 39-62 has been in force since 1962 and, under its authority, shopping centre development has taken place on the site in question and other sites within the Township of Nepean

and further:

> ... the respondents Nepean and bourne had or have no grounds upon which to base a rejection of the application for Building Permit.

For these reasons I have concluded that the appeal should be allowed and the order of Keith J. pronounced on November 12, 1971, should be restored. The appellant and the respondents, the Township of Nepean and William Bourne, will be entitled to their costs throughout from the respondent March Ridge Developments Limited.

> Appeal allowed with costs.

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End of Document

Actions and land claims agreement

(2) An action or thing authorized by this Act must be carried out in accordance with any applicable land claims agreement.

(2) Toute action ou toute chose qu'autorise la présente loi doit être exécutée conformément aux accords sur des revendications territoriales applicables.

Actions conformes à un accord sur des revendications territoriales

Conflict, inconsistency with land claims agreement

(3) If there is a conflict or an inconsistency between a provision of this Act or the regulations and a provision of a land claims agreement or legislation approving, giving effect to and declaring valid a land claims agreement, the provision of the land claims agreement or legislation prevails to the extent of the conflict or inconsistency.

(3) Les dispositions d'un accord sur des revendications territoriales ou d'une législation qui ratifient, rendent exécutoire et déclarent valide un tel accord l'emportent sur les dispositions incompatibles de la présente loi ou de ses règlements.

Incompatibilité

Government bound

**2.** This Act binds the Government of the Northwest Territories.

**2.** La présente loi lie le gouvernement des Territoires du Nord-Ouest.

Gouvernement lié

## PART 2
## MUNICIPAL PLANNING

### Community Plans

## PARTIE 2
## PLANIFICATION MUNICIPALE

### Plans directeurs

Purpose

**3.** (1) The purpose of a community plan is to provide a policy framework to guide the physical development of a municipality, having regard to sustainability, the environment, and the economic, social and cultural development of the community.

**3.** (1) Le plan directeur vise à fournir un cadre stratégique sur l'aménagement physique d'une municipalité, compte tenu de la viabilité, de l'environnement, et du développement économique, social et culturel de la collectivité.

But

Preparation

(2) Council may initiate the preparation of a community plan for a municipality.

(2) Le conseil peut élaborer le plan directeur pour la municipalité.

Élaboration

Contents

**4.** (1) A community plan must

(a) describe future land uses in the municipality;

(b) incorporate, insofar as is practical, any applicable territorial land use policies and statements of territorial interest;

(c) contain statements of policy respecting the management of any environmentally sensitive lands or lands subject to natural hazards such as flood or slope instability;

(d) address the provision of required transportation systems, public utilities and municipal services and facilities, and address any requirements for land for municipal and public purposes; and

(e) include a schedule of the sequence in which specified areas of land may be developed or redeveloped, and the manner in which the services and facilities referred to in paragraph (d) will be provided in specified areas.

**4.** (1) Le plan directeur doit, à la fois :

a) décrire l'usage actuel et futur des biens-fonds sur le territoire municipal;

b) incorporer, dans la mesure du possible, les politiques territoriales sur l'usage des biens-fonds et les déclarations d'intérêt territorial applicables;

c) inclure des énoncés de politique en matière de gestion de biens-fonds écosensibles ou de biens-fonds sujets aux risques naturels comme les inondations ou l'instabilité de pente;

d) traiter de la fourniture des systèmes de transport requis, des services publics et des services et des installations municipaux, et traiter de toutes exigences concernant la réserve de biens-fonds aux fins municipales et publiques;

e) comprend, à l'égard des secteurs précisés, une liste précisant l'ordre de leur aménagement ou de leur réaménagement, et la manière dont les services et les installations visés à l'alinéa d) seront fournis.

Contenu

Specific requirements

(2) A community plan must include a map or series of maps showing the land that is affected by the plan and indicating

(a) future land use; and

(b) any land in respect of which policy statements are included under paragraph (1)(c).

Contenu obligatoire

(2) Le plan directeur doit inclure une carte ou une série de cartes qui illustre les biens-fonds touchés par le plan directeur et qui indique, à la fois :

a) l'usage futur des biens-fonds;

b) tout bien-fonds dans les énoncés de politique inclus en vertu de l'alinéa (1)c).

Preparation

(3) A community plan must be prepared

(a) on the basis of surveys and studies of land use, population growth, the economic base of the municipality and its needs relating to transportation, communication, public services and social services; and

(b) in consultation with a professional community planner.

Élaboration

(3) Le plan directeur doit être élaboré :

a) d'une part, en se fondant sur des enquêtes et des études sur l'usage des biens-fonds, la croissance démographique, la base économique de la municipalité et ses besoins quant au transport, aux communications, aux services publics et aux services sociaux;

b) d'autre part, en consultation avec un planificateur communautaire professionnel.

Other information and materials

(4) A community plan may

(a) be prepared on the basis of surveys and studies, in addition to those referred to in paragraph (3)(a), relevant to the purpose of the plan; and

(b) include any other written statements, reports, charts and drawings, and other information and materials that may express and illustrate the information contained in the plan.

Information et matériel supplémentaires

(4) Le plan directeur peut :

a) être élaboré en se fondant sur des enquêtes et des études, outre celles visées à l'alinéa (3)a), pertinentes à l'objectif du plan directeur;

b) inclure tout autre énoncé écrit, rapport, carte et dessin, et d'autres renseignements et matériel qui peuvent exprimer et illustrer les renseignements contenus dans le plan.

Requirements

**5.** (1) A community plan has no effect unless it is approved by the Minister and adopted by council by bylaw.

Exigences

**5.** (1) Le plan directeur est sans effet à moins d'être approuvé par le ministre et de faire l'objet d'un règlement municipal adopté par le Conseil.

Review by Minister

(2) Council may, in accordance with the regulations, submit a community plan to the Minister for review and approval.

Révision par le ministre

(2) Le Conseil peut, conformément aux règlements, présenter un plan directeur au ministre aux fins de révision et d'approbation.

First and second reading

(3) A bylaw to adopt a community plan must have received first and second reading before council may submit the plan to the Minister.

Première et deuxième lecture

(3) Le règlement municipal portant adoption d'un plan directeur doit avoir été approuvé en première et en deuxième lecture avant que le Conseil puisse présenter le plan au ministre.

Effective date

(4) A community plan takes effect when the bylaw adopting it takes effect.

Entrée en vigueur

(4) Le plan directeur prend effet lors de l'entrée en vigueur du règlement municipal habilitant.

Exception

(5) Notwithstanding subsection (4), if a zoning bylaw conflicts with an amendment to a community plan, the amendment to the plan is deemed to come into effect on the earlier of

(a) the effective date of an amendment to the bylaw that conforms with the amendment to the plan; and

(b) the day that is six months after the day

Exception

(5) Malgré le paragraphe (4), s'il y a incompatibilité du règlement de zonage avec une modification apportée au plan directeur, la modification apportée au plan est réputée prendre effet à la première des dates suivantes :

a) la date d'entrée en vigueur d'une modification au règlement de zonage qui est conforme avec la modification

nécessaire à des fins municipales et publiques.

Redevelopment

(2) An area development plan relating to the redevelopment of an area must also describe any plans for the

(a) preservation or improvement of lands or buildings in the area;
(b) rehabilitation of buildings in the area;
(c) removal of buildings from the area;
(d) construction or replacement of buildings in the area; and
(e) establishment, improvement or relocation of roads, public utilities or other services in the area.

Réaménagement

(2) Le plan d'aménagement régional portant sur le réaménagement d'un secteur doit en outre décrire, à l'égard du secteur, tout projet :

a) de conservation ou d'amélioration des biens-fonds ou des bâtiments;
b) de réhabilitation de bâtiments;
c) d'enlèvement de bâtiments;
d) de construction ou de remplacement de bâtiments;
e) de création, d'amélioration ou de déplacement de chemins, de services publics ou d'autres services.

Other matters

(3) An area development plan may

(a) describe the manner in which land affected by the plan is to be subdivided;
(b) describe land to be set aside for municipal or public purposes and the particular purpose for which, and manner by which, it is to be set aside; and
(c) address any other matters council considers necessary.

Contenu facultatif

(3) Le plan d'aménagement régional peut :

a) décrire la manière dont les biens-fonds qu'il vise seront lotis;
b) préciser les biens-fonds qui seront réservés aux fins municipales ou publiques, et le but de la réserve et la manière dont elle sera effectuée;
c) traiter de toute question que le conseil estime essentielle.

Map required

(4) An area development plan must include a map or series of maps showing the land that is affected by the plan and indicating the proposed subdivision or development of the land.

Carte obligatoire

(4) Le plan d'aménagement régional doit inclure une carte ou une série de cartes illustrant le bien-fonds visé et indiquant le projet de lotissement ou d'aménagement.

Effective date

**10.** (1) An area development plan takes effect when the bylaw adopting it takes effect.

Entrée en vigueur

**10.** (1) Le plan d'aménagement régional prend effet lors de l'entrée en vigueur du règlement municipal habilitant.

Documents

(2) All documents, including maps, that constitute an area development plan are deemed to be part of the bylaw adopting the plan.

Documents

(2) Tous les documents, y compris les cartes, qui forment le plan d'aménagement régional sont réputés faire partie du règlement municipal portant adoption du plan.

General

Disposition générale

Effect of plan

**11.** The adoption by council of a community plan or an area development plan does not require the municipal corporation to implement it, but subject to sections 26, 27 and 28, use and development of land and buildings in the municipality or area must conform with the plan.

Effet du plan

**11.** L'adoption par le conseil d'un plan directeur ou d'un plan d'aménagement régional n'oblige pas la municipalité à mettre le plan à exécution sauf que, sous réserve des articles 26, 27 et 28, l'usage et l'aménagement des biens-fonds et des bâtiments dans la municipalité ou le secteur ne peuvent contrevenir au plan.

Zoning Bylaws

Règlements de zonage

Purpose

**12.** (1) The purpose of a zoning bylaw is to regulate and control the use and development of land and buildings in a municipality in a manner that conforms

But

**12.** (1) Le règlement de zonage vise à régir et à contrôler l'usage et l'aménagement des biens-fonds et des bâtiments dans la municipalité d'une manière

with a community plan, and if applicable, to prohibit the use or development of land or buildings in particular areas of a municipality.

conforme au plan directeur et, le cas échéant, d'interdire l'usage ou l'aménagement de biens-fonds ou de bâtiments dans certains secteurs de la municipalité.

Zoning bylaw

(2) On the adoption of a community plan, council may make a zoning bylaw respecting the use and development of land and buildings in the municipality.

(2) Dès l'adoption d'un plan directeur, le conseil peut adopter un règlement de zonage concernant l'usage et l'aménagement des biens-fonds et des bâtiments dans la municipalité.

Règlement de zonage

General power

(3) Except to the extent indicated, this Part is not intended to restrict the general power under subsection (2) to make a zoning bylaw.

(3) Sauf dans la mesure prévue, la présente partie n'a pas pour effet de restreindre le pouvoir général de faire un règlement de zonage en vertu du paragraphe (2).

Pouvoir général

Community plan

(4) A zoning bylaw must not conflict with a community plan.

(4) Le règlement de zonage ne doit pas être contraire au plan directeur.

Plan directeur

Preparation of zoning bylaw

(5) For greater certainty, council may begin the preparation of a zoning bylaw before a community plan is adopted.

(5) Il est entendu que le conseil peut commencer l'élaboration d'un règlement de zonage avant l'adoption du plan directeur.

Élaboration d'un règlement de zonage

Documents

(6) A zoning map and any schedules accompanying or appended to a zoning bylaw are deemed to be part of the bylaw.

(6) La carte de zonage et les annexes jointes ou annexées au règlement de zonage sont réputées en faire partie intégrante.

Documents

Exception to public hearing requirement

**13.** Notwithstanding that the Act under which a municipal corporation had been established or continued requires council to hold a public hearing before making a zoning bylaw, council is not required to hold a public hearing before amending the bylaw if the amendments are limited to the correction of errors and do not affect the substance of the bylaw.

**13.** Malgré le fait que la loi sous le régime de laquelle la municipalité a été constituée ou maintenue oblige le conseil à tenir une séance publique avant de prendre un règlement de zonage, le conseil n'est pas obligé de tenir une telle séance lorsqu'il s'agit de modifier ce règlement dans l'unique but de corriger des erreurs qui n'influent pas sur sa teneur.

Exception à l'obligation de tenir une séance publique

Zones and uses

**14.** (1) A zoning bylaw must

(a) divide the municipality into zones of the number and area that council considers appropriate;

(b) include a map showing the zones;

(c) specify one or more of the following for each zone:

(i) the permitted uses of land,

(ii) the permitted uses of buildings,

(iii) the uses of land that may be permitted at the discretion of a development authority,

(iv) the uses of buildings that may be permitted at the discretion of a development authority;

(d) describe any conditions that may apply or be imposed with respect to any of the permitted uses under paragraph (c); and

(e) prohibit or otherwise regulate uses of land and buildings that fail to conform with permitted uses.

**14.** (1) Le règlement de zonage doit, à la fois :

a) répartir le territoire municipal en zones du nombre et de la superficie que le conseil estime indiqués;

b) inclure une carte qui illustre les zones;

c) préciser au moins l'un des éléments suivants pour chaque zone :

(i) les usages de biens-fonds permis,

(ii) les usages de bâtiments permis,

(iii) les usages de biens-fonds susceptibles d'être permis à la discrétion d'une autorité d'aménagement,

(iv) les usages de bâtiments susceptibles d'être permis à la discrétion d'une autorité d'aménagement;

d) décrire les conditions pouvant s'appliquer ou assortir tout usage permis en vertu de l'alinéa c);

Zones et usages

# Walsh v. Hamilton (City) Chief Building Official

Ontario Judgments

Ontario Superior Court of Justice

Hamilton, Ontario

C.R. Harris J.

Heard: May 5, 16 and June 3 2008.

Judgment: July 3, 2008.

Court File No. 07-31501

**[2008] O.J. No. 2645** | 74 C.L.R. (3d) 101 | 48 M.P.L.R. (4th) 239 | 2008 CarswellOnt 3921 | 168 A.C.W.S. (3d) 409

Between Fred Walsh, Applicant, and John A. Spolnik (Chief Building Official for the City of Hamilton), City of Hamilton, Don B. Jeffrey (Inspector for the City of Hamilton), Thaddeus Urbanowicz and Rosella Giammarco, Respondents

(37 paras.)

## Case Summary

**Municipal law — Government — Delegation of exercise of power — Administrative functions — Licences and permits — Appeal from decision to issue the respondents a building permit for a two storey addition dismissed — The building inspector had jurisdiction to issue the permit; the decision was administrative and the decision maker was not expected to make the decision personally — The proposed structure was an addition, and not a "private garage", as it was not only going to only be used for housing automobiles — It was unnecessary to consider the location of the proposed structure; the addition was a permitted use — Building Code Act, s. 8(2), s. 25 By-law 6593 of the City of Hamilton, s. 9(1).**

**Municipal law — Planning and development — Building regulations — Building permits — Issuing — Appeal from decision to issue the respondents a building permit for a two storey addition dismissed — The building inspector had jurisdiction to issue the permit; the decision was administrative and the decision maker was not expected to make the decision personally — The proposed structure was an addition, and not a "private garage", as it was not only going to only be used for housing automobiles — It was unnecessary to consider the location of the proposed structure; the addition was a permitted use — Building Code Act, s. 8(2), s. 25 By-law 6593 of the City of Hamilton, s. 9(1).**

Appeal from decision to issue the respondents a building permit for a two storey addition which included, amongst other rooms, a garage and home office. Applicant argued that building inspector Don Jeffrey did not have the jurisdiction to issue the permit on behalf of the Chief Building Official and that the proposed structure was a "private garage" which could not be located on the side yard of a property. City of Hamilton By-law 6593 (the By-law) defined "private garage" as being "used only for the housing of passenger automobiles of the occupants of the premises"; the definition of "parking space" allowed for parking within principal buildings. Under subsection 9(1) of the By-law extensions and enlargements of buildings were a permitted use.

HELD: Appeal dismissed.

The building inspector had jurisdiction to issue the permit; the decision was administrative and the decision maker was not expected to make the decision personally. It was unnecessary to consider the location of the proposed

structure as it was an addition and not a private garage.

## Statutes, Regulations and Rules Cited:

Building Code Act, S.O. 1992, c. 23, s. 8(2), s. 25

By-law 6593 of the City of Hamilton, s. 9(1)

## Counsel

Lee A. Pinelli, counsel on behalf of the Applicant.

Byrdena M. MacNeil, counsel on behalf of the Respondents, John A. Spolnik, City of Hamilton, and Don B. Jeffrey.

Scott Snider, counsel on behalf of the Respondents Thaddeus Urbanowicz and Rosella Giammarco.

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**C.R. HARRIS J.**

**BACKGROUND**

**1** Simply put, this is a dispute over a proposed garage between two neighbours sufficiently earnest to engage the time of the Superior Court of Justice in analyzing the minutiae of a municipal zoning by-law.

**2** The Applicant, Mr. Walsh, and the Respondents, Mr. Urbanowicz and Ms. Giammarco, are next door neighbours. The respondents wish to construct a structure on their property. The structure is to contain a three car garage and other living area and is to be attached to their house by a porte cochère. The applicant opposes this construction since it will impact his backyard by casting a shadow over his pool and backyard. The variable topography of the properties are such that the addition will be effectively a three floor wall against the applicant's tranquil living yard. The City, through its Chief Building Official and a building inspector, saw nothing wrong with the proposed construction and issued a building permit. Hence, the applicant has brought this Application to review the actions of the City officials and have the permit overturned.

**FACTS**

**3** I find the relevant facts to be as follows.

* Mr. Walsh resides at 17 Ravenscliffe Avenue, in the City of Hamilton. Mr. Urbanowicz and Ms. Giammarco reside on the abutting lands at 19 Ravenscliffe Avenue. Their irregular shaped property primarily abuts the rear of Mr. Walsh's property, with the exception of a driveway which fronts onto Ravenscliffe to the side of Mr. Walsh's property. The respondents' property has another frontage onto Turner Avenue making it a *"through lot"*; however, this additional frontage turned out to be immaterial to the issues raised by the proposed construction.
* Mr. Urbanowicz and Ms. Giammarco decided they wanted to construct a garage at 19 Ravenscliffe Avenue and submitted an application for a building permit to the City of Hamilton. The application was approved, resulting in the issuance of Building Permit No. 07-278684-00-R9. This permit was issued by Don B. Jeffery, a building inspector for the City, on May 10, 2007. Mr. Jeffery signed the

permit *"For Director of Building and Licensing"*. John A. Spolnik is the Acting Director of Building Services and the Chief Building Official (CBO) for the City. As a building inspector, one of Mr. Jeffery's responsibilities is to issue non-discretionary building permits on behalf of CBO Spolnik.

* Minor, internal changes in the proposed structure resulted in a new permit, Permit No. 07-278684-01-R9, being issued on July 23, 2007. This permit replaced the first permit issued. Again, Mr. Jeffery issued the permit on behalf of the CBO. The permit was issued *"to construct a two storey stone veneer and stucco addition to a single family dwelling. Addition to include, gallery, home office, stair, utility room, storage room, porte cochere and 3 car garage"*. It is this permit which is at issue in these proceedings.

**4** Mr. Walsh argues first, that Mr. Jeffrey did not have the jurisdiction to issue the permit as he was not the CBO and the CBO could not delegate his authority in this matter. Alternatively, Mr. Walsh argues that the permit was incorrectly granted since the location of the proposed structure contravenes the zoning by-law. According to Mr. Walsh, the structure is a *"private garage"* and an *"accessory building"*, which cannot be located in a side yard of a property. The respondents dispute all of Mr. Walsh's claims and contend that Mr. Jeffrey had authority to grant the permit and that the permit was correctly granted since the proposed structure is an addition and not an *"accessory building"*. Further, the respondents submit that the location of the building will be in the front yard of the property, an allowable location.

**5** Mr. Walsh brings this Application pursuant to s. 25 of the ***Building Code Act, 1992***, S.O. 1992, c. 23 (*BCA*), which provides for an appeal to the Superior Court of Justice:

> *25.(1) A person who considers themself aggrieved by an order or decision made by the chief building official, a registered code agency or an inspector under this Act (except a decision under subsection 8(3) not to issue a conditional permit) may appeal the order or decision to the Superior Court of Justice within 20 days after the order or decision is made.*

**APPLICABLE LEGISLATION**

**6** It is helpful to set out the relevant provisions to this discussion. Under s. 8(2) of the ***BCA***:

> *8.(2) The chief building official shall issue a permit referred to in subsection (1) unless,*
>
> *(a) the proposed building, construction or demolition will contravene this Act, the building code or any other applicable law;*

**7** The parties agree that the *"other applicable law"* in dispute here is the By-Law No. 6593 of the City of Hamilton ("*the zoning by-law*"). The relevant definitions from the by-law are:

> *"Garage, Private" shall mean a garage appurtenant to a dwelling or multiple dwelling, either detached or attached to the same, used only for the housing of passenger automobiles of the occupants of the premises*
>
> ...
>
> *"Accessory" shall mean normally and customarily incidental, subordinate and exclusively devoted to a principal use, building or structure, and located on the same lot therewith;*
>
> *"Parking Space" means a space enclosed in a principal building or in an accessory building or unenclosed for the parking of a vehicle and having manoeuvring space and one or more access driveways appurtenant thereto with ingress into and egress from a highway.*
>
> *"Lot Line Front" with reference to an interior lot shall mean the boundary line along the street;*
>
> ...
>
> *"Lot Line, Side" shall mean any lot line except a front lot line or a rear lot line;*

*"Yard, Front" shall mean a yard extending across the front of a lot from side lot line to side lot line, and from the front lot line to a principal building or structure, disregarding front steps and unenclosed entrance porches;*

*"Yard, Side" shall mean a yard between a side lot line and a main building, and extending from the front yard to the rear yard, except where there is no front yard or rear yard, in which case the front or rear boundary of a side yard shall be the front lot line or rear lot line, as the case may be; and on a corner lot, a side yard abutting a street line shall be a flakage side yard*

## ISSUES

**8** The following issues arise in this case:

1. Did Mr. Jeffrey have jurisdiction to issue the permit on behalf of the Chief Building Official, Mr. Spolnik?
2. If Mr. Jeffrey had jurisdiction to issue the permit, then what is the appropriate standard of review of the decision to issue the building permit?
3. Is the proposed structure an *"addition"* or an *"accessory building"*?
4. If it is an *"accessory building"*, then in which yard is the proposed construction to occur?

## POSITIONS OF THE PARTIES

**9** For ease of understanding, the positions of the respondents are set out first, as they indicate what interpretations of the relevant legislation were applied in the City's decision to grant the building permit.

### Positions of the Respondents - City of Hamilton, John Spolnik and Don Jeffrey

**10** These respondents submit that Mr. Jeffrey had the authority to issue the building permit and that Mr. Spolnik did not improperly delegate authority. Mr. Spolnik, as CBO, only delegates decisions on building permits when the requirements set out in s. 8(2) of the ***Building Code Act*** have been fulfilled and there is no discretion to refuse the permits. That is, Mr. Jeffrey may only issue non-discretionary permits where all prescribed requirements have been satisfied. The City contends that, in the absence of evidence to the contrary, Inspector Jeffrey signed on behalf of CBO Spolnik with CBO Spolnik's authority. Therefore, the actual authority of CBO Spolnik can be considered to have been exercised in issuing the building permit. Further, the function of issuing a permit is an administrative action involving the consideration of a specific set of facts and circumstances surrounding the application of legislative guidelines and standards set out in s. 8(2) of the ***BCA***. This delegation of an administrative action falls within the two exceptions to the maxim *delegatus non potest delegare*. The City relies on the following cases for the above propositions: ***Walmar Investments Ltd. v. North Bay (City)***, *[1969] O.J. No. 1431*, 1969 CarswellOnt 243 (C.A.); ***R. v. Harrison***, *[1977] 1 S.C.R. 238*, *1976 CarswellBC 155* (S.C.C.); and ***Northeast Bottle Depot Ltd. v. Alberta (Beverage Container Management Board)***, *[2000] A.J. No. 980*, 2000 CarswellAlta 876 (Q.B.).

**11** In regards to the appropriate standard of review, the City submits that the standard is one of reasonableness. The City contends that the determinations made by the CBO were issues of fact and/or issues of mixed law and fact within the CBO's specialized area of knowledge, training and experience. This accords a greater degree of deference to be given. Further, municipal planning and zoning has been held by courts to be a specialized area falling squarely within the expertise of a chief building official and supporting a greater degree of deference. For the above propositions, the City relies upon ***Dunsmuir v. New Brunswick***, *2008 SCC 9*; ***Rotstein v. Oro-Medonte (Township)***, *[2002] O.J. No. 4990*, *2002 CarswellOnt 4411* (S.C.J.); ***Runnymede Development Corp. v. 1201262 Ontario Inc.***, *[2000] O.J. No. 981*, 2000 CarswellOnt 934 (S.C.J.); ***Northeast Bottle Depot***, *supra*; ***1218897 Ontario Ltd. v. Toronto (City) Chief Building Official***, *[2005] O.J. No. 4607*, *2005 CarswellOnt 5296* (S.C.J.) and ***Bayshore Shopping Centre Ltd. v. Nepean (Township)***, *[1972] S.C.R. 755*, 1972 CarswellOnt 207 (S.C.C.).

**12** The City submits that the proposed structure qualifies as an *"addition"* and is not an "accessory building" under the zoning by-law. In determining that the proposed structure is an *"addition"*, the City relies upon the proposed use of the second floor as living space. The proposed use, described in the building permit, is as a gallery, home office, stair, utility room and storage room. The City submits that these uses all constitute living spaces found in residential homes and will form an integral part of the principal building once constructed. Further, the proposed structure will form part of the existing building as it will be connected by a hallway over the porte cochere. The City contends that it is not appropriate to sever the garage or parking space portion of the structure in an attempt to qualify the structure as an accessory building.

**13** Finally, if the structure is found to be an accessory building, the City submits that it is being constructed in the front yard of the property. While an accessory building may not be constructed in a side yard, there is no restriction on its erection in a front yard. The front yard of 19 Ravenscliffe Avenue is determined according to the definitions in the zoning by-law and this factual determination by the CBO should be given deference by the Court.

**Position of the Respondents - Mr. Urbanowicz and Ms. Giammarco**

**14** These respondents did not put forth a position in regards to Mr. Jeffrey's authority to issue the permit on behalf of the CBO. They submit that the issue is academic as CBO Spolnik personally confirmed Inspector Jeffrey's interpretation in his affidavit.

**15** In regards to the appropriate standard of review, these respondents submit that it is one of reasonableness. They base this on the following factors: the CBO does not conduct a hearing prior to making a decision, on appeal the Court has broad powers and the ability to hear additional evidence, the questions are ones of mixed fact and law, the interpretation of the zoning by-law is dependant on very specific facts, the by-law is dependant on the municipal context specific to Hamilton, and the determination under the by-law is less concerned with legal interests and more concerned with economic and business interests. ***Dunsmuir***, *supra*; ***Runnymede***, *supra*; and ***Canada (Director of Investigation and Research Competition Act) v. Southam Inc.***, *[1997] 1 S.C.R. 748*, were all cited by the respondents.

**16** Mr. Urbanowicz and Ms. Giammarco, as supported by their two experts - Mr. Ariens and Mr. Fothergill, submit that the proposed structure is an addition and not a *"private garage"* since it is not to be used *only* for the housing of passenger automobiles of the occupants of the premises. Rather, the structure will also contain a gallery, home office, stair, utility room and storage room. The respondents point out that the structure will be integrated with the principal dwelling physically, mechanically and functionally. Further, the definition of *"parking space"* in the by-law allows for a space to be enclosed in a principal building; therefore, the provision for a three car garage in the proposed structure is a permitted use as part of the principal dwelling. Ultimately, Mr. Urbanowicz and Ms. Giammarco contend that the CBO was reasonable in concluding that the proposed construction was an addition to the principal building.

**17** Mr. Urbanowicz and Ms. Giammarco also submit that, if it is necessary to consider the location of the construction, then the proposed structure will be located in the front yard of the property. They support the interpretation of the CBO in delineating the front yard along the Ravenscliffe Avenue frontage.

**Applicant's Position**

**18** The applicant submits that it is the CBO who is legislatively empowered to issue building permits. The only other persons who could issue the permits are three Deputy CBO's appointed under City of Hamilton By-Law No. 07-051 with *"all the powers and duties of the CBO"*. An inspector is restricted to reviewing plans, inspecting construction and issuing orders, as those are the powers and duties set out in s. 1.1(7) of the ***BCA***. Therefore, the applicant contends that Mr. Jeffrey, as an inspector, was not empowered to issue the building permit and the permit is consequently void and of no legal force or effect.

**19** The applicant submits that the appropriate standard of review, should the permit be upheld, is one of correctness. The applicant argues that the question to be answered, whether the permit contravened any other applicable law, is a question of law. Further, Mr. Walsh points out that there is an appeal as of right in s. 25 of the ***BCA***, upon which the Court has broad rights to vary or substitute its decision. The applicant relies upon ***Runnymede***, *supra* and ***Loblaws Inc. v. Ancaster (Town) Chief Building Official*** (1993), 13 M.P.L.R. 73 (Ont. Gen. Div.).

**20** It is the applicant's view that the proposed structure constitutes a private garage under that definition in the zoning by-law. According to the applicant, the primary purpose of the proposed construction is to build a three car garage and the living space above the garage is an ancillary characteristic that does not remove the structure from the definition of *"private garage"*. The applicant notes that according to the definition, a private garage need not be detached from the principal dwelling but may be attached to it. It is also noted that under the by-law a private garage is an accessory building and an accessory building may not be located in a side yard.

**21** Mr. Walsh argues that the proposed location of the structure is in a side yard, relying on his expert's determination in delineating the front and side yards. The applicant also points out that one of the respondents' experts, Mr. Ariens, assumed the proposed location was in a side yard when initially retained by the respondents.

**LAW & ANALYSIS**

**Issue 1 - Delegation of Authority**

**22** As indicated above, the first issue to address is whether CBO Spolnik properly delegated authority to issue the building permit to Inspector Jeffrey. While the applicant contends that this was improper, it is clear that administrative, non-discretionary decision may be delegated. The issuance of a permit in accordance with policy guidelines and standards was held to be an administrative decision in ***Northeast Bottle Depot***, *supra* at para. 58. The delegation of an administrative action is one of the exceptions to the maxim against subdelegation, *delegatus non potest delegare*. Section 8(2)(a) of the ***BCA*** is a similar situation - provided that there is no contravention of applicable law, the permit *"shall"* be issued. There is no discretion to refuse to issue the permit; rather, the issuance is simply an administrative action. Another exception to the maxim is where the decision maker was not expected to make the decisions personally: ***Walmar Investments***, *supra* at para. 10; ***Northeast Bottle Depot***, *supra* at para. 48. It is clear that the CBO was not intended to make all of the building permit decisions personally, as evidence was led that the City receives thousands of these applications a year.

**23** The facts of this case satisfy both exceptions to the maxim against subdelegation, in that the decision was administrative and the decision maker was not expected to make the decisions personally. Therefore, Mr. Jeffrey had the authority to issue the permit on behalf of the CBO and the decision may be attributed to CBO Spolnik upon review or appeal.

**Issue 2 - Standard of Review**

**24** Following the Supreme Court of Canada's recent decision in ***Dunsmuir***, *supra*, there are now only two possible standards of review: reasonableness and correctness. The Court in ***Dunsmuir***, *supra* also held that an exhaustive analysis to determine the proper standard is not required where the jurisprudence has already determined in a satisfactory manner the applicable standard. In this case, the appropriate standard has been previously discussed in ***Runnymede***, ***1218897*** and ***Rotstein***, *supra*. These cases held that a standard of reasonableness is applicable when deciding questions of mixed law and fact, remembering that *"the degree of deference will vary depending upon the remoteness or closeness of the issue in question to one of law within the court's area of expertise or of fact within the CBO's more specialized ambit of knowledge, training and experience"* [***Rotstein***, *supra* at para. 17].

**25** According to ***Dunsmuir***, *supra*, when the standard of review is one of reasonableness, the court inquires into the qualities that make a decision reasonable, such as the existence of justification, transparency and intelligibility.

More particularly, to be upheld on a reasonableness standard, the decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

**Issue 3 - Addition or Accessory Building?**

**26** The applicant has tried to parse the proposed structure so that the mere fact that it includes garage space satisfies the definition for *"private garage"*. However, the respondents have pointed out that the definition includes the word *"only"* when discussing the purpose of a private garage. The definition, set out above, is repeated here for clarity.

> *"Garage, private" shall mean a garage appurtenant to a dwelling or multiple dwelling, either detached or attached to the same, used only for the housing of passenger automobiles of the occupants of the premises.*
>
> [emphasis added]

**27** The definition of *"parking space"* allows for parking to be within the principal building, in an accessory structure or an unenclosed space. Therefore, it is clear that a structure does not simply become a private garage because there is parking within it, since a principal building may contain parking spaces but not have a private garage.

**28** In this case, the proposed structure includes more than the three car garage. The gallery, office, laundry room and storage room are also features of the proposed structure. That is, the structure will not be used *only* for the housing of the respondents' passenger automobiles. Rather, there is considerable living space in the building that will be integrated mechanically and physically to the existing, principal building. Once completed, the building will have one footprint. Under s. 9(1) of the by-law, alterations, extensions and enlargements of a building are a permitted use. The decision of Inspector Jeffrey, on behalf of CBO Spolnik, that the structure was an addition permitted under s. 9(1) was a reasonable decision. The decision that the structure is an addition certainly falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

**Issue 4 - Front or Side Yard?**

**29** It is unnecessary to consider the location since the proposed structure is not an accessory building and is not subject to any restrictions as an addition; however, I would like to make the following comments.

**30** The applicant submitted that the characterization of the location as the side yard was *res judicata* since it had been mentioned before the Ontario Municipal Board in a proceeding regarding a variance application for a proposed detached garage at 19 Ravenscliffe Avenue. The requirements for *res judicata* were discussed by the Court of Appeal in ***Canam Enterprises Inc. v. Coles*** *(2000), 51 O.R. (3d) 481* at para. 19:

> *The principle of res judicata applies where a judgment rendered by a Court of competent jurisdiction provides a conclusive disposition of the merits of the case and acts as an absolute bar to any subsequent proceedings involving the same claim, demand or cause of action. Issue estoppel is one aspect of res judicata. The oft-cited requirements of issue estoppel are attributed to Lord Guest in Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] 1 A.C. No. 853 at 935 (H.L.): (1) That the same question has been previously decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.*

**31** In this case, it is not clear that the requirements have been met. The City was not a party at the OMB hearing and the question decided at the OMB hearing concerned a variance for a proposed detached structure and not a determination of which yard the structure would be located in.

**32** Additionally, I believe that the decision of Inspector Jeffrey and CBO Spolnik as to the location of the front and

side yards was entirely reasonable. These officials are familiar with the by-law and its interpretation. Their interpretation, set out in drawing A0.04 (part of exhibit 6 to the Transcript of Examination for Discovery of Don Jeffrey), of how to determine the yards corresponds to the definitions in the by-law. The drawing demonstrates that the boundary of the property along Ravenscliffe Avenue is the front lot line. All of the other boundaries (in the area we are concerned about) are side lot lines. The front yard is then determined to be the yard from the front lot line to the front of the principal building and extending from the side lot line to side lot line. In this interpretation, the side lot lines used for delineating the yard are those at the outer north and south limits of the property. That is, the side lot lines to be used are not restricted in any way. The proposed structure is located within this front yard.

**33** The applicant, based on his expert's opinion, believes that the front yard should be constrained to the width of the front lot line. Lines perpendicular to the front of the principal building are then extended to the side lot lines. This interpretation is not supported by the by-law or by the definition of front yard.

**34** Again, the decision of Inspector Jeffrey and CBO Spolnik as to the location of the front yard is a reasonable one.

**CONCLUSION**

**35** The answers to the questions posed above are as follows:

1. Did Mr. Jeffrey have jurisdiction to issue the permit on behalf of the Chief Building Official, Mr. Spolnik?

Yes.

2. If Mr. Jeffrey had jurisdiction to issue the permit, then what is the appropriate standard of review of the decision to issue the building permit?

Reasonableness.

3. Is the proposed structure an *"addition"* or an *"accessory building"*?

The proposed structure is an addition to the existing dwelling at 19 Ravenscliffe Avenue.

**36** Accordingly the application is dismissed.

**37** If counsel are unable to resolve cost considerations they may provide me with a one-page (Letterhead) cost memorandum by July 31, 2008.

C.R. HARRIS J.

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End of Document

# *Hastings Park Conservancy v. Vancouver (City)*

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Dorgan J.

Heard: April 10 - 13 and May 5, 2006.

Judgment: August 16, 2006.

Vancouver Registry No. L052643

**[2006] B.C.J. No. 1912** | 2006 BCSC 1261 | 47 Admin. L.R. (4th) 280 | 27 M.P.L.R. (4th) 235 | 152 A.C.W.S. (3d) 725 | 2006 CarswellBC 2079

Between The Hastings Park Conservancy, Petitioner, and City of Vancouver, Respondent

(127 paras.)

## Case Summary

**Administrative law — Natural justice — Duty of fairness — Procedural fairness — The park conservancy's petition seeking judicial review of a zoning by-law amendment wherein the Vancouver City Council allowed for the installation and use of slot machines at the Hastings Racecourse was dismissed — The decision to enact the by-law amendment allowing slot machines at Hastings Recourse was intra vires the city's zoning powers — Furthermore, the city had met its statutory procedural obligations and there was no breach of any common law procedural fairness obligations.**

**Municipal law — Powers of municipality — Judicial review of exercise of authority — The park conservancy's petition seeking judicial review of a zoning by-law amendment wherein the Vancouver City Council allowed for the installation and use of slot machines at the Hastings Racecourse was dismissed — The decision to enact the by-law amendment allowing slot machines at Hastings Recourse was intra vires the city's zoning powers — Furthermore, the city had met its statutory procedural obligations and there was no breach of any common law procedural fairness obligations.**

**Municipal law — Bylaws — Amendment — Particular subject matter — Zoning — Planning — Quashing bylaws — Grounds — Ultra vires — The park conservancy's petition seeking judicial review of a zoning by-law amendment wherein the Vancouver City Council allowed for the installation and use of slot machines at the Hastings Racecourse was dismissed — The decision to enact the by-law amendment allowing slot machines at Hastings Recourse was intra vires the city's zoning powers — Furthermore, the city had met its statutory procedural obligations and there was no breach of any common law procedural fairness obligations.**

The petition was dismissed -- The petitioning park conservancy, a community stewardship organization, sought judicial review of a zoning by-law amendment wherein the Vancouver city council allowed for the installation and use of slot machines at Hastings Racecourse -- The petitioner submitted that the council did not have jurisdiction to zone or rezone park land, or to enter into a lease or licensing agreements with respect to Hastings Park -- HELD: The petition was dismissed -- The decision to enact the by-law amendment allowing slot machines at Hastings Recourse was intra vires the city's zoning powers -- Furthermore, the city had met its statutory procedural obligations and there was no breach of any common law procedural fairness obligations -- The notice of the hearing

was not misleading and complied with statutory requirements -- The petitioner had not met its onus of showing that the city did not have jurisdiction to enter into lease or licensing agreements with respect to the park, or that the operating agreement constituted an unauthorized grant to Hastings Entertainment Inc. -- There was nothing in the Vancouver Charter requiring public input or feedback on agreements between the city and third party corporations or business partners -- The request for an order requiring disclosure of the operating agreement and any related property appraisal was dismissed.

## Statutes, Regulations and Rules Cited:

Judicial Review Procedure Act, s. 2, s. 7

Society Act, *R.S.B.C. 1996, c. 433*,

Vancouver Charter, *S.B.C. 1953, c. 55, s. 148*, s. 151, s. 206, s. 456, s. 488, s. 524, s. 565, s. 566

## Counsel

Counsel for the Petitioner: D.C. Creighton and J.T. Rohrick

Counsel for the Respondent: B.S. Parkin

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[Editor's Note: A Corrigendum was released by the Court August 21, 2006. The corrections have been made to the text and the Corrigendum is appended to this document.]

**DORGAN J.**

**1** The petitioner seeks judicial review of a zoning by-law amendment passed by Council of the respondent City of Vancouver ("Council") which amendment allows for the installation and use of slot machines at Hastings Racecourse in Hastings Park. Hastings Park, home to the Pacific National Exhibition, is located in the Hastings-Sunrise area of Vancouver.

**2** The petitioner, Hastings Park Conservancy (the "Conservancy"), is a society incorporated under the ***Society Act***, *R.S.B.C. 1996, c. 433*, and is a community stewardship organization active in the Hastings Park area.

**3** On July 22, 2004, Council approved in principle a by-law amending CD-1 By-law No. 3656 for 2901 East Hastings Street (Hastings Park) to permit the use of slot machines at Hastings Racecourse. Council enacted the amending by-law on October 4, 2005. The petitioner asks this court to quash that amending by-law.

**4** The validity of a municipal by-law may be challenged in court on two bases: (1) that the municipality, through its elected council, did not have the jurisdiction to enact the by-law, that is, that the by-law is *ultra vires*; or (2) that the municipality, in enacting the by-law, breached statutory procedural requirements or failed to fulfil common law procedural fairness obligations.

**5** In order to be successful, the petitioner bears the onus of demonstrating to this court that the zoning by-law amendment allowing slot machines at Hastings Racecourse was either *ultra vires* Council's jurisdiction, or that the City did not meet statutory procedural requirements, or that it otherwise breached its duty of procedural fairness during the process leading up to the enactment of the amending by-law.

**6** Dissatisfaction with process or divergent political points of view is not synonymous with the legal underpinnings required for the courts to alter the course taken by democratically elected decision-makers.

## BACKGROUND

**7** While the petitioner seeks an order quashing the impugned by-law, the petition also raises a number of issues with respect to the development application process.

**8** A zoning by-law amendment and a development permit are two distinct matters; each requires a distinct and separate process. I propose to set out the background with respect to each, in turn.

### 1. The Rezoning Process

### a. The process in general

**9** The by-law amendment process was initiated by an application by Hastings Entertainment Inc. ("HEI"), the corporation that operates the Hastings Park racetrack, and by the British Columbia Lottery Corporation ("BCLC"). On April 8, 2004 HEI was bought by Great Canadian Gaming Corporation ("GCGC"). However, within the zoning application, the reference continues to be to HEI.

**10** There are two types of rezoning in the City of Vancouver: changing the zoning on a site from one zoning by-law to another zoning by-law, or changing the text of the zoning by-law that already applies to a site, for example to provide for new allowable uses (a "text amendment"). A text amendment is performed by Council enacting a by-law amending the existing zoning by-law covering the property in question (an "amending by-law").

**11** Section 151 of the ***Vancouver Charter***, *S.B.C. 1953, c. 55*, requires that Council's powers be exercised by by-law or by resolution. That section is as follows:

> 151.(1) Except as restricted by this section, the powers of the Council may be exercised either by by-law or by resolution.
>
> (2) A by-law may not be amended by resolution.
>
> (3) If an enactment provides that Council is required or empowered to exercise a power by by-law, that power may only be exercised by by-law.
>
> (4) If the Council exercises a power to direct that a thing should or should not be done and a person who fails to comply is subject to a fine or penalty, the power shall be exercised by by-law.

**12** The power for Council to zone and rezone land is found at section 565 of the ***Vancouver Charter***. The relevant portions of that section are as follows:

> (1) The Council may make by-laws
>
> ...
>
> (c) regulating, within any designated district or zone, the construction, use, or occupancy of buildings for or except for such purposes as may be set out in the by-law;
>
> ...

(f) designating districts or zones in which there shall be no uniform regulations and in which any person wishing to carry out development must submit such plans and specifications as may be required by the Director of Planning and obtain the approval of Council to the form of development, or in which any person wishing to carry out development must comply with regulations and guidelines set out in a development plan or official development plan;

(f.1) requiring, where it creates a zone pursuant to this section, that as a condition of approving a form of development a person provide public amenities, facilities or utilities or provide land for such purposes or require that the purpose retain and enhance natural physical features of a parcel being developed;

(g) delegating to the Director of Planning or such other persons as are authorized by Council the authority to certify the authorized use or occupancy of any land or building;

...

**13** The procedural requirements for rezoning in the City of Vancouver are set out at section 566 of the ***Vancouver Charter***. The relevant sub-sections are as follows:

(1) The Council shall not make, amend, or repeal a zoning by-law until it has held a public hearing thereon, and an application for rezoning shall be treated as an application to amend a zoning by-law.

...

(3) Notice of the hearing, stating

(a) the time and place of the hearing, and

(b) the place where and the times when a copy of the proposed by-law may be inspected,

shall be published in at least 2 consecutive issues of a daily newspaper circulating in the city, with the last publication appearing at least 7 days and not more than 14 days before the date of the hearing.

(4) At the hearing all persons who deem themselves affected by the proposed by-law shall be afforded an opportunity to be heard in matters contained in the proposed by-law, and the hearing may be adjourned from time to time.

(5) After the conclusion of the public hearing, the Council may pass the proposed by-law in its original form or as altered to give effect to such representations made at the hearing as the Council deems fit. ...

**14** Evidence with respect to the rezoning process was provided in an affidavit sworn by Dave Thomsett, a senior planner for the respondent City. The petitioner provided no evidence regarding the City's zoning or rezoning procedures.

**15** According to Mr. Thomsett, most privately initiated rezonings commence when the prospective applicant approaches the City regarding the general nature of the proposed development. City staff first consider the proposal and determine whether it can be accommodated under the zoning applicable to the property. If not, the applicant may make a rezoning enquiry to the Planning Department to determine whether the City will be supportive of the application. Depending on that advice, the applicant may decide to submit a formal rezoning application. City staff assess the application and provide a report to Council with a recommendation as to whether the application should be refused or referred to public hearing.

**16** If Council decides to refer the application to public hearing, City staff must provide notice of the hearing in accordance with the requirements set out in s. 566 of the ***Vancouver Charter***.

**17** After the hearing has been conducted, Council may decide to approve the proposed by-law in the form presented at the public hearing, or in an altered form to give effect to matters raised at the public hearing (s. 566(5)). Council may also decline to approve or amend the by-law.

**18** Council may approve the rezoning application by passing a resolution approving it "in principle", indicating that Council will enact the amending by-law at a future Council meeting.

**19** Council may also approve a rezoning application subject to certain conditions. Depending on the nature of the conditions, they must either be fulfilled prior to Council enacting the amending by-law, or must be fulfilled at a later date. After the public hearing, Council may alter conditions that it has imposed as a result of staff advice or a change in circumstances. The City does not conduct a further public hearing or provide notice of alterations of the conditions, as the conditions do not constitute part of the by-law amendment. A further public hearing is only held if the by-law itself is to be altered prior to enactment.

**20** City staff will obtain the minutes of the public hearing and review the Council resolution approving the application "in principle" and determine whether any "prior to enactment" conditions exist and, if so, whether they have been met. Once all "prior to enactment" conditions have been met, staff will ask the Legal Services Department to bring the matter forward to Council for enactment of the amending by-law. Council will then enact the by-law.

**b. The rezoning process in this case**

**21** At the time of HEI's rezoning application, Hastings Park was zoned CD-1 (Comprehensive Development), pursuant to zoning by-law no. 3656. CD-1 zones are a type of site specific zoning. There are over 400 CD-1 zones in the City of Vancouver. Section 565(1)(f) of the ***Vancouver Charter*** gives Council the power to create zones with no uniform regulations. Unlike standard zoning district schedules, CD-1 by-laws may contain few or no regulations controlling all development within the zone. Instead, section 565(1)(f) requires Council to approve the form of development for these zones. The "form of development" refers to the massing and siting of buildings on the property.

**22** In 2003, HEI and BCLC submitted to the City an application to amend the zoning for Hastings Park. The purpose of the application was to introduce slot machines to Hastings Racecourse. The City of Vancouver owns the subject property.

**23** City staff determined that it would be necessary for the by-law to be amended to include the use of the property for slot machines. Following a November 17, 2003 staff report containing a number of recommendations, the matter was referred by Council to a public hearing.

**24** Prior to the public hearing, the City conducted public consultation by way of an Ipsos-Reid opinion survey and an open house. The open house was held on July 7, 2004. At the open house, the project was explained to attendees and the public was given an opportunity to complete comment forms.

**25** Notice of the open house and the public hearing was given through advertisement in the *Vancouver Sun* newspaper on July 2 and 3, 2004. In addition to the statutory notice, "courtesy advertisements" were placed in the *Vancouver Courier* and two Chinese language newspapers on July 3 and 4. Further, a notification letter dated June 25, 2004 was sent to all registered property owners in the vicinity of Hastings Park.

**26** The evidence shows that as a result of the controversial nature of the proposed new use, the City decided to notify more widely than the typical two-block radius used for most zoning applications. The notification area was bounded by Nanaimo Street, the waterfront, Boundary Road and Charles Street. Although the courtesy advertisement and notification letter are not required by the ***Vancouver Charter***, apparently such steps are commonly taken in an attempt to give maximum notice of certain applications.

**27** The notice placed in the *Vancouver Sun* stated that the public hearing would consider zoning by-law amendments for Hastings Park to permit up to 900 slot machines in the existing building at Hastings Racecourse. The notice also contained information with respect to the place where and the time at which copies of the draft by-

law could be inspected by the public. Other issues with respect to the development, including changes to the building or to parking, were not referred to in the legal notice.

**28** At the public hearing on July 15, 2004, an agenda package containing the following information was made available to members of the public attending:

* A draft of the proposed amending by-law;
* A memorandum dated July 15, 2004, from Mr. Thomsett to the Mayor and Council setting out the comments of open house attendees on July 7, 2004;
* A November 17, 2003 staff policy report recommending to Council that the application be referred to public hearing. The report contained a discussion of the background of the project, a description of the project, and issues for the consideration of Council. Appended to the report were the proposed conditions of approval, and comments on the report by HEI and BCLC;
* A memorandum dated May 31, 2004 from the Director of Current Planning and the Director of Social Planning to the Mayor and Council providing additional information to Council regarding the project. Page 5 of the memorandum stated that all details pertaining to building form, access, parking, mitigation measures, signage and amenities were contemplated to be dealt with at the development permit stage, not as part of the rezoning. The memorandum further stated that depending on the extent of the proposed on-site changes, Council may be asked to approve an amendment to the form of development.

**29** The public hearing proceeded on July 15 and continued on July 19, 20 and 21, 2004. The meeting was attended by many members of the public and a large number of people spoke both in support of and against the application, including representatives of the petitioner. Council concluded the hearing at 2:40 a.m. on July 22, 2004 and agreed to refer Council's decision to the regular Council meeting following the meeting of the Standing Committee on Planning and Environment to be held at 2:00 p.m. on July 22, 2004.

**30** Council met on July 22, 2004 and approved "in principle", by resolution, HEI's application to amend the CD-1 by-law to permit slot machines at Hastings Racecourse. The vote was close; five councillors and the Mayor in favour, and five councillors opposed. Approval was subject to certain conditions which are noted in the minutes. As a number of the petitioner's arguments center on the nature and effect of the conditions on the validity of the by-law itself, I will set out the full text of the resolution:

> THAT the application by Hastings Entertainment Inc. and British Columbia Lottery Corporation to amend CD-1 By-law No. 3656 for 2901 East Hastings Street (Hastings Park) to permit slot machines at Hastings Racecourse, generally as outlined in Appendix A of the Policy Report dated November 17, 2003 entitled "CD-1 Text Amendment - 2901 East Hastings Street (Hastings Park)" be approved, subject to the following conditions:
>
> a. THAT, prior to approval by Council of an amended form of development for Hastings Park to accommodate slot machines at Hastings Racecourse, the applicant shall obtain approval of a development application by the Development Permit Board, which shall have particular regard for the following:
>
> (i) initial approval to be given to no more than 600 slot machines if parking can be satisfactorily accommodated and traffic circulation issues can be resolved.
>
> (ii) arrangements to the satisfaction of the Director of Planning in consultation with the General Manager of Engineering Services having due regard to neighbourhood considerations including:
>
> * the provision of improvements to McGill Street and Renfrew Street adjacent or in proximity to the site and new or modified signalization as required;

* the location and design of access to/from, and circulation routes within, the site;

* the number and arrangements of parking spaces;

* the design of all parking areas, and passenger and goods loading facilities;

* traffic management, curb zone and trip reduction measures;

* improvements to support pedestrians, bicyclists and transit riders; and

* minimize all destination and truck traffic from Renfrew in order to mitigate traffic problems on the street.

(iii) arrangements for the costs of any mitigation of community impacts, which may include traffic, parking, noise, or policing to be paid by the proponents.

(iv) arrangements to the satisfaction of the Director of Planning for signage to be compatible with the Sign By-law.

(v) special consideration to be given to a high standard of architecture, landscaping and finishes.

(vi) public benefits to the satisfaction to City Council.

(vii) design development to ensure strong mitigation measures for any light or noise pollution created at the Racetrack.

b. THAT in pursuance of rezoning condition a(vi) [public benefits to the satisfaction of City Council], the following be secured:

* resources to be invested in the Hastings Park greening process;

* resources to improve the community outside Hastings Park through consultation between the Racetrack operator, staff and community representatives;

* commitment to local hiring, childcare, creating a grooming school and expansion of the learning centre.

c. THAT staff report back as part of the report on the Operating Agreement (lease) for the Racetrack, achieving the following:

* securing horse racing and the related jobs to the existence of slots on the site;

* ensuring that the Racetrack stays within its current footprint;

* ensuring there are no alcoholic drinks allowed on the slots floor; and

* confirming there are no gaming tables allowed on the site.

d. THAT staff report back to Council on circumstances after one year of slots operation.

e. THAT through the Development Application or Operating Agreement or Condition a(vi), commitments be confirmed for the Racetrack operator to provide $40 Million in capital improvements at the Racetrack and/or on Hastings Park.

**31** On August 25, 2005, HEI submitted a formal public benefits offering to the City. On September 22, 2005 Council met to consider a staff report regarding HEI's public benefits offering and to consider the by-law amendment. Council heard from members of the public regarding HEI's proposed public benefits package.

**32** By-law No. 9119 amending the zoning was enacted on October 4, 2005. That by-law was identical to the by-law presented at the public hearing in July 2004. The language of the conditional approval as set out in the July 2004 resolution was amended to delete the requirements that Council approve an amended form of development, that staff report back as part of the ability of the operating agreement to achieve certain objectives, and that the commitments to provide capital improvements be confirmed. Those changes were made to reflect the fact that HEI's proposed development no longer required Council's approval of an amended form of development, and that

HEI's public benefit offering had been approved by Council. The public benefits package was approved at the October 4, 2005 Council meeting.

## 2. The Development Application Process

### a. The development application process in general

**33** The steps that occur in the City's development application process are set out in Mr. Thomsett's affidavit.

**34** Where a zoning amendment is needed to accommodate a proposed development, an applicant may wait until the enactment of the by-law amending the zoning before applying for a development permit. Alternatively, the applicant may apply after the public hearing has been conducted with respect to the zoning amendment if the rezoning is approved in principle. A development application will not, except in rare cases, be accepted if the proposed development is not allowed under the current zoning and an amendment to that zoning has not been approved at least in principle following a public hearing.

**35** If an applicant submits a development application prior to enactment of an amending by-law, and if the application meets the appropriate requirements, it may be approved subject to enactment of the amending by-law. Once the amending by-law is enacted, the development permit will be issued if all other conditions of the development application approval have been met.

**36** A development application may be dealt with by the Director of Planning or by the Development Permit Board ("DPB") depending on the nature, complexity, size and potential controversy of the application.

**37** The statutory requirements the Development Permit Board must meet in processing an application, such as the one in this case, are set out in the *Development Permit Board and Advisory Panel By-law*, No. 5869. The relevant sections read:

> 5. (a) The duty and function of the Board is to receive and approve, approve subject to conditions, or refuse such development permit applications as may by by-law be prescribed to be brought before the Board.
>
> (b) In the consideration of all applications brought before it, the Board shall hear any representations of the applicant as well as any other person interested in the application, and before rendering its decision shall consult with and receive any submissions of the Advisory Panel.
>
> ...
>
> 12. The Board shall determine its own procedure, provided that all decisions of the Board shall be rendered in public unless the Board for good and sufficient cause otherwise directs, and the Board shall give reasons for its decisions. The Board may set the time, date and place of its meetings, provided that the Chair shall be at liberty to call a meeting whenever he deems it necessary.
>
> 13. The Board shall keep written minutes of all business transacted at the meetings.

### b. The development application process in this case

**38** Details of the development application process that unfolded in this case are set out in the affidavit of Doug

Robinson, Project Facilitator with the Development Services Department of the City of Vancouver. Mr. Robinson had responsibility from August 2005 for the development application by HEI regarding the introduction of slot machines at Hastings Racecourse. The Project Facilitator is responsible for coordinating the preparation of the staff report to the Development Permit Board with commentary and conditions of approval, if recommended, by relevant staff departments.

**39** On July 18, 2005, the City received a development permit application from the architects for HEI. The Project Facilitator gave notice to the residents of the Hastings Park area of a DPB meeting scheduled for October 3, 2005. A letter dated August 11, 2005 was sent to approximately 4,800 property owners in the vicinity of Hastings Park. The letter informed recipients that the City had received a development application from HEI. It provided details of the application, including the proposed parking for the project. The letter stated that the DPB had to consider the conditions of approval established by Council following the July 2004 public hearing. Public feedback was solicited and notice was given of two open houses scheduled for September 7 and 10, 2005. In addition, the letter provided information about accessing the architectural plans and documents submitted with the application.

**40** Notification signs with respect to the development application were not posted at the site.

**41** At the open houses, attendees were given the opportunity to review the application materials and ask questions of City staff and the applicant. Public comments were recorded and incorporated into a Development Permit Staff Committee Report dated October 12, 2005. In addition, attendees were provided with Survey Comment Forms with respect to the public benefits offering and a traffic impact study, to complete and submit to the City. There were insufficient numbers of comment forms available for all open house attendees. The City's evidence is that staff took the names of people who wanted comment forms and mailed forms to them.

**42** The October 3, 2005 DPB meeting was subsequently rescheduled and a further letter dated September 28, 2005 was sent to the property owners advising them the meeting had been moved to October 24, 2005. In addition, the meeting was advertised in the *Vancouver Courier* newspaper on October 19, 2005.

**43** The Development Permit Board considered HEI's application for a development permit on October 24, 2005. The application was approved subject to a number of conditions.

**44** Members of the community who expressed interest in the application were notified by letter of November 23, 2005 of the DPB's decision. Members of the community were also sent a copy of a letter from the Development Services Department to the architects retained by HEI with respect to the application, outlining the conditions on which the application was approved.

**45** At the time of the hearing of the petition, the conditions were still being dealt with and, as a result, a development permit has not yet been issued by the City to HEI.

**ISSUES**

**46** The petitioner alleges a number of breaches of procedural fairness in the passing of the amending by-law. Further, the petitioner submits that Council did not have jurisdiction to zone or rezone park land, or to enter into lease or licensing agreements with respect to Hastings Park. The petitioner seeks various and numerous orders. The following is the relief sought as set out in the amended petition:

1. An Order for certiorari pursuant to Sections 2 and 7 of the *Judicial Review Procedure Act* quashing the By-Law enacted by Council of the Respondent to amend By-Law No. 3656, CD-1 on July 22, 2004 and amended on September 22, 2005 and October 4, 2005 to permit slot machines at Hastings Racecourse as being contrary to the provisions of Sections 565 and 566 of the *Vancouver Charter* and in violation of the rules of procedural fairness and in breach of the common law doctrine of legitimate expectations.

2. An Order pursuant to Section 524 of the *Vancouver Charter S.B.C. 1953, c. 55* quashing the By-Law enacted by Council of the Respondent to amend By-Law No. 3656, CD-1 on July 22, 2004 and amended on September 22, 2005 and October 4, 2005 to permit slot machines at Hastings Racecourse as being void for illegality.

3. In the alternative, an Order for a declaration that the By-law enacted by Council of the Respondent to amend By-Law No. 3656, CD-1 on July 22, 2004 to permit slot machines at Hastings Racecourse is in whole or in part of no force or effect until the original conditions precedent to the Respondent's approval have been fully complied with contrary to Section 566 of the *Vancouver Charter.*

4. In the alternative, an Order for a declaration that the amendments dated September 22, 2005 and October 4, 2005 to the By-Law enacted by Council of the Respondent on July 22, 2004 to amend By-Law No. 3656, CD-1 to permit slot machines at Hastings Racecourse are void and without effect without the conditions precedent to its approval having been fully met constitutes a new proposed amendment to the By-Law, subject to the provisions for public hearings in Section 566 of the *Vancouver Charter S.B.C. 1953, c. 55.*

5. A declaration that the By-Law to amend By-Law No. 3656, CD-1 enacted at the Public Hearing of July 22, 2004 is of no force and effect as said by-law only addresses use and does not fully and with certainty address the proposed form of development as required by Section 565(1)(f) & (g) of the *Vancouver Charter.*

6. A declaration that the By-Law to amend by law No. 3656, CD-1 enacted at the Public Hearing of July 22, 2004, September 22, 2005 and October 4, 2005 and resolutions passed by Council on said dates are void and of no force and effect as being void and uncertain or a fetter on Council's discretion and contrary to Section 566 of the *Vancouver Charter.*

7. A declaration that the amendments made on September 22, 2005 and October 4, 2005 to CD-1 By-law enacted on July 22, 2004 are void and of no force and effect as said amendments were not made with proper notice pursuant to Section 566(3) of the *Vancouver Charter* and that said meetings of Council did not constitute a valid Public Hearing;

8. A declaration that the Operating Agreement is of no force and effect as it is in substance an unauthorized grant to Hastings Entertainment Inc. made without advising Council of said grant and without obtaining a 2/3 approval of Council in compliance with Sections 206 or 456 of the *Vancouver Charter.*

9. An Order in the nature of certiorari pursuant to Sections 2 and 7 of the *Judicial Review Procedure Act* quashing the By-Law enacted by Council of the Respondent to amend By-Law No. 3656, CD-1 on July 22, 2004 as amended on September 22, 2005 and October 4, 2005 to permit slot machines at Hastings Racecourse as being contrary to rules of natural justice and procedural fairness in failing to disclose the operating agreement, the amenity agreements, appraisals or other negotiating documents available to the City and the applicant prior to the Public Hearing of July 22, 2005 or at all.

10. An Order in the nature of certiorari pursuant to Sections 2 and 7 of the *Judicial Review Procedure Act* quashing the decisions of the Development Permit Board relating to Development Permit Application DE409601 as being made with [sic] without jurisdiction under the provisions of the *Vancouver Charter.*

11. An Order in the nature of certiorari pursuant to Sections 2 and 7 of the *Judicial Review Procedure Act* quashing the decisions of the Development Permit Board refusal [sic] to release the audio tape relating to Development Permit Application DE409601 and an Order in the nature of mandamus directing its production.

12. An Order in the nature of mandamus ordering the respondent to disclose the operating agreement with Hastings Entertainment Inc., any appraisal of the land occupied by Hastings Inc. on which the

terms of the agreement were based, audio recordings of the Development Permit Board and the amenity agreement between the respondent and Hastings Entertainment Inc.

13. A declaration that the operating agreement entered into between Hastings Enterprises Inc. [sic] and the City of Vancouver is void as having no force and effect as the Vancouver Board of Parks and Recreation has the exclusive jurisdiction to enter into lease agreements relating to Hastings Park as a permanent park pursuant to Sections 488(5)(b), (d) and (e) of the *Vancouver Charter*.

**47** At the hearing, the petitioner abandoned the relief sought pursuant to s. 524 of the ***Vancouver Charter***. The only relief sought is that available under the ***Judicial Review Procedure Act***, *R.S.B.C. 1996, c. 241*.

**STANDARD OF REVIEW**

**48** The parties agree that the standard of review applicable to issues of Council's jurisdiction to enact the amending by-law is correctness. See ***United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)***, *[2004] 1 S.C.R. 485*, *2004 SCC 19*.

**49** If Council's enactment of the amending by-law is found to be *intra vires*, the question then becomes what standard of review should be applied to the remaining issues raised by the petitioner.

**50** The ***Vancouver Charter*** contains the following privative clause at section 148:

148. A by-law or resolution duly passed by the Council in the exercise of its powers, and in good faith, shall not be open to question in any Court, or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them.

**51** At common law, the standard of review of decisions within the jurisdiction of a municipal council, is patent unreasonableness: see ***Nanaimo v. Rascal Trucking***, *[2000] 1 S.C.R. 342*, *2000 SCC 13* at para. 37; ***Gardner v. Williams Lake (City)*** *(2005), 10 M.P.L.R. (4th) 71*, *2005 BCSC 706* at para. 65.

**52** The content of the City's procedural fairness obligations will depend, in part, on the nature of the function being exercised by the City when enacting the amending by-law. The present approach to this determination was set out by Sopinka J. in ***Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)***, *[1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385*. Sopinka J. stated at para. 44 that the content of the rules of natural justice and procedural fairness is based on a number of factors including the terms of the council's enabling statute, the nature of the particular function it is exercising, and the type of decision being made.

**53** In ***Guimond v. Vancouver (City)*** *(1999), 7 M.P.L.R. (3d) 44*, *[1999] B.C.J. No. 2529* (S.C.), Davies J., in concluding that Council's decision to rezone land in that case was a legislative decision rather than an adjudicative or quasi-judicial one, stated the following at paras. 87 and 88:

> [87] In my opinion, the re-zoning decision made by City Council in this case was a legislative rather than a quasi-judicial one. In determining that issue, I have considered and applied the reasoning in Jones v. Delta *(1992), 11 M.P.L.R. (2d) 1* (B.C.C.A.). In that case, in considering the question of the standard of procedural fairness which could be expected in the context of consideration of a municipal zoning by-law, Southin J.A. stated (at p. 30):
>
> > As I understand the judgments of the Supreme Court of Canada in ***Save Richmond Farmland Society v. Richmond (Township)***, *[1990] 3 S.C.R. 1213*, *2 M.P.L.R. (2d) 288*, *46 Admin. L.R. 264*, *[1991] 2 W.W.R. 178*, *75 D.L.R. (4th) 425*, *52 B.C.L.R. (2d) 145*, *116 N.R. 68*, the judicial task is to discover what standard of natural justice or what is now called procedural fairness the legislature would expect to be observed in the matter before the council. That standard depends in large measure on what council is really doing on any particular matter. I do not think that judgment, or its companion judgment,

> the ***Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)***, *[1990] 3 S.C.R. 1170, 2 M.P.L.R. (2d) 217, 46 Admin. L.R. 161, [1991] 2 W.W.R. 145, 75 D.L.R. (4th) 385, 116 N.R. 46, 69 Man.R. (2d) 134*, requires one to consider whether the by-law in issue is site specific, to use the words of counsel for the respondents. I think those judgments require one to look at the real nature of the issue before the council. Was it a matter falling to be decided on a question of broad policy, or was it a matter affecting some one or two persons, for instance, adjoining neighbours?
>
> [88] The decision made by City Council in this case required consideration of broad policy questions requiring the balancing of issues of growth, residential density, affordability of accommodation, the availability of rental and privately owned housing, traffic congestion, general municipal economic development and other land use issues.

**54** In that case, Council for the City of Vancouver approved a zoning amendment by-law which rezoned land on which a low-density residential rental complex was situated to allow for a large, high density condominium development. Many of the tenants of the complex, including the petitioner, were senior citizens.

**55** In this case, I am satisfied that Council was exercising its legislative function in enacting the zoning by-law amendment. The decision to allow the rezoning to permit slot machines affected not just the applicant and adjacent landowners, but affected a large portion of the community, if not the city as a whole. Council had to weigh considerations with respect to economic and employment benefits to the city, potential neighbourhood impacts such as traffic, parking, crime and noise, any moral and social implications of allowing gambling at the site, the desirability of expanding gambling in the City, and the future development of Hastings Park. These are policy questions that, as in ***Guimond***, required Council to balance a number of competing issues.

**56** Further, the ***Vancouver Charter*** appears to give broad zoning powers to the City, subject to the procedural requirements for the exercise of that power in s. 566.

**57** It is clear, however, that the exercise of zoning powers by a municipality attracts procedural fairness obligations in excess of those set out in the enabling statute. The content of those obligations may be higher where the matter to be decided is particularly controversial or affects a large section of the community such as, for example, decisions with environmental impacts: see *e.g.* ***Jones v. Delta (Municipality)*** *(1992), 69 B.C.L.R. (2d) 239, 92 D.L.R. (4th) 714* (C.A.).

## ANALYSIS

### 1. City Council's jurisdiction to zone or rezone park land

**58** At the hearing, the petitioner submitted that Council's decision to enact the amending by-law was *ultra vires* the City as the Vancouver Park Board (the "Park Board") has exclusive jurisdiction over park land.

**59** This jurisdictional challenge was not specifically pleaded in the amended petition. The petition referred only to the Park Board's exclusive jurisdiction to enter into licensing or lease agreements. Further, the petitioner provided no evidence to support its position. The argument fails on these grounds.

**60** In any event, Council has the authority to zone and rezone land pursuant to s. 565 of the ***Vancouver Charter***. Nothing in that statute exempts park land from Council's zoning powers. Further, the City has not devolved responsibility for all of Hastings Park to the Park Board.

**61** As a result, this argument must fail. Whether or not the City has the jurisdiction to enter into lease or licensing agreements with respect to Hastings Park will be considered later in these reasons.

**2. Procedural fairness issues**

**62** The petitioner has raised a number of issues with respect to alleged breaches of Council's statutory and common law procedural fairness obligations in the process culminating in Council enacting the amending by-law in October 2005. The issues raised by the petition and supporting affidavits are as follows:

a. whether the City provided sufficient notice to the public regarding the rezoning and development application process;

b. whether Council's approval of the amendment of the zoning by-law was subject to conditions precedent to enactment, which were not fulfilled;

c. whether the City improperly delegated decision-making to City staff or to the Development Permit Board;

d. whether Council fettered its discretion by approving the by-law "in principle"; and

e. whether the City was required to make available to the public all of the information upon which Council based its zoning decision prior to the public hearing.

**63** The substantive issue on this application is the validity of the zoning amendment by-law allowing slot machines at Hastings Racecourse. The petition raises a number of allegations concerning the following: the nature of the operating agreement between the City and HEI; the jurisdiction of the Development Permit Board; and the obligation of the City and the Board to produce certain documents to representatives of the petitioner or members of the public. These allegations are not relevant to the validity of the zoning by-law. Accordingly, those allegations, even if proven, cannot render the by-law invalid.

**64** Further, the petition raises a number of issues with respect to the development application process followed in this case. As noted at the beginning of these reasons, the development application process and the zoning by-law process are two distinct processes. Allegations regarding the appropriate procedure in HEI's development application to the City regarding Hastings Racecourse cannot be used to attack the validity of the zoning by-law.

**65** Finally, the issues regarding concerns over perceived negative effects (e.g. parking issues, traffic, etc.) that may result from the City's decision to allow slot machines at Hastings Park do not advance and are not supportive of the petitioner's procedural fairness arguments. In ***Eddington v. Surrey (District)*** *(1984), 26 M.P.L.R. 229*, *[1984] B.C.J. No. 900* (S.C.), Macdonald J. stated the following with respect to an attack on a zoning by-law under both the ***Municipal Act***, R.S.B.C. 1979, c. 290, and the ***Judicial Review Procedure Act*** (at paras. 7 and 8):

> ... It must be kept in mind that the bylaw process is partly legal and partly political. Disappointment with the political decision is not a ground on which the bylaw can be attacked. The appeal from those decisions by council is at the municipal ballot box.
>
> What the law requires is that all the steps prescribed by the relevant legislation be taken, and in the correct sequence. It also demands procedural fairness, in the sense that there be full disclosure of the opposing arguments and an adequate opportunity to meet them. ...

**66** I will now turn to the remaining issues with respect to whether the City failed to satisfy statutory requirements or breached the rules of procedural fairness in enacting the amending zoning by-law.

**a. Did the City provide sufficient notice to the public regarding the rezoning process?**

Was the content of the notice sufficient in the circumstances?

**67** As stated above, the statutory requirements with respect to public hearings are set out in s. 566 of the ***Vancouver Charter***. The petitioner alleges that the content of the notice was deficient because it only provided notice of the proposed change of use and no notice was given of proposed changes to the existing structure at Hastings Racecourse to accommodate that change of use. The petitioner asks the court to interpret s. 566(3) of the ***Vancouver Charter*** as requiring the notice of the public hearing to provide the substance of all incidental aspects of the proposed by-law, such as parking, access, traffic, and approval of the operating agreement. The petitioner submits that meaningful notice would include sufficient information on the form of development to allow meaningful public input at the hearing.

**68** Despite these submissions, none of the affidavits filed in support of the petition raise issues with respect to the sufficiency of the content of the notice. None of the affiants deposed that they were mislead by the notice or that any alleged insufficiency of the notice content prevented them from participating meaningfully in the public hearing. In fact, one of the affiants, David Bornman, states that he received notice and attended at and participated in the July 2004 public hearing.

**69** The notice requirements in s. 566(3) of the Vancouver Charter were discussed by Shaw J. in ***East Broadway Residents Assn. v. Vancouver (City)*** *(2000), 18 M.P.L.R. (3d) 21*, *2000 BCSC 840* ["***East Broadway***"]. In that case, the petitioner argued that the notice of a public hearing regarding a by-law rezoning a property was insufficient. The intent of the City in changing the zoning was to encourage the establishment of technology industries in the rezoned area. Shaw J. stated the following with respect to s. 566 at paras. 26 and 27 of his reasons:

> [26] The intent of s. 566 has been stated by Davey C.J.B.C. in ***Re McMartin et al. and City of Vancouver*** *(1968), 70 D.L.R. (2d) 38* (B.C.C.A.) at p. 40:
>
> > In my respectful opinion the Legislature in enacting s. 566 of the Charter intended that every person affected by the rezoning should have a full opportunity of presenting his views and contentions and an opportunity of answering the opposing arguments, whether the council was acting *quasi*-judicially or legislatively; ...
>
> [27] In my view, it may fairly be inferred that notice under s. 566 of the ***Vancouver Charter*** must contain reasonable information about the general nature of the proposed zoning by-law so that persons who may be affected can decide whether to inspect it and/or attend the public hearing and make representations. Without such information, the inspection and hearing rights would be of little use. As the Legislature has required public hearings for proposed zoning changes and the giving of notice of such hearings, it must follow that a notice should communicate enough information to give substance to the rights to inspect proposed zoning by-laws, attend public hearings and make representations.

**70** In ***Guimond v. Vancouver (City)***, *supra*, Davies J. found that the City complied with the statutory notice requirements as the content of the notice was not misleading or confusing. In ***East Broadway***, Shaw J. concluded that the test used by Davies J. in ***Guimond*** did not exclude the test of reasonableness adopted by Shaw J., but that whether a notice is confusing or misleading is an aspect of reasonableness.

**71** I am satisfied that the notice of public hearing complied with s. 566 of the ***Vancouver Charter***. The notice set out the time and place of the hearing, and clearly stated that the public hearing would "consider zoning bylaw amendments ... to permit up to 900 slot machines in the existing main building at Hastings Racecourse". It was clear that the only matter being dealt with by the by-law amendment was the introduction of slot machines.

**72** The notice of the public hearing was not misleading and complied with the statutory requirements. At the meeting commencing on July 15, 2004, members of the public had the opportunity to be heard. A number of public

concerns were addressed through the addition of conditions when the by-law was approved in principle on July 22, 2004.

**73** The petitioner's submission that the notice was deficient is not supported in fact or in law.

Was a further public hearing and further notice required?

**74** The petitioner alleges that the by-law was amended on September 22, 2005 and October 4, 2005 and, as a result, notice of a further public hearing was required. This submission, however, arises from a fundamental misunderstanding of the process in this case. As the amending by-law was approved in principle on July 22, 2004, it was not enacted on that date. The by-law was enacted on October 4, 2005. Accordingly, amendments were not made on September 22 or October 4, 2005.

**75** A further public hearing would only be required if there was an amendment to the text of the by-law. The by-law that was enacted on October 4, 2005 was identical to that approved in principle on July 22, 2004.

**76** The amendments which concern the petitioner are in fact subsequent consideration by Council of the conditions attached to the by-law. The petitioner submits changes to the conditional approval should have been referred back to Council for approval.

**77** The ***Vancouver Charter*** does not require notice of Council's subsequent consideration of conditions. Nor does it require notice of the enactment of the by-law. The lack of notice of either of these events does not breach the statutory notice requirements or further procedural fairness obligations. The public had an opportunity to participate meaningfully in the process and to voice their opinions. Borrowing the words of Davies J. in ***Guimond***, *supra*, "The right to be heard by City Council does not include the right to have one's submissions accepted."

**78** The petitioner further submits that any conditions regarding the provision of public benefits as part of HEI's application should have been made known to the public and should have been included in the by-law. Because Council reserved discretion to itself with respect to the provision of public amenities, the public could not respond to a proposal that was sufficiently "crystallized".

**79** The respondent's position is that there is no statutory requirement that conditions regarding the provision of public benefits must be included in the zoning by-law and that in any event, this is not a zoning matter and is more properly dealt with at the development permit stage. Further, it is submitted that Council would not know what conditions it would impose until after any public concerns had been addressed at the public hearing.

**80** I am satisfied that the conditions regarding the provision of public amenities were not required to be part of the zoning by-law amendment. It follows that there was no statutory breach or breach of natural justice with respect to the public hearing and notice requirements in this regard.

**b. Was Council's approval of the amendment of the zoning by-law subject to conditions precedent to enactment that were not fulfilled?**

**81** The petitioner's submissions raise two issues with respect to the conditions of approval imposed by Council when the amending by-law was approved in principle on July 22, 2004. First, that the conditions were not sufficiently defined and therefore did not meet the standard of certainty required for passage of a by-law. Second, that the conditions were conditions precedent to enactment and the amending by-law was enacted before all of the conditions were fulfilled.

**82** The minutes of the July 22, 2004 Council meeting are clear. A condition to approval of the by-law was that prior to Council approving an amended form of development, the applicant must obtain approval of a development application from the Development Permit Board, having regard to issues such as neighbourhood considerations, arrangements for mitigation of community impacts (including parking, noise, traffic or policing), public benefits, and

signage. Further conditions were that staff report back as part of the report on the operating agreement for the racetrack confirming a number of issues, that staff report back to Council on circumstances after one year of slots operation, and that the racetrack operator's commitment to providing capital improvements be confirmed.

**83** Further, the conditions are not part of the zoning by-law itself and, as such, cannot render the by-law void for uncertainty.

**84** The resolution does not indicate that any of the conditions are prior to enactment conditions. In fact, before the July 22 meeting, an original draft of the conditions of approval recommended by City staff in the November 17, 2003 policy report included the following:

> (a) That, prior to the enactment of the CD-1 amending by-law, the proponents shall make arrangements to the satisfaction of the Director of Planning and the Director of Legal Services to ensure that the proponents will not initiate the submission of a development application for slot machines at Hastings Racecourse until a new concept plan for the PNE in Hastings Park, scheduled for completion in July, 2004, has been approved by Council.

**85** The City's evidence is that this prior to enactment condition was not included in the conditions of approval in the July 22, 2004 Council resolution because a new concept plan for the PNE and Hastings Park had been approved by the time the application for rezoning had reached the public hearing stage.

**86** I am satisfied that the wording of the conditions makes it clear that the conditions were not intended to be fulfilled prior to enactment. Nor, in many cases, could they be.

**87** I accept the evidence of the respondent that the conditions set out in the July 22, 2004 Council resolution were matters Council wanted addressed at later stages of the development process.

**88** Although Council was required to approve an amended form of development, the evidence shows that City staff later came to the conclusion that HEI's development proposal no longer required that step. This was recommended by City staff to Council in a September 15, 2005 report. The increase in square footage in HEI's plans was so small compared to the overall square footage of the site that it did not constitute an alteration to the floor space ratio. As a result, that requirement was subsequently deleted from the conditions of approval.

**c. Did the City improperly delegate decision-making to City staff or to the Development Permit Board?**

**89** The petitioner submits that Council of the respondent delegated decision-making with respect to the conditions to the Development Permit Board in an attempt to free itself from public accountability. It is further submitted that Council's approval in principle on July 22, 2004 of HEI's application to amend the zoning by-law did not specify who would carry out the discretionary actions required and that no by-law was passed authorizing delegation to the DPB. By approving a by-law in principle and then passing resolutions with respect to conditions after the DPB reported back to Council, the petitioner submits that Council did indirectly what it could not do directly - enact a by-law by resolution.

**90** The CD-1 (Comprehensive Development) District Schedule to the City of Vancouver *Zoning and Development By-law*, No. 3575 provides at s. 1.1 that where an area is zoned CD-1 and Council has approved the form of development, the DPB may approve the issuance of permits for the uses approved in the by-law subject to such conditions as the Board may decide. The evidence shows that there was an existing form of development for the site at the time the by-law was approved in principle, and that form of development included the racetrack and the grandstand building as it currently exists. As there was an existing form of development, the DPB had the authority to issue development permits with respect to the approved uses, including slots, subject to conditions.

**91** The petitioner has not established that the legislation required Council to delegate decision-making with respect to the conditions to the DPB by by-law.

**92** The only zoning issue was the change of use to allow slot machines. This was dealt with in the amending by-law approved in principle on July 22, 2004 and enacted on October 4, 2005. The conditions set out in the July 22, 2004 Council resolution are not zoning matters. There is no statutory requirement that Council deal with each condition. There appears to be no bar to Council arranging for the conditions to be dealt with through the development permit process or the operating agreement.

**d. Did Council fetter its discretion by approving the by-law "in principle"?**

**93** The petitioner submits that by approving use without addressing other development issues, Council of the respondent fettered its discretion. It is argued that s. 565(1)(f) of the ***Vancouver Charter*** contemplates a comprehensive development and "use" cannot be determined separately from other development issues in a comprehensive development (CD-1) zone. Further, the petitioner submits that approving the by-law in principle fettered Council's discretion and placed pressure on Council to approve the by-law regardless of the final details of the conditions.

**94** The respondent submits that the language in s. 565(1) is permissive, not mandatory. As a result, Council is free to deal with only allowable uses during the zoning process and is not required to insert regulations regarding, for example, parking in the zoning by-law.

**95** I do not read s. 565(1)(f) as placing any limits on Council's ability to amend a by-law to allow a new use and provide for the details of development to be dealt with at the development permit stage. Council did not fetter its discretion by approving the application in principle and setting out a number of conditions to be dealt with at another stage.

**e. Was the City required to make available to the public all of the information upon which Council based its zoning decision prior to the public hearing?**

**96** In order for a public hearing to be meaningful, a municipal council must disclose information to be considered by it in coming to its zoning decision. In ***Pitt Polder Preservation Society v. Pitt Meadows (District)*** *(2000), 77 B.C.L.R. (3d) 54*, *2000 BCCA 415* ["***Pitt Polder***"], a case relied on by the petitioner, the B.C. Court of Appeal considered the issue of whether a local government has a duty of procedural fairness to make available to the public reports and other documents relevant to a proposed land use or zoning by-law in advance of a public hearing. In that case, section 890 of the ***Municipal Act*** provided that a local government must not adopt a zoning by-law without holding a public hearing, and that members of the public must be afforded a reasonable opportunity to be heard at the hearing. Rowles J.A., writing for the Court, canvassed a number of decisions with respect to the issue, and summarized her findings at para. 54 as follows:

> In my opinion, the cases to which I have just referred support the view that in order to provide the opportunity for informed, thoughtful, and rational presentations in relation to proposed land use and zoning bylaws it is necessary that interested members of the public have the opportunity to examine in advance of a public hearing not only the proposed bylaws but also reports and other documents that are material to the approval, amendment or rejection of the bylaws by local government.

**97** In ***Pitt Polder***, the Court concluded that because a number of reports that the chambers judge had concluded were highly relevant to the rezoning application were disclosed at, rather than prior to, the public hearing, the requirements of procedural fairness had not been met.

**98** ***Pitt Polder*** considered the notice and public hearing requirements under the ***Municipal Act***. Section 566(4) of the ***Vancouver Charter*** provides that "all persons who deem themselves affected by the proposed by-law shall be

afforded the opportunity to be heard in matters contained the proposed by-law". In order for that sub-section to be meaningful, there may be circumstances where the public should be afforded the opportunity to review reports and documents material to a by-law amendment prior to a public hearing required by the ***Vancouver Charter***.

**99** The fairness of the disclosure process will depend on the circumstances of each case: ***Wilde v. Metchosin (District)*** *(2005), 51 B.C.L.R. (4th) 75*, *2005 BCCA 453*.

**100** In this case, the petitioner's focus is on the non-disclosure of the operating agreement at the public hearing. It is my understanding that there is no issue with respect to the disclosure of relevant information prior to the public hearing. The evidence shows that an agenda package of information was provided to the public at the public hearing. In addition, consultant reports and Council reports with respect to the project were posted to the City's public website in mid-May 2004, prior to the public hearing.

**101** The conditions of approval included terms relating to the operating agreement between the City and HEI. Condition (c) directed that staff report back as part of the report on the operating agreement for the racetrack, including "securing horse racing and the related jobs to the existence of slots on the site; ensuring the racetrack stays within its current building footprint; ensuring alcoholic drinks are not permitted on the slots floor; and confirming that no gaming tables allowed on the site". Condition (e) provided that HEI's commitments to provide $40 million in capital improvements be confirmed through the development application, the operating agreement, or the provision of public benefits.

**102** The operating agreement is still being negotiated. The respondent's position is that it is the City's policy not to disclose to the public agreements with third parties that are under negotiation.

**103** City staff has reported back to Council on the terms of the operating agreement during *in camera* meetings held in May and July 2005. The City has provided information regarding the principal terms of the operating agreement on the City's website.

**104** There has been no breach of the City's duty of procedural fairness in refusing to disclose the operating agreement at this time.

### 3. The Development Permit

**105** As noted above, at the time of hearing no development permit had been issued by the City to HEI. Accordingly, the relief sought by the petitioner with respect to the development permit is premature at this time.

### 4. The Operating Agreement

**106** The petitioner seeks a declaration that the operating agreement between the respondent and HEI is of no force and effect and, to that end, raises two allegations with respect to its validity. First, that the operating agreement constitutes an unauthorized "grant" to HEI which does not have the requisite 2/3 approval of Council under the ***Vancouver Charter***. Second, that the City does not have jurisdiction to enter into the operating agreement because Hastings Park falls under the exclusive jurisdiction of the Park Board.

**107** In addition, the petitioner seeks an order requiring the respondent to disclose the operating agreement between the City and HEI, and disclosure of an appraisal of the land at issue.

**108** The evidence with respect to the operating agreement is set out in the affidavit of Jerry Evans. Mr. Evans is a Property Development Officer with the City and has been involved in the preparation of the operating agreement between the City, HEI and GCGC. His evidence is that the operating agreement is concerned with the use and operation of the racetrack site, including the grandstand building. It will allow HEI to operate the racetrack and slot machines on certain terms and conditions. The agreement will require HEI and GCGC to pay an annual licence fee to the City, and to commit to certain capital improvements.

**109** Mr. Evans deposes that as of January 25, 2006, the draft operating agreement was still being prepared by City staff. Since the operating agreement has yet to be finalized, the relief sought by the petitioner in this regard is premature.

**110** In any event, the petitioner did not pursue in oral submissions its position with respect to the operating agreement constituting a grant. The petitioner has filed five affidavits in support of its position. There is nothing in any of the evidence filed that supports the allegation that the annual licence fee provided for in the operating agreement has been undervalued such that it constitutes a "grant" to HEI. Nor have the relevant provisions of the ***Vancouver Charter*** with respect to Council approval of grants been provided to the court.

**111** With respect to the jurisdictional argument, there is no evidence in the affidavit material filed by the petitioner supporting the assertion that Hastings Park is a permanent public park. The City's evidence is that the site is not a permanent public park and responsibility for it has never been delegated by the City to the Park Board.

**112** I am satisfied that the petitioner has not met its onus of showing that the City does not have jurisdiction to enter into lease or licensing agreements with respect to Hastings Park, or that the operating agreement constitutes an unauthorized grant to HEI.

**113** With respect to disclosure of the draft agreement, the petitioner's evidence is that a member of the Conservancy and a member of the public have made repeated requests of the City to disclose the operating agreement before it is approved by Council. It appears that neither of these parties has received a copy of the agreement.

**114** Barry Sharbo, a resident of the Hastings-Sunrise community, deposed that he filed a Freedom of Information request with the City, seeking a copy of the draft operating agreement on March 24, 2005. He was informed on May 20, 2005 by the Deputy City Manager that the City had not yet begun to draft the new operating agreement. On September 19, 2005, Mr. Sharbo submitted a request to the City for access to City records regarding the agreement. Mr. Sharbo received a response to his request, with enclosed records, on February 22, 2006. Although his affidavit does not state as such, it can be inferred that he did not receive a copy of any draft operating agreement.

**115** Mr. Evans' evidence is that the public was provided with information regarding the principal terms of the operating agreement. An information sheet was posted on the City's website and made available at the public meetings regarding the development application in September 2005. The information included the term of the agreement, the provision for and terms of renewal, and general terms with respect to horse racing, capital improvements and parking, and how revenue generated from the agreement will be used.

**116** I am satisfied that there has been disclosure of the key terms of the proposed operating agreement. As the agreement is still being prepared, the petitioner's application is premature. There is nothing in the ***Vancouver Charter*** requiring public input into or feedback on agreements between the City and third party corporations or business partners. The request for an order requiring disclosure of the operating agreement and any related property appraisal is dismissed.

**5. Request for the Audio Recordings of Development Permit Board Meetings**

**117** The petitioner seeks an order directing the production of audio recordings of the Development Permit Board meetings with respect to Development Permit Application DE409601, HEI's development application for Hastings Racecourse.

**118** Barry Sharbo deposes that on November 28, 2005, he made a Freedom of Information Request to the respondent City for the audio recordings of the October 24, 2005 DPB meeting, and the first 15 minutes of the November 21, 2005 meeting. He also requested all City records regarding the development permit created and/or exchanged between DPB members, and exchanged between DPB members and City staff or Councillors.

**119** On January 12, 2006, Mr. Sharbo received from the City, among other documents, two CDs purported to contain the requested audio recordings. It appears, however, that those recordings are inaudible.

**120** I gather from the material provided that the petitioner believes there has been some kind of misconduct or conspiracy on the part of the City with respect to the disclosure of the audio recordings. The basis for this appears to be that the official minutes of the meetings do not, in the petitioner's view, reflect the actual discussions held, the information presented, or the decisions made at those meetings.

**121** Mr. Sharbo subsequently filed a complaint with the Office of the Information and Privacy Commissioner ("OIPC") in February 2006. Mr. Sharbo deposes that to date there has been no further communication between himself and the OIPC with respect to this matter.

**122** The respondent City has provided the requested audio recordings to the petitioner. Unfortunately, those recordings may not be audible. The petitioner has not established that the City has engaged in misconduct or any kind of conspiracy in endeavouring to keep those recordings from the petitioner or the public. Members of the public attended the meetings in question, and there is no evidence establishing that what occurred at those meetings is in fact recorded incorrectly or incompletely in the meeting minutes.

**123** Further, as the matter is now in the hands of the OIPC, I find it would be premature for this Court to grant the relief sought by the petitioner on this issue. This aspect of the petition must be dismissed.

**CONCLUSION**

**124** Doubtless, a community is well served, and the democratic process enhanced, by the participation of vigilant, informed citizens. Court intervention in that process requires the applicant, the petitioner in this case, to meet the legal onus earlier referred to. Not being heard must be distinguished from not being agreed with.

**125** Although the petitioner has set out a number of issues in its material, many of the submissions do not support the petitioner's position with respect to the validity of the zoning by-law amendment allowing slot machines at Hastings Racecourse. Further, a number of the claims raised are simply not supported by evidence.

**126** I am satisfied that the decision to enact the by-law amendment allowing slot machines at Hastings Racecourse was *intra vires* the City's zoning powers. I am further satisfied that the City met its statutory procedural obligations and there was no breach of any common law procedural fairness obligations. The petition is dismissed.

**127** The parties are at liberty to speak to costs, if required.

DORGAN J.

* * * * *

CORRIGENDUM

Released: August 21, 2006.

Corrigendum to the Reasons for Judgment issued advising that the word "neither" in the second sentence of paragraph 63 should be replaced with the word "none". The name "Barry Sharbo" in the third sentence of paragraph 68 should be replaced with the name "David Bornman".

The word "four" in the second sentence of paragraph 110 should be replaced with the word "five".

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**End of Document**