LIDSTONE & COMPANY

the Law Letter

In this issue

Retreat!

Meetings of a municipal Council or a regional district Board are open to the public. Except when they are not. Section 89 of the *Community Charter*, which also applies to regional districts, codifies the principle that, when meetings are closed to the public, or held *in camera,* council must cite an exception, listed in section 90 of the *Community Charter*, to the open meeting rule. All meetings – open, closed, and special – must be held in accordance with the legislation and applicable procedure bylaws. A failure to hold a Council or Board meeting in public in the absence of a section 90 ground could result in the decision or ultimate decision being set aside.

Every meeting begins as an open meeting and notice of the fact that it is taking place must be given to the public. If a part of the meeting is to be closed to the public, the Council or Board must pass a resolution stating that the meeting or a part of it is to be closed and the basis on which the meeting is being closed (per section 90). A section 90 exception that gives the Council or Board authority to close the meeting must be cited for each separate item that is being considered in the closed meeting and, if applicable, more than one section may be cited (*Barnett v. Cariboo (Regional District)* (2009), 177 A.C.W.S. (3d) 1091 (BCSC)).

Closed meetings should follow the same procedure as open meetings do, however there are at least four key actions that a Council cannot do or purport to do in a closed meeting:

- pass the resolution to close the meeting (section 92);
- make the statement of why the meeting is being closed (section 92);

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- vote on bylaws (section 89(2)); and
- consider any subject matter that is not listed in sections 90(1) or 90(2).

A special meeting of Council is a meeting other than a regular or adjourned meeting, and may (as in the case of a regular meeting) be closed or open (section 125(4)). A special meeting may be called by the Mayor or Chair, either at her or his own discretion or upon the request of two Councillors. The Mayor does not have to be the one to call a special meeting if one of the following circumstances applies:

- if, within 24 hours after receiving the request of two or more councillors, the mayor has failed to make arrangements to hold a special meeting within 7 days, or
- both the mayor and the mayor's designate are absent or otherwise unable to act.

Written notice of a special meeting must be posted *at least* 24 hours before the meeting at the regular Council meeting place, the usual public notice posting places, and at the place where each member of Council has directed notices be sent. The notice must include the date, time and place of the special meeting as well as a description of its general purpose. The notice must be signed by the mayor or corporate officer, or, if the meeting is called by two councillors, the notice must be signed by either the council members or the corporate officer. Waiver of these notice requirements is only by unanimous vote of council. Special meetings do not have to be held entirely or at all in person if the Council has already passed a procedure bylaw that permits a special meeting to be held electronically (section 128).

If a retreat, workshop, shirtsleeve session or a retreat by any other name walks, talks and looks like a meeting, it is a meeting. And if it is a meeting, all of the normal rules of notices, agendas, public openness, and minute taking apply. Generally, the courts are of the view that local government deliberations and decision making should be as transparent and publicly accessible as possible, subject to requirements that are provided for as an exception under section 90. The ground rule is that if the Council or Board is meeting and discusses a matter such that it is moved along the spectrum of decision-making toward a decision, then the meeting is a Council or Board meeting and requires notice, minutes and public openness (subject to section 90 matters which may or must go in camera). In *London (City) v. RSJ Holdings Inc.*, [2007] 2 S.C.R. 588, at para. 38, the court commented on the prime policy reason why courts frown upon retreats that are held in private:

> ... The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law. When a municipal government improperly acts with secrecy, this undermines the democratic legitimacy of its decision, and such decisions, even when *intra vires*, are less worthy of deference.

Procedure bylaws must include certain information, as set out in section 124. However, a Council or Board may want to consider including more than the minimum that is required in their procedure bylaw. If a procedure bylaw sets out the specific mandatory process or options that a Council or Board must follow, there will be less opportunity for misunderstanding or misapplication of the provisions of the *Community Charter*. Note, however, that section 124(3) requires that notice in accordance with section 94 be given for an amendment of a procedure bylaw.

Rachel Forbes

Itinerant Girl Guide Cookie Vendors: business licence exemptions

The power of local governments to regulate businesses operating within their boundaries is broad. Almost every local government in British Columbia has exercised its power to regulate businesses by enacting a business licence bylaw. These bylaws generally require anyone engaged in business within the municipality to apply for a business licence, pay a licence fee and display the licence.

One issue that arises in regulating business, however, is the definition of "business" itself. The *Community Charter* defines business to include any commercial or industrial activity, as well as the provision of professional, personal or other services carried on for the purpose of profit. This definition, which also finds its way into many business licence bylaws, may unintentionally capture many activities that a local government does not intend to subject to licencing requirements. Case in point: two 12-year olds who had their lemonade stand shut down this summer. While the media excitement sensationalized a common occurrence in municipalities, it has also provided a timely opportunity to discuss options local governments have to exempt certain activities from the ambit of their business licence bylaws.

The simplest way to get around an overly broad application of a business licence bylaw is to provide exemptions within the business licence bylaw itself. Exemptions can be tailored to exclude activities that a local government has no interest in regulating. Among other criteria, exemptions can be provided for certain types of activities, classes of individuals or organizations and profit margins.

With respect to the exemption of activities that would, strictly speaking, qualify as a "business", some local governments in British Columbia have adopted business licence bylaws that specifically exempt academic tutors, music instructors, small daycares and babysitters from the requirement that everyone carrying on business must apply for a licence. Other local governments have chosen to exempt garage sales, craft sales, bake sales and other forms of short lived residential enterprises that would technically qualify as a business. Additionally, some local governments have chosen to exempt non-resident delivery businesses from the requirements of the bylaw. The types of activities that can be exempted are limited only by the public policy consensus arrived at by a Council. A local government could choose to exempt snow shoveling services, lawn cutting, animal daycares, and even Kool-Aid stands from the requirement to obtain a business licence.

We have reviewed a number of municipal business licensing bylaws and note a wide range of exemptions. Examples of exemptions are set out in the bylaws discussed below (noting that we might:

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have worded these provisions differently) are found in the following exemptions provided in the City of Chilliwack's Business Licence Bylaw:

> **6. EXEMPTIONS:**
>
> (1) No licence is required for the business of renting apartment suites where not more than two (2) suites are available for renting.
>
> (2) No licence is required by a farmer or orchardist with respect to the sale in an unprocessed, natural state of produce grown by him upon his own land or lands which he rents or leases within the District.
>
> (3) No licence is required with respect to the door-to-door sale of newspapers published in Canada.
>
> (4) No licence is required with respect to the teaching of music, handicrafts or art as a home occupation where such teaching involves not more than one class of five (5) students at one time.

There are also Business Licence Bylaws which exempt certain classes of people or organizations from business licence requirements. For example, the Town of Osoyoos has a Business Licence Bylaw that exempts self-employed students from the requirement that they must obtain a business licence:

> 4(d) A licence is not required for a student while engaged in self-employed work to support his educational or vocational training objectives.

Other bylaws exempt non-profit, religious and charitable organizations from the requirement that they must obtain a business licence. The Town of Smithers has a Business Licence Bylaw that contains the following exemption:

> **4.2 Non-Profit Organizations** are required to obtain a Business Licence but no fees shall be charged. Business licences are not required for religious organizations, registered charities, Smithers service clubs and Smithers Community Organizations offering goods or merchandise for sale to raise funds for local community projects.

Another manner in which exemptions can be provided is through profit margins. There are bylaws which state that a business licence is not required if the anticipated gross revenue is less than $5,000 for the year. However, there is no set limit for the amount of revenue that will force a local government to require a business licence. This means that a local government can itself determine the amount of revenue a business should earn before it is subjected to the provisions of a Business Licence Bylaw. As an example, the City of Yorkton, Saskatchewan has a business licence bylaw that states as follows:

> 13.2. A business licence is not required for any *resident business* or *activity* that:
>
> (a) does not more than $8,500.00 in total gross sales provided a written declaration is given to the *business license inspector* and this is the proprietor's sole source of income; or
>
> (b) does no more than $5,000 in total gross sales provided a written declaration is given to the business license inspector.

There are several benefits to local governments in providing exemptions for certain businesses in their business licencing bylaws. First, although

local governments have discretion to determine whether or not they will enforce the provisions of **:**

Itinerant Girl Guide Cookie Vendors: business licence exemptions (continued from page 4)

their bylaws, (see, for example, *Thompson-Nicola (Regional District) v. Galbraith,* [1998] B.C.J. No. 1436 (S.C.), in which the court specifically stated that "[a local government] is entitled to expect its by-laws to be complied with and it has the discretion to enforce and prosecute those who do not comply with them subject to private law duty of care considerations."), they often feel pressured to enforce them. Enforcement could become a major undertaking if a local government attempted to regulate every activity that technically fit the definition of "business". Providing exemptions for certain businesses would reduce the pressure on bylaw officers to enforce bylaws that unnecessarily capture certain individuals or entities.

Further, providing exemptions for smaller operations or certain classes of business would reduce the administrative toll on local governments in processing applications and issuing licences. Finally, providing exemptions for certain 'businesses' allows those small potatoes, apples, pies and lemonade stands to stay out of the headlines and back behind the fundraising table – clearly a benefit to every community!

Marisa Cruickshank and Stuart Ross

LIONS AND TIGERS AND SNAKES – regulating animals

In mid September 2010, the first person was convicted under the Province's recent *Controlled Alien Species Regulations* for illegal possession of two lion cubs. The offender was issued a minor fine of $500, though the regulations allow for one 200 times as great and up to one year imprisonment. The Province amended the *Wildlife Act* in 2009 to expand the regulation of certain animals and to prohibit the possession of many others. In regard to animal related health and safety issues, or welfare standards, municipalities have nearly as great a breadth of jurisdiction as the Province within which to regulate animals kept domestically as pets or companions.

There were limited controls over animals permitted under the former *Municipal Act* and *Local Government Act*, but the *Community Charter* allows a Council by bylaw to regulate, prohibit or impose requirements in regard to animals. The powers that regional districts have in relation to animals are not quite as broad, and may be influenced by the terms of their letters patent. Many municipalities have not yet updated or reformed their animal bylaws to reflect this expanded jurisdiction.

Some municipalities, however, are taking steps to regulate or prohibit the possession, exhibition or sale of wild or exotic animals and others are regulating rare animals, and imposing conditions on the keeping of animals to ensure public health and safety and animal welfare standards are kept high.

Legal framework

A municipality may regulate, prohibit and impose requirements in relation to animals (*Community Charter* section 8(3)(k)). The *Community Charter* defines animals as any member of the animal kingdom, other than a human being.

Municipal regulation of animals must not include the regulation of animals that are considered wildlife, as defined in the *Wildlife Act* or by regulation, because that is a power reserved to the Province unless otherwise specified by regulation or agreement (*Community Charter* section 9). However, there are a number of exceptions to this rule that have been specified in regulations:

1. The *Wildlife Regulation* under the *Community Charter* limits "wildlife" to raptors, game, prescribed vertebrates, some fish and threatened and endangered species (limited to species in BC designated as such by the Minister (sections 1 and 6 *Wildlife Act),* currently

LIONS AND TIGERS AND SNAKES – regulating animals (continued from page 5)

including threatened sea otters, and endangered Vancouver Island marmots, burrowing owls, and American white pelicans).

2. *Spheres of Concurrent Jurisdiction – Environment and Wildlife Regulation* does permit the municipal regulation, prohibition or imposition of restrictions upon some types of wildlife. This includes wildlife species listed in Schedule B and C of the *Designation and Exemption Regulation* and specifically the feeding or attracting of dangerous wildlife (bear, cougar, coyote or wolf, or other prescribed species of wildlife) or members of the family Cervidae (includes deer). Schedules B and C of *Designation and Exemption Regulation* include animals like deer, skunks, raccoons, some birds and are available at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/13_168_90 .

3. The *Spheres of Concurrent Jurisdiction – Environment and Wildlife Regulation* also states that any bylaw made in relation to dangerous wildlife or the wildlife listed in Schedules B and C does not apply to authorized hunters or trappers, farm operations that meet certain legal requirements, or certain waste disposal facilities. A clarifying section stating this could be added to a municipal bylaw if desired.

Finally, municipal bylaws may regulate the same or similar matters as provincial laws as long as they are not inconsistent with them and a person can simultaneously comply with both the bylaw and the relevant provincial laws (section 10 of the *Community Charter*).

Controlled Alien Species ("CAS")

The Province has identified species that are a sufficient risk to public safety to warrant regulation. The *Controlled Alien Species Regulation* ("CAS") under the *Wildlife Act* contains a list of species that individuals are prohibited from possessing unless the animal was in BC prior to March 16, 2009. The regulation also includes restrictions on possessing, breeding, transporting and releasing animals that are currently in BC.

Individuals who are in possession of a listed animal that was in BC before March 16, 2009 may be able to keep the animal until its death if they have been granted a permit from the Ministry of Environment before March 31, 2010. All breeding of these animals is prohibited as of April 1, 2010 unless they are in the possession of an accredited zoo, research or educational institution and a permit is granted. The film industry is also now required to obtain permits to bring any listed animal into BC.

The full list of controlled alien species and the requirements and restrictions under the new regulation contained in the *Wildlife Act* are posted on the Ministry website: www.env.gov.bc.ca/fw/wildlifeactreview/cas/

Options for municipalities

If a person can also comply with the provincial laws, a municipal animal regulation bylaw may prohibit, regulate, impose conditions on, require a permit for the breeding, possession, display or exhibition for entertainment or educational purposes a list of selected animals. A prohibition on certain animals will usually require exceptions for properties such as the municipal pound, police department, BC SPCA facilities, veterinary clinics, permitted zoos or research facilities, and for properties where a valid permit is held under the *Wildlife Act.*

LIONS AND TIGERS AND SNAKES – regulating animals (continued from page 6)

Any animal that is listed in the *Controlled Alien Species* Regulation to the *Wildlife Act* will be regulated by the Province as well, including a ban on possession *unless* a person has a grandparenting permit. Having similar restrictions and prohibitions in a municipal bylaw provides another level of monitoring and enforcement, and provides the opportunity to regulate animals that the Province does not (for example, invertebrates are not included under the *Wildlife Act* and therefore are excluded from the CAS as well).

Pet store owners along with the general public were provided the opportunity to apply for grandparenting permits for CAS; however, if they do not have a permit now, they are not allowed to possess, transfer, release or breed any of the CAS listed in the Regulation.

In relation to exhibitions and performances involving wild or exotic animals, or the sale of wild or exotic animals, many municipalities in BC and elsewhere have taken steps to regulate these activities with wild or exotic animal performance or restrictive sale bylaws. A list of animals for this purpose may be more limited if a municipality is interested in prohibiting only some exotic or performance animals.

It should also be noted that by including these exotic and other animals in the bylaw, a municipality is not necessarily requiring that a poundkeeper regulate them because a poundkeeper's authority to seize and detain an animal is typically permissive, not obligatory. However, a municipality could still regulate these animals by enforcing the bylaw's offence sections and imposing fines.

What animals are not yet commonly regulated by bylaw?

A municipality of course does not have to regulate all the animals it *can* regulate. The animals that are also listed in the *Controlled Alien Species Regulation* are subject to that regulation still, but the level of monitoring and enforcement of the Province is not certain and not within the control of the municipality. Certain areas of the province may be more affected by or concerned about the public health and safety and animal welfare concerns that arise when dealing with exotic animals, and those concerns may provide grounds on which a municipality chooses to regulate certain animals.

An inclusive schedule of animals could list non-human primates, marsupials, whales and dolphins, reptiles and amphibians over two feet adult size, venomous and poisonous invertebrates (black widow spiders, tarantulas), skunks, and specific types of rodents, rabbits, fish or birds, and other animals. The list of *Controlled Alien Species* is at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/94_2009

And a proposed, more all-inclusive list of animals for municipal regulation or prohibitions is within the BC SPCA's model animal bylaw publication at http://www.spca.bc.ca/welfare/professional-resources/model-bylaw.html

All of the animals proposed by either of these lists would be listed for one or more of the following reasons (with information from the BC SPCA animal bylaw publication):

- they are not animals that are regulated provincially (i.e. all invertebrates) and

  therefore the municipality may want to have some regulation over them (such as scorpions, tarantulas, other poisonous or

  venomous invertebrates);

- they pose a risk to public health and safety and a danger to local species and ecosystems if they are released or escape; and

they are very difficult to care for, long- living

LIONS AND TIGERS AND SNAKES – regulating animals (continued from page 7)

animals, and therefore are much less likely to be properly cared for and more likely to be abandon or by owners due to old age or high veterinary bills.

Risks to public health and safety

Exotic animals can pose a risk to humans and other animals if not handled properly due to exotic pathogens. For example, Centers for Disease Control statistics show that many of the 74,000+ cases of salmonella poisoning from reptiles and amphibians in the US each year are from animals kept as pets. Some hedgehog species carry foot and mouth disease, a highly contagious disease of cloven-hooved animals. Exotics still retain their natural predatory and defensive instincts, making them dangerous or unsuitable to living in an environment with other animals and humans. Even in play, many exotics can harm another animal or human.

Risks to the environment

Escaped or released exotics may breed with local animals, disrupting the gene pool and introducing exotic diseases. For example, in 2003, a shipment of Gambian rats from Africa escaped and introduced the potentially fatal disease Monkeypox into North America. Exotic animals can also disturb natural indigenous ecologies. There have already been harsh ecological effects of releasing exotic catfish, toads, red-eared slider turtles, bullfrogs, and other species into environments foreign to those species. Many wild-caught exotics are captured through partial or whole destruction of their environment, and may be caught and transported contrary to local or international endangered species laws.

Risks to animal welfare

Exotics are often acquired as "status pets" without enough consideration being given to their specialized needs. Exotics have food, housing, and maintenance needs that cannot be provided by the typical owner/guardian. Few exotic guardians recognize the specialized needs of exotics or can provide the full and proper care for their exotic pets. Many exotic "fad pets" are introduced into the pet trade each year that are not domesticated animals but wild caught or captive bred and suffer from confinement or improper care.

Relatively few veterinarians possess the training or experience to address the medical needs of exotics. Exotic pet guardians/owners often attempt to change the nature of their companion animal by surgically removing teeth or claws, leaving the animals potentially stressed and defenceless. Exotics have specialized behaviours some of which their new guardians try to forcibly alter, with serious effects on the animals' well being. Many nocturnal exotics, for example, are forced to adapt to the diurnal lives of their human keepers.

Many exotics become unwanted a few months after the novelty of the pet wears off. Large reptiles and birds with long life spans are particular victims of this. Few resources exist to take in these unwanted animals, as most zoos, animal shelters, and wildlife sanctuaries do not have the capacity to take in unwanted exotic pets. The result is poor animal welfare, a high rate of euthanasia, and widespread abandonment of these animals.

Rachel Forbes

Sewer Reg Relaxative: potty talk on the new private sewer regulations

Cabinet has approved changes to the regulatory regime governing private sewers. The changes, which went into effect June 28, 2010, involve amendments to the Sewerage System Regulation, B.C. Reg. 326, 2004; the Public Health Act Transitional Regulation, B.C. Reg. 51/2009 and the Violation Ticket Administration and Fines Regulation, B.C. Reg. 89/97.

Sewer Reg Relaxative (continued from page 8)

The most significant changes are the following:

1. The obligation to ensure that domestic sewage does not *contribute to* a health hazard has been removed, leaving only the obligation to ensure that domestic sewage does not *cause* a health hazard;
2. There are new regulations regarding minimum setbacks of holding tanks and sewerage systems from wells;
3. The authority for a medical health officer or public health inspector to inspect prior to issuing a permit for a holding tank has been removed and conditions can no longer be attached to a permit or enforced;
4. Landowners may now construct or maintain a Type 1 or Type 2 sewerage system on their own land, under the supervision of an authorized person;
5. New offences, namely contravening section 3(1) [discharge of domestic sewage] or section 10(1) [maintenance of a sewer system] of the Sewerage System Regulation, have been added.

Sara Dubinsky

Whither the Land Reserve?

In June 2010 then-Provincial Minister of Agriculture and Lands Steve Thomson announced that Richard Bullock was appointed chair of the Agricultural Land Commission and Ron Kilmury was appointed chair of the BC Farm Industry Review Board.

As part of his mandate Bullock was to conduct a review of the Commission, which was to be presented to the Minister. ALC's executive director, Brian Underhill, indicated that a number of meetings with stakeholder groups were to be held to hear any comments and experiences. Stakeholders were to include regional governments, agricultural organizations, NGOs with an interest in land preservation, and the development and real estate industries.

We understand the review was established in order to help Bullock become more familiar with the issues facing the ALC. Underhill has also indicated Bullock's review may form a basis for government to discuss with the Commission possibilities or ways to strengthen and improve the Agricultural Land Reserve (ALR) and ALC and that is the premise on which the Chair was undertaking his review.

The Union of British Columbia Municipalities made an August 25, 2010 submission to the review process and noted that Bullock's letter inviting their presentation stated:

> The purpose of this review is to determine if the Commission is capable of meeting its mandate as outlined in Section 6 of the *Agricultural Land Commission Act* and to explore opportunities to more effectively and efficiently administer the Agricultural Land Reserve

One of the key features of the UBCM's presentation was the need for more communication with municipalities as land use planning at a local government level and the ALR are inextricably linked.

While the review did not originally include plans for public consultation, persons wishing to express their views were invited to write to the Commission directly.

On September 7, 2010, BC's Auditor General, John Doyle, released a report following up from a 1994 review of the ALC. In the report, Doyle noted that the ALC continues to face challenges in achieving its mandate to preserve agricultural land and encourage farming in BC.

The audit examined whether the ALC was effectively preserving agricultural land,

Whither the Land Reserve? (continued from page 9)

encouraging farming, protecting the ALR and evaluating its own effectiveness. Doyle noted the following challenges to meeting these criteria:

- a lack of knowledge regarding the boundaries of the ALR and the included land suitable for agricultural use;
- inadequate compliance and enforcement activities;
- the Commission's self-identified limitations to meet its goals through the application process;
- the Commission's insufficient involvement in long-term land use planning with local governments; and
- a need for more adequate evaluation of the results of the Commission's decision.

Doyle made nine recommendations ranging from ensuring the ALR boundaries are accurate to engaging in proactive long-term planning with local governments to encourage farming and ensuring it has a sufficiently robust compliance and enforcement program. The full report is available at the Auditor General's website – www.bcauditor.com

Jessica McKeachie

A Grandmotherhood Issue

Madam Justice Allan of the BC Supreme Court has released her decision in *Conibear v. Dahling,* 2010 BCSC 985. The main issue in the case was whether the Mayor of Tahsis had a conflict of interest and so ought not to have voted on the matter of the Village hosting a music festival. The festival was a joint venture between the Village and a company, and the profits would be shared between them.

The Mayor was alleged to have a conflict of interest arising out of her familial relationships: the Mayor's son and the owner of the company had had a short relationship approximately 14 years prior, which produced a child (the Mayor's granddaughter). The Mayor had only seen the owner twice since the end of the relationship, though she was close with her granddaughter. The Petitioners alleged that the Mayor's interests in the welfare and wellbeing of her granddaughter created a conflict of interest.

The judge concluded that the Mayor did not have a direct or indirect pecuniary interest in the Village's venture with the company, and so was not disqualified from office. In these circumstances, the simple fact of the Mayor's familial relationships, without more, was insufficient to create a conflict of interest.

Of note, in discussing the conflict of interest provisions in the *Community Charter*, the judge indicated that the restrictions on participation only apply in cases of a pecuniary interest in a matter. We note that the court did not address the implications of section 100(3), which states that the restrictions on participation apply to a council member that has a pecuniary interest or another interest that constitutes a conflict of interest.

Sara Dubinsky

Yanke v. Salmon Arm (City), 2010 BCSC 814

This case involves the applicability of the Riparian Areas Regulations ("RAR") under the *Fish Protection Act* ("FPA"), in respect of the development of the petitioner's residential lot near the foreshore of Shuswap Lake. The petitioner's application for variance to construct a home 15 metres from the average high-water mark in Shuswap Lake included an opinion from a qualified environmental professional (QEP) that no harmful alteration, disruption or destruction to fish habitat (HADD) would occur. The City therefore supported

Yanke v. Salmon Arm (continued from page 10)

the variance but made its approval conditional on approval by the Department of Fisheries and Oceans Canada (DFOC/DFO) and the BC Ministry of Environment. DFO agreed the proposal would not cause any HADD, but thought that the project could be redesigned to lessen riparian impact. The City then withheld its approval and the petitioner challenged this decision.

The City's decision to withhold approval was based upon its interpretation of the RAR. The court found that the property, despite not being adjacent to a water body, was a riparian area because the FPA and the RAR are concerned not with riparian rights of streamside owners but with "the protection and enhancement of streamside lands which may be close enough to the water that development upon them can exert an influence on fish habitat". Although the RAR *could* apply to the petitioner's property, the court found that they did not because the City's previous streamside protection and enhancement areas ("SPEAs") were still valid due to a transitional provision in the new RAR (section 8(2)). It was also determined that SPEAs do not have to be large scale policies or plans but can be constituted by individual or site specific tools that apply to the property (covenants, subdivision conditions, etc.) (paras.34-35).

The court said that the City does not need DFO approval for activities that do not cause any HADD and so DFO does not have the power to deny non-HADD developments. The court also said that the City's practice of deferring to DFO and MOE for approval was not consistent with the RAR.

Together, the findings of this decision are likely to create greater uncertainty for local governments in determining what is a riparian area, when there is a valid SPEA in place, where the RAR apply, and when and to what extent it should be deferring to or waiting for DFO and MOE. A lot of these variables will be determined on the facts of each case, but – pending appeal – this case does confirm that DFO's ability to deny developments is limited to circumstances where HADD are found to likely occur.

Rachel Forbes

Kelowna (City) v. Axa Pacific Insurance Company 2010 BCSC 904

[See also: ***Saanich (District) v. Aviva Insurance Company of Canada*** 2010 BCSC 1321; and ***Penticton (City) v. Axa Pacific Insurance Company*** 2009 BCSC 1404].

There has been a string of cases recently about the ability of a municipality to be defended and to recover under an insurance policy where it is named as a third party.

All three of these cases have roughly similar facts: the municipality is named as an insured party on a contractor's insurance policy. A civil action is brought against the contractor, generally for negligence. Even if the municipality is not found to have any liability, they incur costs to defend the action. In all three cases the insurer took the position that they did not have to indemnify the municipality. And in all three cases, the court disagreed and issued declarations that the insurance companies are required to defend the, and to indemnify the municipalities if damages are found to be owing to the original claimant/injured party.
Together these cases confirm principles that govern the existence of an insurer's duty to defend and, where applicable, indemnify (see paras.25 in *Saanich*):

1) if the facts in the injured's/claimant's pleadings support an action that could *potentially* fall within the municipality's

Kelowna (City) v. Axa Pacific (continued from page 11)

coverage, then the insurer has a duty to defend;

2) even where there is a duty to defend found, the duty to indemnify only arises if the facts in the pleadings are proven at trial;
3) the pleadings must be analyzed to find the "substance and true nature" of the claim, and the factual allegations must be considered to see if they support the claimant's claims;
4) the duty to defend must be considered within the general purpose of insurance, which is to "provide a mechanism for transferring fortuitous contingent risks";
5) ambiguities in insurance contracts should be resolved against the insurer, coverage provisions should be read broadly, and exclusion clauses should be read narrowly; and
6) where there is ambiguity in the contract, a court should give effect to the reasonable expectations of the parties.

Rachel Forbes

Salt Spring Island Local Trust Committee v. Guinness, 2010 BCSC 1218

In this case the defendant, who did not appear at the trial, was alleged to have contravened Salt Spring's land use bylaw by having more than one dwelling on her property. The local government sought a statutory injunction pursuant to s. 274 of the *Community Charter* in order to enforce the bylaw.

Although the case was heard in July of 2010, the proceedings had been commenced more than a decade earlier, in 1999. The judge held that there had been inordinate and inexcusable delay in enforcing the bylaw, and that the local government seemed to have abandoned the proceedings. Notwithstanding the delay, the judge found for the local government.

This case follows the general rule that local governments may enforce their zoning bylaws even after a lengthy delay. However, local governments run the risk of not receiving an order for their costs if the delay is inordinate and inexcusable. The judge in this case made no order for costs.

Sara Dubinsky

Virdis v. North Vancouver (City), 2010 BCCA 222

In this case a North Vancouver resident challenged two bylaws that amended the land use designation of a number of residential properties near her home. Changes to the OCP and the zoning bylaw were required in order for the landowners to proceed with their proposed development. The challenge, seeking to quash the amending bylaws, was based on a number of procedural grounds.

Particularly at issue was the fact that after the public hearing and third reading of the amending bylaws, Council voted to refer a presentation by the developers to the staff of the City Community Development Department. Neither the *Community Charter,* the *Local Government Act*, nor the City's bylaws provided for this referral.

The amending bylaws were eventually passed by Council, after all of the requisite procedural steps had been satisfied.

Virdis v. North Vancouver (City) (continued from page 12)

The plaintiff's primary claim at trial and on appeal was that the lack of a procedure for referring the developers' presentation to the City Community Development Department was fatal, and that the amending bylaws were therefore invalid.

The Court of Appeal agreed with the plaintiff that Council had not invoked any prescribed procedure to enable the referral to the City Community Development Department. However, the Court also held that Council had not acted contrary to its procedure bylaw: the procedure bylaw simply did not deal with referring development applications back to staff. The referral was neither prescribed nor precluded by bylaw or statute.

Accordingly, the Court found that the procedural deficiency was an irregularity at most, and was not sufficient to invalidate the amending bylaws. This case reiterates the general principle that courts will grant municipal councils wide discretion to determine their own procedures, and will be reluctant to intervene especially in cases where there is no detrimental impact to procedural rights.

Sara Dubinsky

Quebec (Attorney General) v. Lacombe Quebec (Attorney General) v. Canadian Owners and Pilots Association

In *Quebec (Attorney General) v. Lacombe,* 2010 SCC 38, a company that operated a float plane air excursion business had obtained a licence from the federal Department of Transport and registered its aerodrome. A municipal zoning bylaw amendment adopted thereafter prohibited aerodromes in that location as well as almost the entire municipality. The municipality attempted to enforce its zoning bylaw by seeking an injunction to restrain the company from continuing its aviation activities. The case was appealed ultimately to the Supreme Court of Canada.

The majority held that the real essence of the zoning bylaw was to regulate the location of water aerodromes in the municipality, which is a matter that is reserved for the exclusive jurisdiction of the federal government. The majority held that a municipal prohibition on aerodromes, even if it was part of a valid land use regime, would unacceptably narrow Parliament's power over aeronautics. The bylaw was held to be invalid, because the municipality lacked the jurisdiction to prohibit aerodromes.

In the companion case *Quebec (Attorney General) v. Canadian Owners and Pilots Association,* 2010 SCC 39, similar facts were before the Supreme Court of Canada. Two individuals built an aerodrome and registered it pursuant to federal legislation. The aerodrome was located on land that was zoned as agricultural, and a provincial act precluded the use of the land for any other purpose (unless prior permission was granted). Because they had not been granted prior permission, the relevant commission ordered the individuals to return the land to its original state.

This case was also appealed to the Supreme Court of Canada.

The majority found that the provincial legislation, which concerned land use planning and agriculture, was valid and fell within provincial jurisdiction. However, the power to determine the location of airports and aerodromes falls within the protected core of the federal aeronautics power, and the provincial legislation seriously affected the manner in which that power could be exercised. Accordingly, the majority ruled that to the extent that it impacted the federal power over aeronautics, the provincial legislation did not apply.

Quebec v. Quebec (continued from page 13)

Accordingly, a local government may not validly use zoning or other provincially-enabled powers in order to control or seriously affect land use in respect of aerodromes, airports or aeronautics, and provincial entities exercising provincial powers, such as the Agricultural Land Commission, may not exercise powers that control or seriously affect the manner in which the federal aeronautics powers may be exercised.

Sara Dubinsky

Sahota v. Vancouver (City), 2010 BCSC 387

In this case, the City of Vancouver passed a resolution declaring a building to be a nuisance and danger to public safety and requiring the owner to demolish the building within 30 days. The owner of the property in question argued that the City's decision should be quashed, in part on the basis that its decision was unreasonable. Although a portion of the case was also directed to an argument that the property had retained its status as a legally non-conforming use, the case is more helpful for its review of the City's declaration of the building as a hazard and the requirement that the building be demolished. Although the City's resolution in this case was made under the *Vancouver Charter*, the provisions are similar to sections 72-74 of the *Community Charter* which are not often considered by the courts.

The judge considered whether the City's decision to declare the building a nuisance and to require that it be demolished was unreasonable. The judge determined that his review of the City's decision on the basis of whether it was 'reasonable' accorded a high degree of deference to the City's decision. There were several reasons for this. First, the judge noted that the City's decision fell within a specific power granted to the City pursuant to the *Vancouver Charter* (as are the powers granted under the *Community Charter*). Second, the judge noted that the *Vancouver Charter* contains a clause which is worded such that it is meant to protect the political and administrative functions of the City as much as possible from review by the courts. The judge also made note of the decision reached in an earlier case, *Vernon v. Sengotta,* in which a similar resolution passed under the provisions of the *Community Charter* had been considered. In that case, the judge determined that the City's resolution requiring the plaintiffs to demolish their fire damaged premises was reasonable, and a decision to which the court should defer, "given the council's knowledge and experience with respect to its community needs and requirements".

In this case, the judge noted the multitude of factors that led to the City's determination: unkempt premises, including discarded furniture and debris, numerous responses by police, squatters living in the building, and the fact that the City had to board up the premises on a number of occasions. The evidence amassed by the City prior to making its decision included pictures of the interior and exterior of the property, affidavits of residents describing the

property as unkempt and a nuisance, and a report of the Building Inspector. Ultimately, the judge determined that the City's decision to declare a nuisance and a danger was reasonable in the circumstances.

Marisa Cruickshank

R. v. Shaw, 2010 BCSC 1565

*Language in this case summary may be offensive (or alternatively, fairly entertaining) to readers. Reader discretion is advised.

R. v. Shaw (continued from page 14)

This case involved the appeal of a $500 fine for littering that had been imposed upon the appellant, Ms. Shaw. Ms. Shaw's son had previously had two of his skateboards impounded by the City of Kamloops for breach of its Skateboarding Bylaw. The two skateboards were described in the case as the "valuable skateboard" and the "worthless skateboard". Following the impoundment, Ms. Shaw went to the City's bylaw services centre to attempt to redeem the valuable skateboard, but not the worthless skateboard. However, she was not given the option of only picking up one skateboard; the skateboards had been saran wrapped together and had a note attached indicating they had to be picked up at the same time, for a fee of $25 each. Ms. Shaw protested the demand for $50, stating she only wanted to redeem the valuable skateboard. She attempted to reason with the counter staff, and then the supervisor of the City's bylaw department, but with no success. The judge noted that Ms. Shaw's expression of her view of the supervisor's decision was that the decision was "bullshit", meaning (according to the *Concise Oxford English Dictionary*):

> bullshit: vulgar slang ■ n. nonsense. ■ v. (bullshits, bullshitting, bullshitted) talk nonsense in an attempt to deceive.

After much use of the 'vulgar slang', Ms. Shaw reluctantly paid the impoundment fee of $25 for each skateboard. As she was leaving the bylaw offices, she took the worthless skateboard and planted it into the landscape within a few meters of the door of the bylaw office. Within days, the City issued a Bylaw Violation Notice ("BVN") to Ms. Shaw, charging her for littering, contrary to the City's Traffic Bylaw. Ms. Shaw disputed the BVN, which led to the issuance of a summons pursuant to the *Offence Act.* The summons charged Ms. Shaw with littering, contrary to the City's Parks Regulation Bylaw. She was ultimately found guilty at a trial before a Justice of the Peace, dealt some fairly harsh words by the Justice, and fined $500. On appeal, the judge substituted a fine of $25 in its place, finding that the littering Ms. Shaw was convicted of was of a minor and insignificant nature. The judge noted that Ms. Shaw was actually entitled to redeem only one skateboard, given the wording of the impoundment provision in the Bylaw. She also noted that the City's lawyer had been mistaken at trial in his reference to the penalty provisions available for littering under the *Parks Regulation Bylaw*. Finally, the judge made note of several discrepancies in the manner by which Ms. Shaw had been ticketed and charged, including the fact that the littering she was ultimately charged with pursuant to the long form under the *Offence Act* was not the littering charge she was initially advised of under the BVN – which was actually inapplicable altogether.

Beyond the fact that this case has already become infamous for its entertaining dictionary definition, it is also interesting because the judge also awarded Ms. Shaw her costs of the appeal against the Crown, which is quite rare. The judge found that the prosecution of Ms. Shaw fit within two of the types of cases where costs may be awarded against the Crown: her prosecution was frivolous and may have had oblique motives by some of the bylaw enforcement employees. The judge noted that Ms. Shaw had been correct that she was not obliged to redeem the worthless skateboard; this should have been known by the bylaw enforcement officers; and, the original ticket was issued in contravention of a bylaw she did not actually contravene. For these reasons, the judge ordered the Crown to pay the majority of the costs of Ms. Shaw's appeal.

Marisa Cruickshank

Lidstone & Company

Paul Hildebrand is Associate Counsel at Lidstone & Company. Paul is the head of the law firm's Litigation Department. He won the Gold Medal in law at the University of British Columbia in 1980. Paul has a Doctorate in Economics in addition to his Law Degree and Master of Science degree in mathematics. For nearly 29 years, Paul Hildebrand has practiced law in the area of complex litigation, including a recent 12 year stint with McAlpine & Company, one of the leading complex litigation firms in Canada. Paul is responsible for the conduct of our local government clients' litigation matters, including defense of claims, insurance matters, suing other parties, injunctions, appeals, and other litigation related matters. He also has expertise in regard to arbitration, mediation and conciliation. He has done securities work, including financings for public and private companies, and real estate transactions. He represented the Japanese Steel Industry in proceedings, the amount in issue of which was in excess of $500 million.

Don Lidstone Q.C. has practiced generally in the area of local government law since 1980. His municipal law focus is in the areas of constitutional, administrative, and environmental law, particularly in respect of governance, land use/sustainable development, regulatory approvals, and legislative drafting. Invited to speak regularly at conferences, symposia and universities, he has chaired the Sustainable Region Initiative (Governance and Finance), Liquid Waste Expert Review Panel, Fire Services Review Panel, Whistler Waste Blue Ribbon Panel, and the Municipal Law Section of the British Columbia Branch of the Canadian Bar Association. Don has published numerous papers and manuals and consulted on the development of the *Community Charter* and other municipal statutes in a number of provinces. He was designated Queen's Counsel in 2008.

Marisa Cruickshank has experience preparing legal opinions on a wide range of matters, including in relation to constitutional, administrative, and environmental law issues relevant to municipal law. Marisa completed her law degree at the University of Victoria. She was awarded five major scholarships and academic awards. She also served as a judicial law clerk in the British Columbia Court of Appeal.

Sara Dubinsky is a graduate of the University of Victoria Faculty of Law. Sara summered with a boutique litigation firm in Vancouver and appeared at the Braidwood Commissions of Inquiry on behalf of the British Columbia Civil Liberties Association, where she articled. Sara is a litigation lawyer and handles bylaw enforcement matters. She also provides legal opinions on a wide variety of issues, and is the go-to person in our firm for conflict of interest opinions. Sara received three awards in law school for her performance in the Wilson Moot Competition.

Rachel Forbes graduated from the University of Victoria Faculty of Law, articled with the Environmental Law Centre and Ratcliff & Company, and then practiced law as an associate at Ratcliff & Company. Rachel has won several awards for academics and community service. She has an undergraduate degree in urban studies and worked as a planning assistant for the UniverCity development on Burnaby Mountain. Rachel provides legal opinions on a wide variety of municipal law matters, drafts agreements in relation to real property and other matters, drafts bylaws, and is the go-to person in our firm for environmental law issues.

Jessica McKeachie is an Articled Student. She graduated from the Queen Mary, University of London in 2007 with an Honours Law Degree, worked in Brisbane, Australia for a law firm that provided legal services to municipalities and worked for the Braidwood Commissions of Inquiry throughout 2009.

Stuart Ross is an Articled Student. Stuart drafted bylaws and conducted legal research for the City of Coquitlam Legal Department for the past two summers. Stuart won three scholarships this year at University of Victoria, including for the highest marks.

Lidstone & Company welcomes **Scott Black.** Scott completed his law degree at the University of Victoria and worked as a policy analyst before beginning work with Lidstone & Company as an articling student. Scott has worked for provincial and other governments on access to information and privacy, legislative drafting and bylaw drafting.