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LAW LETTER

In This Issue

BC Housing vs. Zoning: Buechler v. Island Crisis Care Society, 2019 BCSC 1899

The location of housing facilities for homeless persons can be a controversial issue in communities throughout British Columbia. A recent decision by the BC Supreme Court has provided some insight, and raised questions, as to the extent to which zoning may be unable to restrict such facilities, depending on the involvement of BC Housing.

In **Buechler v Island Crisis Care Society, 2019 BCSC 1899**, BC Housing had developed temporary modular units for people from a homeless encampment in Nanaimo. The facility was located on crown land and did not comply with the applicable zoning. BC Housing invoked s. 14(2) of the *Interpretation Act* which provides that zoning bylaws do not bind or affect the Province in the use of lands:

> …an enactment that would bind or affect the government in the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements…does not bind or affect the government.

The Plaintiff lived next to the facility and objected to the location. She argued that because the facility was operated by Island Crisis Care Society (the "Society"), and not BC Housing, s. 14(2) did not apply. In general, s. 14(2) does not limit the application of zoning when crown lands are leased to a private user, and in **Squamish v. Great Pacific Pumice Inc. (2000, BCCA)** the court held that the zoning bylaw there applied to a private for-profit mining corporation leasing Crown lands.

In its decision in **Buechler**, the court disagreed with the Plaintiff, distinguished the **Great Pacific Pumice** case**,** and held that s. 14(2) did apply (so the zoning bylaw did not) for two main reasons.

First, the court found that a close review of the agreement between the Society and BC Housing indicated that BC Housing was in fact the "user" of the lands. BC Housing conceived of the project, provided most of the funding, contracted with the Society to provide services there, and

continued to take an active role in overseeing the facility.

Second, the court found that even if the Society and not BC Housing was the "user" of the lands, the Society was still carrying out a crown

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objective on crown land. The court commented that where "compliance with municipal bylaws will prejudice the Crown's objectives, Crown immunity may be extended to persons who are neither Crown agents nor Crown servants" and held that the s. 14(2) immunity may extend to "private parties carrying out certain activities on Crown land at the behest of the Crown".

The main lesson from the **Buechler** case is that if a housing facility on Crown land is developed and controlled by BC Housing, even with day to day operations carried out by a private party, the immunity set out in s. 14(2) may still apply, so the zoning bylaw may not. However, there may be other situations which are less clear, such as where facilities funded by BC Housing were conceived of by a private party and/or are subject to less oversight by BC Housing. In those situations, the application of zoning may turn on a close examination of the wording of the applicable agreement, the entity operating the facility and the history/purpose of the project.

~ Anthony Price

Local Government Services Outside Municipal Boundaries

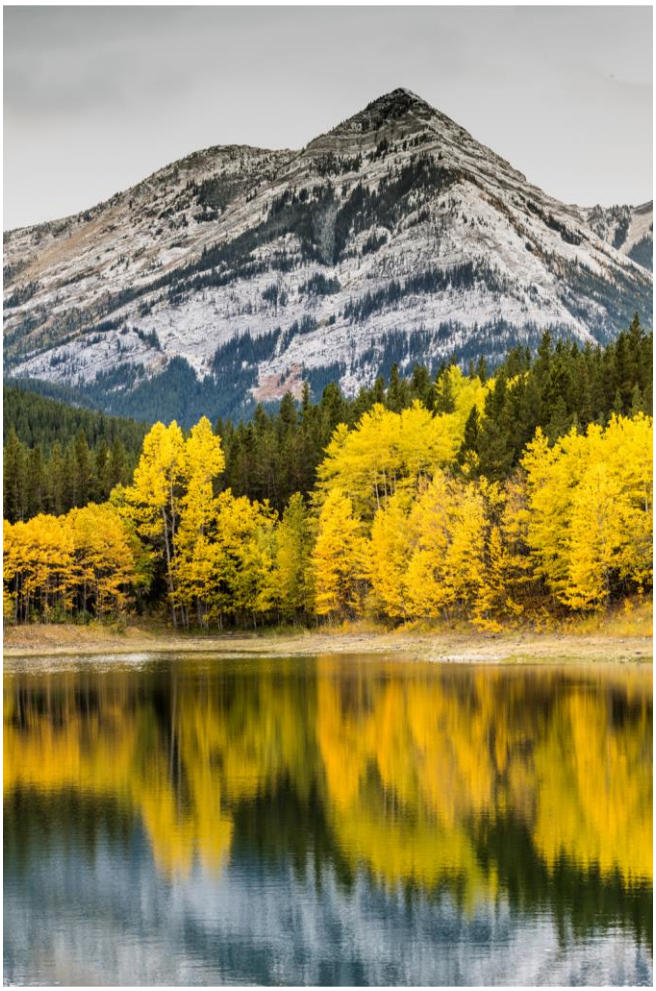
Municipalities can rely on their natural person powers under s. 8(1) of the *Community Charter* to enter into agreements with other public authorities; however if the agreement contemplates the provision of services or activities or extending a municipal regulatory scheme outside municipal boundaries, then ss. 13, 13.1 , 14 and 23 of the *Community Charter* empower municipalities to enter into agreements with other local governments, treaty first nations and other public authorities to establish services, regulations and activities outside municipal boundaries. Services may consist of any services provided by the municipality including "hard services" that require infrastructure such as water and sewer services, "soft services" such as building inspection or garbage collection, or a combination of both such as fire protection services where fire hydrants and other infrastructure may need to be constructed outside municipal boundaries.

Section 13 of the *Community Charter* allows a municipality to provide a service outside municipal boundaries provided it obtains the consent of the municipal council or regional district board where the service is to be provided. The consent of the receiving municipal council or regional district board may include limits on the service to be provided as well as the process for terminating the service. Upon

consent being given, the municipal powers, duties and functions of the providing municipality may be exercised in relation to the service subject only to the terms of consent given by the local government receiving the service. Section 13.1 of the *Community Charter* has identical provisions for the provision of services to treaty first nation lands.

An increased level of intermunicipal cooperation is provided by s. 14 of the *Community Charter* which allow two or more municipalities, by bylaw adopted by the council of each participating municipality, to establish an intermunicipal scheme in relation to one or more matters for which they have authority under the *Community Charter* or the *Local Government Act*. If an intermunicipal service scheme is established under s. 14, s. 14 rather than s. 13 applies to the subject matter of the scheme. Section 23 of the *Community Charter* expands the ability of municipalities to enter into agreements with public authorities (which includes first nations, other levels of government or government agencies) respecting activities and services within the powers of a party to the agreement, operation and enforcement in relation to the exercise of authority to regulate, prohibit and impose requirements within the powers of a party to the agreement, and the management of property or an interest in property held by a party to the agreement.

The judgement in *Benoit v. Strathcona Regional District*, 2019 BCSC 362, is the only reported case to consider s. 13 of the *Community Charter*. The BC Supreme Court in that case considered circumstances where the Strathcona Regional District ("**SRD**") purchased bulk water from the City of Campbell River (the "**City**") to supply water to its electoral Area D in the SRD at rate set out in the City's By-law. The City's By-law was amended to provide that residents outside City's boundaries would be charged double the rate paid by City residents. In response, the SRD passed its own by-law which doubled the fee for water charged to Area D residents, based on its financial plan. The petitioner Benoit, who was a resident of Area D, brought a petition to quash portions of the City by-law and two SRD by-laws for illegality. The petitioner's legal challenge to the City and SRD bylaws was ultimately dismissed; however, the case affirms a



number of relevant legal principles that are relevant to ss. 13, 13.1, 14 and 23 of the *Community Charter*. These principles include the following:

1. Municipalities can rely on their natural person powers under s. 8(1) of the *Community Charter* to enter into agreements with other public authorities. As indicated by the court in paragraph 61 of the judgement:

> "61 The City is empowered to contract with the SRD pursuant to

> its natural person powers: *Community Charter*, s. 8(1). The City's natural person powers are exercisable outside municipal boundaries: *Community Charter*, s. 11(2). In exercising its natural person powers, the City may establish any terms and conditions it deems appropriate: *Community Charter*, s. 12(2). As noted above, s. 192(h) of the *Community Charter* also provides that the City is entitled to raise revenue by agreement."

2. The ability of municipalities to rely on their natural person powers does not extend to the provision of services or any activities that require express statutory authority. Municipalities must be careful to follow all statutory requirements in the provision of those services and activities outside municipal boundaries, including those prescribed in ss. 13, 13.1, 14 and 23. At paragraph 51, the court noted the following:

> "55 The City requires express statutory authority to impose a fee: s. 193(1) of the *Community Charter.* Since the City set the price of bulk water by bylaw, it cannot rely on its natural person powers under s. 8(1) of the *Community Charter* as authorization for the fee.

As a side note, in *Benoit v. Strathcona Regional District*, the petitioner argued that the City had not satisfied its statutory obligations to obtain the consent of the SRD to provide water services as required by s. 13 of the *Community Charter*; however, the court determined in that instance that the City was merely selling water as a commodity to the SRD and not providing a service as envisaged by s. 13. If the court had concluded that the City was providing a service rather than selling a commodity, the outcome may have been different.

The provision of municipal services, activities or regulatory schemes outside municipal boundaries will necessitate a written agreement between the parties. Among other things, the agreement should include the following:

1. Details of the services provided, including the location, quantity and quality of the services. Typically, the agreement will include a provision that the quality of services will be the same as those provided to residents in the municipality providing the service and further that the providing municipality does not guarantee the quantity or quality of such services beyond the standards imposed on it within the municipality.

2. The rates for the services. As was the case in *Benoit v. Strathcona Regional District*, the rates need not be the same as those applicable in the municipality; however, the parties to the agreement must ensure that all statutory obligations of the participating parties must be complied with as a condition of providing the services. The agreement should also specify how rates are to be changed in the future.

3. The term of the agreement, including provisions for determining events of default, dispute resolution and the termination of the agreement. As noted above, s. 13 and 13.1 of the Agreement requires that the process for terminating the service be included in the agreement. The agreement should enable either party to unilaterally terminate the agreement

on reasonable terms, including reasonable notice and possibly compensation to the non-terminating party.

The powers granted municipalities under ss. 13, 13.1, 14 and 23 of the *Community Charter* to provide services or activities or extend a municipal regulatory scheme outside municipal boundaries are useful tools that enable municipalities and other public authorities to achieve savings and administrative efficiencies in a wide variety of circumstances. To be effective, the parties should ensure that they have a well-drafted agreement and comply with all statutory requirements

~ Lindsay Parcells

Permissive Tax Exemptions

The *Community Charter* authorizes municipal councils to exempt land or improvements from taxes. Unlike statutory exemptions, councils have discretion whether to grant permissive exemptions. Councils wishing to grant permissive exemptions for the 2021 tax year must do so by bylaw prior to October 31.

Substantive Issues

Permissive exemptions involve two related issues: (a) does the applicant fall within an eligible category under s. 224(2) of the *Community Charter* and (b) if yes, does council wish to grant the exemption. For both, the standard of review is presumptively reasonableness.

Section 224 sets out several categories of eligible land or improvements. These generally cover community or public uses of land. For example, subsection (i) allows council to exempt "land or improvements owned or held by an athletic or service club or association and used as a public park or recreation ground or for public athletic or recreational purposes."

If council considers an application eligible for permissive exemptions, it must then consider whether it wishes to grant the exemption. This is discretionary – councils could choose to grant no permissive exemptions.

Further to the broad discretion to grant or reject permissive exemptions, many councils adopt permissive exemption policies. Councils may, for instance, by policy set a cap for the value of permissive exemptions or establish relative priorities for permissive exemptions. Policies can benefit local governments by giving greater certainty as to the financial implications of permissive exemptions. They can also assist applicants through advanced notice of how applicants will be considered.

This is generally acceptable; councils may adopt policies to guide their exercise of discretion. Policies are not binding, however. Councils must not fetter their discretion through a policy. A council must not "shut [its] ears to an application" on the basis of a policy: *Trustees of Westwood Congregation of Jehovah's Witnesses v. City of Coquitlam*, 2006 BCSC 1208 (CanLII), <http://canlii.ca/t/1p2zn>, ("*Westwood Congregation"*) para. 107. Failure to do so may be unreasonable on review. Councils must therefore consider each permissive exemption application they receive.

Procedural Issues

Local governments must afford permissive exemption applicants procedural fairness. The purpose of this section is to canvas common procedural issues councils may encounter. The duty of procedural fairness is however "eminently variable." Local governments should consider their procedural fairness obligations in each case.

Opportunity to Provide Submissions

Courts have found municipalities failed to accord procedural fairness to applicants by not giving an opportunity for written or oral submissions prior to cancelling an exemption: *Westwood Congregation*, para. 86.

While the duty of procedural fairness is fact specific, municipalities should adopt procedures that allow applicants to make written or oral submissions on the substantive merits of their applications. This is especially so where a council considers revoking a permissive exemption it previously granted.

Written Decisions

Procedural fairness may also require councils give reasons for rejecting permissive exemptions. The court in *Westwood Congregation* found a council breached procedural fairness by failing to give reasons for rejecting a permissive exemption: paras. 92-93.

This will ultimately turn on the specific facts of each decision. In *Westwood Congregation*, for instance, the court considered that the permissive exemption impacted the applicants' practice of religion as it related to a place of worship. The court also considered that the applicants there had previously enjoyed permissive exemptions and other unique circumstances. In any case, local governments considering rejecting permissive exemptions should ensure the applicant clearly knows the issues troubling the local government: *377050 B.C. Ltd. dba the Inter-City Motel v. Burnaby (City of)*, 2007 BCCA 162 (CanLII), <http://canlii.ca/t/1r1sl>, para. 13.-

~ Will Pollitt

Settlement Privilege Under FIPPA

We've had some questions recently about the right to withhold records from disclosure on the basis of settlement privilege. There is some understandable confusion about settlement privilege since it is not listed as an exception to disclosure under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). Below we explain what settlement privilege is and some of the circumstances in which it may be applicable.

1. What is settlement privilege?

Settlement privilege is a form of privilege that applies to documents or communications created for or communicated during settlement negotiations. Settlement privilege is important because of the overriding public interest in the settlement of disputes. In *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37, the Supreme Court of Canada noted that settlement privilege is based on an understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed (at para. 13).

Although settlement privilege is not listed as an exception to the right of access to records under *FIPPA,* the BC Supreme Court has confirmed that, because settlement privilege is a fundamental

common law privilege, it cannot be abrogated unless there is clear and explicit statutory language: *Richmond (City) v. Campbell,* 2017 BCSC 331. In other words, FIPPA would have to expressly state that an applicant's right of access to records overrules settlement privilege. Given that it does not do so, public bodies may rely on settlement privilege to withhold records they might otherwise be required to produce under FIPPA.

2. When does settlement privilege apply?

The test for determining whether settlement privilege applies has been established by the courts and has now been applied in a number of decisions of the Office of the Information and Privacy Commissioner for British Columbia ("OIPC"). The three conditions that must be present for settlement privilege to apply were set out in Order F18-06 as follows:

1. A litigious dispute must be in existence or within contemplation;
2. The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
3. The purpose of the communication must be to attempt to effect a settlement of the dispute between the parties.

In *Langley (Township) v. Witschel,* 2015 BCSC 123, the Court concluded that in order to satisfy the "litigious dispute" element of the test, it is sufficient for the parties to be in a "dispute or negotiation", even if they have not commenced formal proceedings. The OIPC has taken the same approach, including in Orders F17-35 and F18-06.

The OIPC has also confirmed that the "litigious dispute" requirement is not limited to disputes to be litigated in court. In Order F20-21, the Adjudicator confirmed that the rationale for settlement privilege applies equally to matters to be resolved by any adjudicator body or third-party decision maker" – which would include arbitrators in commercial disputes or matters before administrative tribunals including the Employment Standards Branch and the Human Rights Tribunal.

Although the words "without prejudice" are often used on records or communications intended to be protected by settlement privilege, in *Sable Offshore Energy,* the Supreme Court of Canada confirmed these precise words are not required to invoke the privilege. What matters instead is the intent of the parties to settle the matter.

If the three conditions above are satisfied, there is a presumption of non-disclosure of the records in question. Further, if settlement privilege is established, it belongs to both parties and cannot be unilaterally waived by either of them. There

are exceptions to settlement privilege, but a fulsome discussion of the exceptions is beyond the scope of this article.

3. Examples of Settlement Privilege

It has only been three years since the BC Supreme Court confirmed settlement privilege as a basis to withhold records from disclosure outside of FIPPA. As a result, there are only a handful of decisions from the OIPC considering its application. A few of these are summarized below.

a. Settlement agreement relating to an employee's termination

In Order F19-20, *Workers Compensation Board (Re),* 2019 BCIPC 22 (CanLii), the Adjudicator confirmed WorkSafe BC's decision to withhold a record from disclosure on the basis of settlement privilege. The record was a two-page memorandum of settlement between WorkSafeBC, the Union and a former employee. The memorandum outlined all matters related to the termination of the third party's employment with WorkSafeBC. The Adjudicator was satisfied the memorandum met the criteria for settlement privilege: there was a dispute about the former employee's departure from WorkSafeBC; the purpose of the memorandum was to effect a settlement; and, the memorandum contained a clause clearly indicating the parties agreed to keep the terms confidential.

b. Record showing repayment of funds by a former employee

In Order F18-06, *British Columbia Lottery Corporation (Re),* 2018 BCIPC 8 (CanLii), a journalist had requested records related to repayment of money to the BC Lottery Corporation ("BCLC") by its former CEO. BCLC withheld certain records on the basis of settlement privilege. The records consisted of emails from the former CEO's lawyer to BCLC's lawyer with a settlement offer as well as a letter from the former CEO's lawyer to BCLC's lawyer regarding settlement funds, including confidential communication regarding some settlement terms. BCLC argued that the records were created in a context that BCLC regarded as a potentially litigious dispute pertaining to the former CEO's departure from BCLC and the payment he had received from BCLC in that regard. The Adjudicator agreed that all three elements of the test were met. Notably, in relation to the second step of the test, the Adjudicator held there was an "implicit understanding between the parties for the information in [the] records to remain confidential and undisclosed to any individuals outside of the negotiation process" (at para. 67).

c. Records relating to settlement of the purchase price for a water utility

In Order F20-21, *White Rock (City) (Re),* 2020 BCIPC 25 (CanLii), the applicant requested records relating to negotiations between the City and EPCOR Utilities Inc. to settle the price of a water utility. The City and EPCOR had entered into an asset purchase agreement which provided, in part, that the purchase price was the "fair market value" of the utility as at the closing date. The agreement provided that if the parties did not agree on the fair market value, the City would pay EPCOR a specified sum and the parties would continue to negotiate in good faith, failing which the parties would proceed to arbitration. The parties had also entered into a "Two-Way Confidentiality Agreement" pursuant to which they agreed that information shared during negotiations would be kept in strict confidence. The parties were still in negotiations at the time of the access request and the City withheld a number of records on the basis of settlement privilege (as well as other exceptions to disclosure in FIPPA).

The Adjudicator agreed that settlement privilege applied to a number of the records. He concluded the City and EPCOR were in a "litigious dispute" after the closing date and in a negotiation aimed at resolving the dispute. He distinguished the circumstances from those where parties are simply negotiating the terms of a commercial

contract (which would not meet the first step of the test), since the parties disagreed about what "fair market value" was and therefore the dispute was about contractual performance. The Adjudicator also agreed that the purpose of certain records (including financial documents, a report prepared by KPMG and communications about those documents) was to settle the dispute over the fair market value and that the records were crucial in assisting the parties to reach a settlement. Ultimately, the Adjudicator found all three aspects of the test were met.

Interestingly, Council for the City had adopted a resolution to waive settlement privilege over the records in question. However, EPCOR had not granted its consent to waive privilege. Given that the privilege is jointly held by both parties and cannot be unilaterally waived by either of them, the Adjudicator found settlement privilege had not been waived.

Conclusion

Local governments often find themselves in negotiations to settle disputes. There may be exceptions to disclosure under FIPPA that apply to the records created during these negotiations, including s. 14 (solicitor-client privilege), s. 17 (disclosure harmful to negotiations) or s. 22 (disclosure harmful to personal privacy). While there may be overlap, settlement privilege at common law is distinct from all of these and can provide its own basis to withhold records from disclosure. If you require advice about whether settlement privilege may apply in a given case, we would be pleased to assist you.

~ Marisa Cruickshank

Board of Variance Corner with Matt

Zoning bylaws are enactments of general application. They are drafted without consideration of the unique physical characteristics of each parcel to which they apply. In recognition of the fact that in some circumstances the application of general zoning regulations may make it difficult, or impossible, for an owner to use a parcel as intended, the *Local Government Act* provides for a safety valve – the Board of Variance.

While it is possible to vary zoning requirements by issuance of a development variance permit, in many local governments the front line for these sorts of requests is the Board of Variance. Accordingly, in this author's view, it is important for local government staff, especially those who work with their Board of Variance, to have a good understanding of the purpose, role and jurisdiction of the Board, as well as what is required of the Board when issuing its decisions.

It is also prudent to ensure that the Board has the tools necessary to comply with legislative and judicial requirements in relation to their work, in order to help insulate their decisions from

successful challenges from unhappy landowners (or local governments).

Jurisdiction

The LGA provides Board of Variance authority to grant variances for some subdivision servicing requirements, the prohibition of alterations and additions to lawful non-conforming buildings, and regulations in relation to trees, however, the vast majority of applications to Boards relate to requests to relax rules regarding the siting, size or dimensions of buildings or structures.

As stated above, the purpose of a Board of Variance is to provide landowners an avenue to obtain relief where the strict application of a zoning bylaw (or other bylaw as listed above), makes it difficult or impossible to use the parcel as intended by that bylaw (*Metchosin v. Metchosin Board of Variance*, 1993 BCCA). The dominant purpose of boards of variance is to ameliorate cases of undue hardship (*Maple Ridge v. Board of Variance of The District of Maple Ridge*, 1996 BCSC).

The jurisdiction of Boards of Variance is often misinterpreted by members of the public. While the decision to issuance a variance is discretionary, the enabling legislation requires that the Board make certain findings before a variance can be granted and accordingly, is quite limited.

First, and with respect to the relaxation of a zoning bylaw, the LGA stipulates that in order to grant a variance, the Board must find that compliance with the siting, size or dimensions regulations of a zoning bylaw causes undue hardship. This is a threshold issue. If the Board is not satisfied that undue hardship would be caused to the applicant if compliance with the bylaw is required, the Board must deny the application (*Steemson v. Burnaby Board of Variance*, 2020 BCSC; *Moore* v. *Lions Bay*, 1990 BCSC).

Hardship has a specific meaning in the context of a Board of Variance application, which is narrower than that used in common parlance. Hardship does not mean difficulty, additional monetary expense, or inability to build a 5 car garage in a residential zone. An applicant must demonstrate more than mere financial hardship (*Coulter v. Esquimalt (Township)*, 1989 BCSC). As stated above, the analysis looks at whether, as a result of the bylaw, the site cannot be used for its intended purpose. The classic example is a parcel which has some particular physical circumstances which impede development on the site. For example, the shape of a parcel might make complying with all applicable setbacks impossible or render any building on the property too small to be usable. Hardship may also arise from the physical characteristics of neighboring parcels (*Saanich v. Kalfon*, 1992 BCSC) or the personal characteristics of individuals residing at the parcel in question (*Bailey v. Delta*, 1994 BCSC).

Second (through eighth), the Board must also conclude that the variance is minor; that the variance does not result in the inappropriate development of the property, adversely affect the natural environment, substantially affect the use and enjoyment of adjacent land, vary permitted uses and densities under the applicable bylaw, defeat the intent of the bylaw, or vary the application of an applicable bylaw in relation to the residential tenure. The Board must also conclude that the variance does not fall within the scope of any of the subsections of s. 542(2), for example, by being in conflict with a s. 219 covenant or a phased development agreement.

It is only where an application meets all of these requirements that the Board can exercise its discretion to grant a variance. If hardship is not found, or the variance is not minor, results in the inappropriate development of the site, etc., then the Board has no jurisdiction to issue the variance.

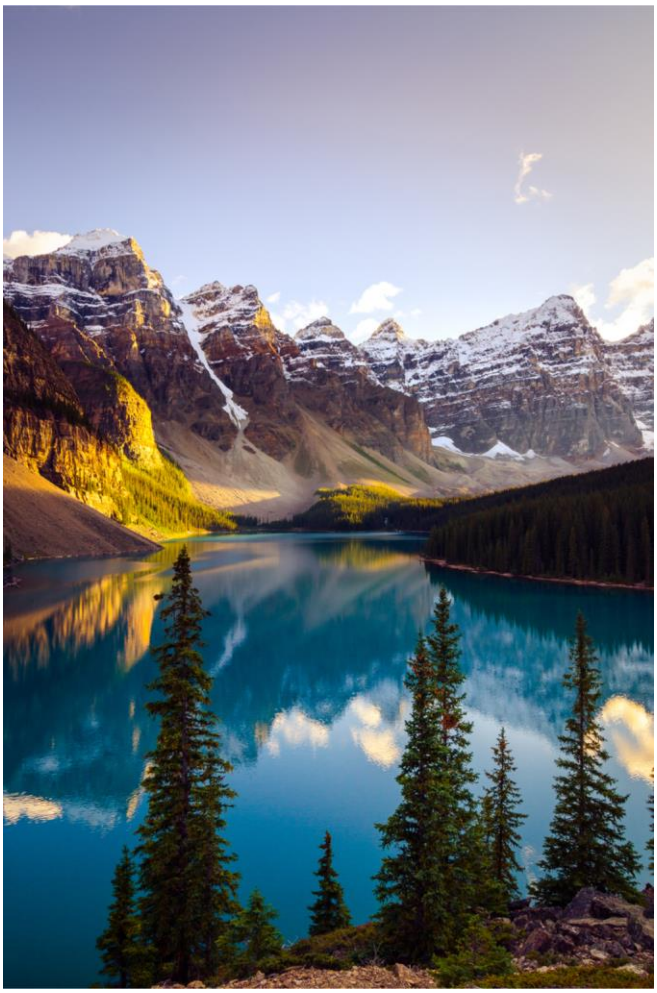
Reasons for Decision

There is no obligation on the Board to provide formal written reasons for its decision (*Surrey v. Surrey Board of Variance*, 1996 BCSC). Indeed, in many cases it is difficult to give reasons because different members of the Board might have different reasons for denying an application – for example some might not find hardship and others might find hardship but determine that the variance proposed is not minor.

Despite no requirement for reasons, a Board of Variance is required to ensure that an applicant is able to glean the rationale for the Board's decision from the context (*Mak v. Vancouver (City) Board of Variance*, 2018 BCSC; *Steemson v. Burnaby Board of Variance*, 2020 BCSC). This is consistent with the recent direction of the Supreme Court of Canada in the case of *Canada v. Vavilov*, 2019 SCC, wherein the Court stated that even where formal reasons for a decision are not required, a reviewing court will examine the decision in light of the relevant factual and legal constraints on the decision maker in order to determine whether the decision is reasonable. If the context surrounding the Board hearing does not provide an applicant the ability to understand or determine why the Board decided as it did, the decision of the Board may very likely be quashed if the applicant seeks judicial review of that decision in the BC Supreme Court.

For that reason, it is imperative that Boards of Variance keep rather detailed minutes of their meetings, which should, at the very minimum, list all speakers on an application and outline their positions. The minutes should indicate the basis of hardship which the applicant claims, as well as any comments or recommendations made by municipal staff. We also recommend that staff record Board of Variance hearings and retain those recording in the local government's records. Minutes and a transcript of the hearing can be used to help provide the required 'context' should the Board's decision be challenged in Court.

We also recommend that when Board members provide their individual decisions to grant or deny a variance, they provide a simple rationale for their decision, for example, by stating "I find that the applicant has not demonstrated



hardship" or "I am denying this application because I find that the variance would adversely affect the natural environment". These "reasons" should be recorded in the minutes. Some local governments take this one step further and provide Board members with summary decision sheets, which provide the Board members a checklist of all of the requirements that must be met before a Board member can grant a variance. In a recent case the BC Supreme Court judge expressly noted that the summary sheets completed by the Board members in that case (along with the minutes) were sufficient to ensure that the parties and the Court understood why the Boar came to the conclusion it did

(*Steemson v. Burnaby Board of Variance*, 2020 BCSC).

Summary

Despite the fact that Boards of Variance are usually the first responder to requests from members of the public to vary zoning regulations, in most cases Boards do not get much attention from local governments (e.g. most Board of Variance bylaws are extremely outdated). Accordingly, their decisions are often unnecessarily vulnerable to challenge as a result of misunderstandings about the scope of their jurisdiction or a lack of processes to provide the 'context' required to understand their decisions. Accordingly, we recommend that local governments check in with their Boards of Variance and review their Board bylaws and procedures, to ensure that the "safety valve" is working.

~ **Matt Voell**

Information & Privacy Update

Environmental Reports

While FIPPA section 13 (1) authorizes public bodies to refuse disclosure of information that would reveal "advice or recommendations developed by or for a public body", subsection (2) lists a number of exceptions. Paragraph 13 (2) (f), for "an environmental impact statement or similar information" is among the list of record categories that cannot be refused under subsection (1). In Order F20-31 (Gibsons), Adjudicator Davis defines an environmental impact statement as "a written analysis or assessment, required by law or policy, about the anticipated effects on the environment of a project or activity and/or environmental harm mitigation strategies for the project or activity'" which will generally be prepared by a professional qualified to opine on that subject. Information in geotechnical and hydrogeological reports prepared by professionals as peer reviews to advise a local government, pursuant to development permit applications for environmentally sensitive DP areas, was found to be "similar information" in this decision, and as such was ordered disclosed pursuant to an FOI request for access.

Legal Advice & Related Invoices

Numerous court decisions have confirmed that privilege over confidential communications between solicitor and client for seeking and giving legal advice is a substantive right of fundamental importance to our legal system. A presumption of privilege applies, including to legal invoices for services provided to various public bodies. Disputes over access to legal fee information, however, continue to proceed to inquiries of the Commissioner. Results are mixed, depending on whether the appointed adjudicator decides that disclosure of fee amounts could reveal a privileged communication; such that an "assiduous inquirer" could deduce the level of importance, time, expertise and preparation a public body assigned to a legal matter. Typically, adjudicators treat the presumption of privilege as rebutted if they find that the information shows only aggregated total amounts paid to different law firms or in regard to various matters, disclosure is ordered. Where the total relates to a single, specific matter, as in Order F20-30 (City of Kelowna), we can expect a refusal to disclose, pursuant to FIPPA s. 14, to be confirmed.

Personal Privacy

Names and email addresses of a member of the public contacting a local government to ask questions about a proposed land deal were held as being subject to 22 (1): Order F20-27 (Vancouver), following Order F17-19 (Vancouver).

Routinely Available Record Categories

The OIPC has published *Investigation Report 20-01*, in which Commissioner McEvoy discusses the obligation set out in section 71 of the *Freedom of Information and Protection of Privacy Act* for the heads of public bodies to establish categories of records that are available to the public routinely,

either by proactive release by the public body, or otherwise without a formal request for access under the Act. The Commissioner advises that public bodies should read section 71 as furthering FIPPA's objective of accountability, and "engage in a more deliberative approach to making records available."

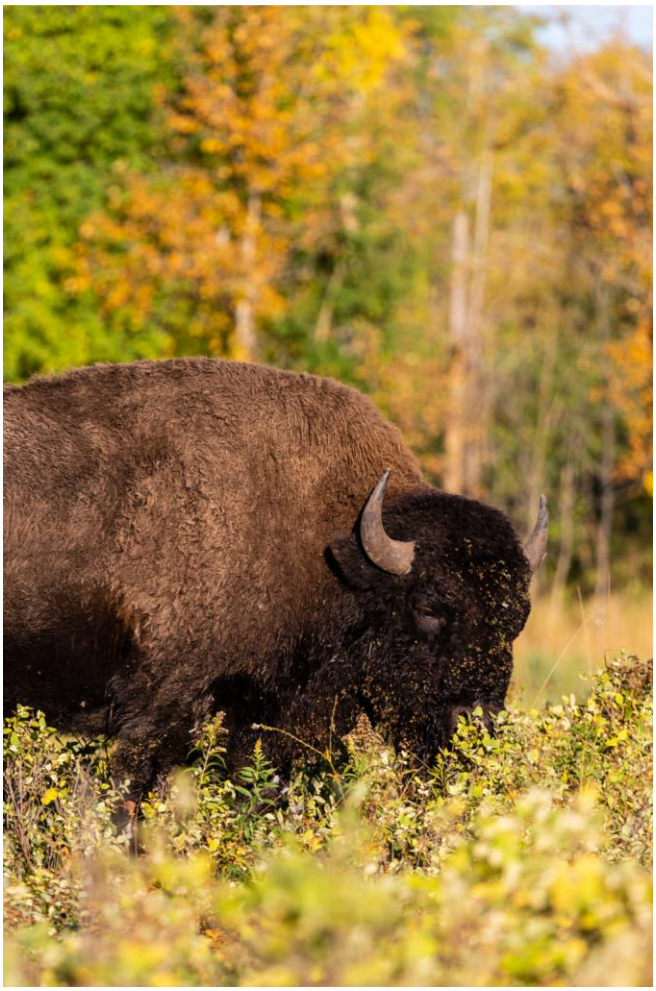
> *The Commissioner emphasized that the categories established should be organized and documented, described meaningfully and specifically, and not limited to ad hoc disclosures, single records, or webpage publication, or to those records that are required by statute to be publicly available (such as the Community Charter and Local Government Act).*

UBCM has published a list of categories of records that provides a referential starting point; it is included in the FIPPA Toolkit published by the Local Government Management Association. Note: The Investigation Report does not address FIPPA section 70 (1.1), which *prohibits* the head from establishing any category of records containing "personal information" (i.e., information about individuals other than business contact information) unless disclosure is authorized under FIPPA section 33.1 or 33.2, or unless disclosure would not unreasonably invade personal privacy, as determined by a section 22 analysis. This provision obviously furthers the other FIPPA objective: protection of personal privacy. The courts have held privacy to be of constitutional importance. Whether a particular disclosure of personal information would be unreasonable under section 22 continues to be at issue in many inquiries of the Commissioner. A cautious approach would be to limit any routinely available category containing personal information to those listed in subsection 22 (4) of the Act.

~ Colleen Burke

Reducing Risk while Reallocating Road Space

The COVID-19 pandemic has dramatically increased demands to reallocate road space away from cars to benefit other road users, as Sarah Thomas describes in the most recent issue of *Planning West*:



The COVID-19 pandemic "crisis provides a narrow window of time for broad, wide-reaching change. […] Swift change erupted […] when stay-at-home orders and solitary exercise sent cyclists out in never before seen numbers. With roads quiet, and walking paths packed, the demand for cycling space transformed streets in British Columbia and around the world into cycling corridors"

(Sarah Thomas, "Together, We Can Ride", *Planning West*, Summer 2020, Planning Institute of British Columbia, page 18).

To meet this demand, local governments have employed a variety of temporary measures such as establishing quiet streets (using barriers and signs to dissuade non-local car traffic) and sectioning off lanes on roads for cyclists and other non-car road users (for example, using pylons).

The following is a non-exhaustive list of suggestions for reducing legal risks while reallocating road spaces in this context of rapid change. Please do not rely on this general information as legal advice; seek legal advice about your situation if you require it.

1. Consider hazards to new road users

What was safe for a car may not be safe for (as examples) a bicycle, wheelchair, stroller, or person travelling by foot. Local governments must consider the hazards to reasonably foreseeable users of a road, and so when reallocating road space it is prudent to consider whether there are any hazards to the new users of the roads that may not have been hazardous to cars.

In *Aberdeen v Township of Langley, Zanatta, Cassels*, 2007 BCSC 993 the court found that a guard rail with a gap large enough for a cyclist to fall through was a hazard to cyclists. The gap was too small for a car to fall through. So, different users can mean different hazards.

2. Consider the *Charter* and *Human Rights Code*

When reallocating road space, we recommend considering whether the new uses of space could discriminate against protected groups or classes of people.

Road design may be discriminatory. For example, a human rights complaint has been filed about "floating" bus stops that are separated from the sidewalk by a bike path. The complaint alleges that the bus stops only allow members of the public who are not blind to safely cross the bike path to reach the bus stop.

3. Install clear signage

Local governments have a duty to mitigate or warn against hazards to road users. Temporary road reallocation may create hazards that can be mitigated with clear signage—for example, confusion regarding whether a lane is closed to cars or not, or confusion regarding the direction of traffic could create hazards. In addition, a local government should provide warning signage regarding any hazards that cannot be removed.

4. Establish a policy to identify hazards that arise

Local governments have a duty to maintain roads in a reasonably safe condition, and may be liable in negligence if they fail to meet this duty. Having a reasonable policy for identifying hazards that may arise from temporary measures to reallocate road space helps reduce a local government's risk of liability. We suggest considering whether your existing policy regarding road maintenance is sufficient to identify hazards in this context.

Public bodies are generally not liable for true policy decisions, but they are liable for operational decisions (*Just v British Columbia*, [1989] 2 SCR 1228). To make use of the policy decision defense, a local government must have actually turned its mind to policy considerations such as balancing social, political, and economic factors when making the relevant decision (*Brown v British Columbia*, [1994] 1 SCR 420). The line between policy and operational decisions can be fuzzy, and there are other limits to this defense. Therefore having a policy for identifying hazards does not provide certain protection—but it is often helpful.

~ Kate Gotziaman

How Should a Municipality Deal with Construction Cranes?

Construction cranes are usually a necessary feature of any construction project of significant size. Because of the large footprint of such cranes and the potential of obstruction or public nuisance caused by their operation, municipalities often consider what measures or regulation they should adopt with respect to installation and operation of construction cranes in their jurisdiction. This article attempts to provide a bird's-eye view of the legal framework surrounding construction cranes from the municipal perspective. While the article is drafted with fixed tower cranes in mind, some aspects may apply to mobile cranes as well.

Generally speaking, measures taken by municipalities with respect to construction cranes can take two forms: (1) 'public interest measures' aimed at protection of the public and (2) 'private property measures' aimed at protecting the local government in its position as a property owner.

Public interest measures

As a starting point for this discussion, it should be noted that there is no provincial statute requiring local governments to regulate tower cranes and there is no legal obligation otherwise upon a municipality to do so. On the other hand, the installation and operation of construction cranes involve several issues that fall squarely within the fundamental powers of municipalities (section 8 of the *Community Charter*) such as public spaces, public nuisances, and buildings. Therefore, while a municipality is not obligated to regulate construction cranes, it *may* choose to do so at the discretion of its Council. Indeed, some BC municipalities do regulate construction cranes to varying extents.

Readers representing municipalities will perhaps feel assured to know that safety of cranes is covered in Part 14 of the *Occupational Health and Safety Regulation* ("*OHSR*"). This *OHSR* requirement is administered entirely by WorkSafeBC with no involvement of local governments required. Thus, crane safety is primarily addressed by the province, with municipalities only left to consider peripheral issues of safety or nuisance that are outside the coverage of the *OHSR*.

A direct method of regulating construction cranes is by adopting, through bylaw, a requirement for builders to obtain a crane

permit prior to erecting a crane. Some BC municipalities have incorporated a crane permitting requirement in their building bylaws.

In drafting such a permit requirement, municipalities should be cautious to not interfere with the exercise of provincial authority over crane safety under the *OHSR*. Through the conditions imposed on such a permit, a municipality may regulate the hours of operation

of cranes or other potential nuisances of cranes such as obstruction of sidewalks or streets.

There are a couple of alternative, indirect methods of regulating cranes without adopting a crane permitting regime. First, the installation of cranes often requires encroachment on public roads, in which case builders typically enter into encroachment agreements with municipalities to allow such encroachment. Conditions on operation of the crane in the public interest may be included in such encroachment agreements. Second, conditions on crane operations may be imposed as a condition to the rezoning permit, if applicable (e.g., through a 'good neighbour agreement').

> *"If a construction crane intrudes upon the air-space of a municipally-owned property without prior agreement, the municipality may bring legal action against the builder on grounds of trespass."*

Private property measures

If the municipality owns property in the vicinity of the crane and the use of the property could be impacted by crane operations, the municipality would have all the rights that a private property owner would have in its position.

As a general principle, a builder has no right to intrude upon the land or air-space of any neighbouring parcels with the construction crane. The BC Supreme Court recently held in *OSED Howe Street Vancouver Leaseholds Inc. v FS Property Inc.*, 2020 BCSC 1066, that "a construction crane which enters the air space of another property is trespassing upon that air space."

As a practical matter, easement agreements are often entered into by builders with neighbouring owners to allow for crane swing into the air-space of adjacent properties. There is no statutory requirement for such agreements, nor can a municipality compel such agreements through its statutory powers. Rather, the agreement would have to be negotiated by the municipality akin to a contract between two private parties. If a construction crane intrudes upon the air-space of a municipally-owned property without prior agreement, the municipality may bring legal action against the builder on grounds of trespass (see *OSED Howe* discussed above) or nuisance (see *Janda Group Holdings Inc. v. Concost Management Inc.*, 2016 BCSC 1503).

~ Rahul Ranade

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