Staples McDannold Stewart
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LoGo NoteBook

... a newsletter for local governments

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Requirements for Public Hearing Reports

On April 27, 2005 the B.C. Supreme Court gave its reasons for judgment in **Pacific Playground Holdings Ltd. v. Regional District of Comox-Strathcona** where it allowed the Petitioner's application to set aside a zoning bylaw for failure to comply with the requirements for a public hearing report. The **Local Government Act** provides:

> *891(2)* *If the holding of a public hearing is delegated, the local government must not adopt the bylaw that is the subject of the hearing until the delegate reports to the local government, either orally or in writing, the views expressed at the hearing.*
>
> *...*
>
> *894(2)* *A member of a council or board who*
>
> *(a)* *is entitled to vote on a bylaw, and*
>
> *(b)* *was not present at the public hearing*
>
> *may vote on the adoption of a bylaw that was the subject of a public hearing, provided that an oral or written report of the public hearing has been given to the member by an officer or employee of the local government or a director who held a hearing delegated under section 891.*

The Petitioner argued that the Report of the Public Hearing Committee did not convey the views expressed at the hearing as required by section 891(2).

The Court summarized the public hearing report as follows:

> *The three-page document headed "Report of the Public Hearing Committee" says only this about the views expressed at the public hearing on behalf of the petitioner:*
>
> > *The Committee discussed three specific areas of concern that arose from the submissions and comments of the October 7, 2003 Public Hearing: concerns within the Saratoga/Miracle Beach Local Plan area, the Union Bay Local Area Plan, and concerns raised by the City of Courtenay.*
>
> *Those brief comments do not amount to a report of the 'views expressed at the hearing'.*
>
> *The five-page Planning Department Report goes only a little further. Under the heading 'Saratoga/Miracle Beach LAP' it states:*
>
> > *Two written submissions were received on this issue, one from Norm McLaren, representing the prospective purchaser Mr. Mitchell, and another from Sidney Shook from the legal firm of McVea, Shook, Wickham & Bishop representing Pacific Playgrounds. The submissions centre on three parcels of land owned by Pacific Playgrounds which are proposed to be rezoned by the draft zoning bylaw. It is the expressed concern of Mr. Shook that the proposed rezoning may collapse a sale of the properties and of Mr. McLaren that the proposed rezoning could be construed as 'expropriation without compensation' which could cause severe financial losses to the developer or land owner.*

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> *The comments in the Planning Department Report are so generic that they would give a reader scant understanding of what views the petitioner expressed at the public hearing. The report says little more than that the petitioner is opposed to the Bylaw because it may affect a sale and could result in economic loss.*
>
> *In fact, the petitioner presented a detailed, six-page, single-spaced, written brief at the public hearing. Among the issues raised in that brief are the effect that the Bylaw would have on the petitioner's proposal for development of a water system and tertiary sewage treatment system on its lands. There is no mention of this or the petitioner's other expressed views in the report.*
>
> *The reporting requirement in section 891(2) is not an empty formality. In considering its purpose, that subsection should be read in the context of the surrounding legislative provisions, including section 890(3), which provides:*
>
> > *890(3) At the public hearing all persons who believe that their interest in property is affected by the proposed bylaw must be afforded a reasonable opportunity to be heard or to present written submissions respecting matters contained in the bylaw that is the subject of the hearing.*
>
> *Clearly, one of the reasons for having a public hearing is to ensure that those affected by a proposed bylaw have a reasonable opportunity to make submissions. The opportunity of making submissions would be a pointless exercise if the elected officials with the responsibility of voting on the bylaw were permitted to vote before learning what submissions were made.*
>
> *Section 891(2) provides considerable latitude. It does not say that the submissions made at the public hearing have to be reported in detail, nor does it require that the report be made in writing. But it does require something more than a mere statement by the delegates that a certain party appeared at the public hearing and was opposed to the adoption of the bylaw. A bald statement that a certain party was opposed to the bylaw, with nothing more, is not a report of 'the views expressed at the hearing', as that phrase is used in section 891(2). In the present case, the Report of the Public Hearing Committee and the Planning Department Report failed to give the members of the Board who were not at the public hearing even the most rudimentary understanding of the submissions made on behalf of the petitioner. The reports did not comply with the requirements of section 891(2). For the same reason, those Board members who were not at the public hearing were not properly qualified to vote on the Bylaw, since the statutory prerequisite to their voting contained in section 894(2) was not satisfied.*

The Court went on to note that section 891(2) does not require that the delegate's report of the public hearing must be in writing; it can be oral. The Court concluded however that the inadequacies of the written report were not remedied orally at the Regional District Board Meeting and accordingly quashed the bylaws for failing to comply with the requirements of sections 891(2) and 894(2), since the views expressed by the petitioner at the public hearing were never reported by the delegated directors to the other directors prior to their vote to adopt the bylaw. The Court concluded that

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since this constituted a failure of a condition precedent to the Board's authority to adopt the bylaw, the bylaw must be quashed regardless of whether the Board acted in good faith and regardless of whether there was any actual prejudice to the petitioner.

This case is of significance as it raises real concerns about the content that needs to be included in a public hearing report. It appears that unless the report is so detailed as to summarize each issue raised by each speaker that the report is at risk of not complying with the requirements of section 891(2).

Simply attaching the minutes of the public hearing to the report may also create uncertainty, as that may not be seen as a "report"; it certainly defeats the purpose of the delegation and its object of relieving the other elected officials from having to review all of the material at the public hearing.

Until this situation is clarified either by a subsequent case or a legislative amendment, the delegation of public hearings for complex rezoning applications is not recommended

Guy McDannold

Flying High Or Flying Low?

Local Governments Cannot Prohibit Private Aerodromes

In R v Kupchanko 2002 BCCA 63, the B.C. Court of Appeal held that provincial regulations regarding navigation on the Columbia River were unconstitutional as being beyond the authority of the Province. Esson, J.A. writing for the Court, acknowledged that the reasoning of the Court of Appeal in Windermere Watersports Inc. v Invermere (1989) 37 BCLR (2d) 112 (CA), was no longer good law. Other legal decisions, that may have upheld the application of a local government bylaw to a matter that would be considered to be a matter of federal responsibility, were then expected to be vulnerable.

In the Windermere case, the Court upheld the validity of a resolution that dealt with the operation of jet skis on Lake Windermere even though it affected a matter involving "navigation" on the surface of the water. "Navigation" is a matter of exclusive federal jurisdiction. In his Kupchanko judgment, Esson, J.A. admitted that his reasons in Windermere had been mistaken.

In the recent Comox-Strathcona Regional District v. Hansen case, the Regional District applied to the B.C. Supreme Court for a declaration that a landing strip established by the defendants on their land contravened the zoning bylaw and for an injunction prohibiting the use of the land as an airfield. The airfield was registered with Transport Canada as an "aerodrome" under the Aeronautics Act.

The Regional District relied upon a B.C. Court of Appeal decision, British Columbia v Van Gool (1987) 36 MPLR 303, where the Court of Appeal had held that a local government bylaw that prohibited the use of land for a private airport for any purpose, other than the owner's, was constitutionally valid and enforceable.

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In the Hansen case, the B.C. Supreme Court declined to follow the Van Gool decision because the Court considered that Van Gool had been wrongly decided. It is unusual for a Supreme Court Justice not to follow a Court of Appeal decision. The Supreme Court Justice noted that the Ontario Court of Appeal had subsequently criticized the B.C. Court of Appeal's decision in Van Gool. In addition, the Justice noted that the decision in Van Gool could not be reconciled with the Supreme Court of Canada decision in Bell Canada v Québec [1988] 1 SCR 749, decided shortly before Van Gool. In the Bell Canada case, the Supreme Court of Canada held that a provincial occupational health and safety law designed to protect pregnant workers did not apply to workers in an area that was under federal jurisdiction. Under the doctrine of interjurisdictional immunity, as articulated by the Supreme Court of Canada, provincial (or local) legislation that affects a vital or essential part of a federal undertaking (such as aeronautics) should be read down so as not to apply.

In reaching its decision in Hansen, the Court stated the following:

> There are some good reasons why municipalities should be able to determine where airports should be located, but under the current federal legislative scheme, this is simply not something the Court can impose.

The federal jurisdiction over aeronautics includes not only airports, but also private aerodromes such as the Hansens' landing strip.

As a result of decisions such as Kupchanko, in relation to navigation and shipping, and Hansen, in relation to aeronautics, it is doubtful that municipal bylaws (or provincial legislation) that deal with a matter of exclusive federal jurisdiction will be held to be valid. Provisions of local government zoning and other bylaws that contain prohibitions or regulations affecting matters within federal jurisdiction are much more likely to be found invalid. This includes not only regulations respecting airports, but may well extend to include references to uses related to navigation and shipping, railways, telecommunications etc. Because private aerodromes give rise to community concerns, there is a clear need for the Federal Government to provide for prior local community input into such land use matters, as has been done with telecommunications towers.

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Tax Sale Limitations

Court Imposes Restrictions on Remedies Available to Local Government

On May 24, 2005 the B.C. Supreme Court gave its decision in McCready v. City of Nanaimo and refused to follow a previous decision of the Court which gave a broad reading to section 423(2) of the Local Government Act.

Section 423(2) provides:

> "**423.(2)** *During the period allowed for redemption, if the council finds a manifest error in the tax sale or in the proceedings before the sale, it may order that*
>
> *(a) the purchase price be returned to the purchaser together with interest …, and*
>
> *(b) the taxes be dealt with as the circumstances require …"*

The facts in this case were that McCready was the successful purchaser at tax sale of a property owned by Hurst Developments. The City, as required by section 414 of the Local Government Act, attempted to deliver notice of the tax sale and of the one year redemption period to Hurst Developments. However three notices were returned undelivered and the effectiveness of delivery to a fourth, out-of-province, address was uncertain.

The City was concerned that it had been unable to comply with the obligation under section 414 to give notice of the tax sale and of the redemption period to the property owner.

In 1994, in similar circumstances, the B.C. Supreme Court in Martman v. Town of Sidney ruled that the failure to give the section 414 notice of the tax sale and redemption period amounted to a manifest error in the tax sale and that City Council had the jurisdiction under section 423(2) to set aside the tax sale for such a manifest error.

Nanaimo City Council, relying on the Martman v. Sidney decision, passed a Resolution under section 423(2) setting aside the tax sale of the Hurst property to McCready due to the manifest error in failing to deliver the section 414 notice.

McCready brought an application to the Court to set aside Nanaimo's section 423(2) Resolution, arguing that the Martman v. Town of Sidney case was wrongly decided and that section 423(2) was a limited remedy dealing only with errors in the process up to and including the tax sale but not relating to any of the process following the tax sale. The Court agreed and stated:

> *When the word "sale" is examined in the context of the Act as a whole, it is clear that the legislature drew distinctions between the sale and events that take place before or after the sale. Section 423(2) gives council the power to set aside a sale if it finds a manifest error in the sale or in the proceedings before the sale. Council is not, however, given the power to set aside a sale for a manifest error that occurs after the sale.*
>
> *The statute sets up a complete code that governs the sale of land for delinquent taxes. The code offers protections, both to owners and to tax sale purchasers. After the sale has taken place, council cannot act to the detriment of the purchaser. If council fails to properly notify the owner of the sale, the owner is given certain remedies against council. Council cannot rectify its failure to give notice by canceling the sale to the prejudice of the purchaser. Although the legislature could undoubtedly give such power to a municipal council, I find that they have not in this legislation. I am satisfied that the City did not have jurisdiction to pass the resolution.*

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> *Such a conclusion is consistent with a broad and purposive approach to the interpretation of the statute.*
>
> *The City submits that regardless of how I might interpret the legislation, I am bound by Martman. Martman has not been subsequently followed or considered.*
>
> *With the greatest respect, I am unable to agree that Martman correctly interprets section 423(2) of the Act. My reading of that decision does not persuade me that Drake J. gave any consideration to the meaning of the word "sale" in the context of the Act, or the authorities which limit "sale" to the events which took place at the auction. I am also satisfied that his conclusion was probably wrong. I therefore respectfully decline to follow Martman.*
>
> *For the reasons I have expressed, I find that the City did not have jurisdiction to pass the resolution setting aside the sale."*

This decision has significant implications for local government. In refusing to follow the Martman v. Town of Sidney decision the B.C. Supreme Court has narrowed the ability of local government to set aside a tax sale due to manifest error. Now such errors will be limited to the tax sale itself and the proceedings before the sale only. Local government now does not have the ability to set aside a tax sale and to insulate its taxpayers against potential liability when errors in the process occur after the tax sale.

This narrow reading of section 423(2) and its restrictions on the ability of local government to act to protect its taxpayers from potential liability arising from errors in the post tax sale procedure should be corrected by a legislative amendment to broaden section 423 to include errors in the procedure after the tax sale and up to the expiration of the one year redemption period.

Guy McDannold

Godfrey v Bird
Business Relationships and Conflict of Interest

The B.C. Supreme Court recently considered a set of circumstances giving rise to an indirect pecuniary conflict of interest that touches upon almost all of the main legal principles relating to conflict of interest. In Godfrey v Bird [2005] BCJ No. 1122, released May 18, 2005, Mr. Justice Burnyeat held that a District of North Saanich councillor was disqualified from office for having participated in the discussion and vote on a development variance application in circumstances where the Court found that he had an indirect pecuniary interest.

In the Godfrey case, Councillor Bird was a realtor and had an ongoing relationship (both social and business) with a resident of North Saanich. The Councillor acted as the real estate agent for the resident on a number of separate occasions. The Councillor and the resident's friendship developed to the point where they met socially for dinner. In addition, the Councillor and the resident were co-owners of two separate properties in the Town of Sidney.

The evidence indicated the Councillor, in the case of some real estate transactions, had given the resident a better or special commission rate because of their ongoing business relationship. In December 2002 the resident, with the assistance of the Councillor as a realtor, purchased a large property on Ardmore Drive in North Saanich. The resident planned to build a large residence on the Ardmore property. Construction of the residence would have required a zoning amendment as the proposed size of the residence exceeded the maximum size of house that could be built on the parcel and, in addition, the resident wished to retain the existing home as a "guest cottage".

It was this development proposal that triggered a series of events that ultimately led to the court challenge to the Councillor's qualification to hold office.

It is important to note that, in August 2002 and early 2003, the District obtained a series of legal opinions from its solicitors on the question of conflict of interest in relation to Councillor Bird. The legal opinions concluded that, as a general principle, a councillor who was a realtor was not disqualified from participating or voting on matters that might have implications for property development in the municipality unless a particular matter arose that created a unique interest on the part of the Councillor. The legal opinions focused on decisions to provide sewer service to areas of the District. They concluded that, because those decisions affected more than 100 parcels, a sufficient community of interest existed to form an exception to conflict of interest under section 104 of the Community Charter.

The Councillor obtained his own legal opinion in July of 2002 which also came to the conclusion that there would be no basis for finding that a person's occupation as a realtor was, in and of itself, sufficient to create a pecuniary interest on the part of the Councillor.

In June 2003, the Councillor declared a conflict of interest with respect to the Ardmore property because of an acknowledged "friendship" with the owner of the Ardmore property. This declaration of conflict of interest on the part of the Councillor was very important to the subsequent analysis of the facts by the Court.

Nine months after declaring a conflict of interest on the basis of a "friendship", the Councillor voted at Council meetings on the rezoning application relating to the Ardmore property. At the same time, staff was directed by Council to develop criteria for the establishment of a new country estate zone and to report on the practical and tax implications of rezoning properties to this proposed zone.

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At a meeting on May 10, 2004 the Councillor participated in the discussion respecting the proposed rezoning of the Ardmore property, made specific comments indicating that he was quite familiar with the property and advised the other Councillors that if the Ardmore property were not rezoned to permit the proposed development, it would be subdivided and sold off. The Councillor then participated and voted at other meetings dealing with the new country estate zone until the District received a further legal opinion in June 2004 stating that a conflict existed. The Councillor then declared again that he would not participate and vote in respect of the matter.

In defence of his actions in voting at the May 10, 2004 meeting, the Councillor cited reliance upon one of the opinions received by the District from its solicitors. However, that opinion had been received more than a year earlier and had dealt with the issue of whether there was sufficient community of interest in relation to sewer servicing decisions. The opinion had not been specific to the particular situation involving the Ardmore property.

In concluding that the Councillor had a disqualifying indirect pecuniary interest in the matter, the Court was particularly critical of a number of actions on the part of the Councillor:

1. The Court was critical of the fact that the Councillor declared a conflict of interest in June 2003 on the basis of a "friendship" with the owner of the property, without any discussion or disclosure of the business relationship between the Councillor and the resident, which included their relationship as realtor/client as well as their co-ownership interests in a Sidney property.

   The Court stated:

   > I am satisfied that the Councillor was being 'less than forthright' when he made this declaration given the extensive business dealings between the parties.

2. The Court was skeptical of the Councillor's statement that in May, 2004 he had relied upon the March 2003 opinion from the District's solicitors. The Court seemed to find that it would have been unreasonable for the Councillor to have relied upon the discussion relating to "community of interest" in the legal opinion, given that it was very clear that the matter involving the "Ardmore property" involved a specific property and not a situation where there might be a "community of interest" claimed.

3. The Court noted that by early 2004 the Councillor had in fact already declared a conflict of interest with respect to the Ardmore property, he had never retracted that declaration of conflict of interest and he had never received a legal opinion to the effect that he was no longer a friend of the resident or that his friendship should not have disentitled him to participate in matters relating to the Ardmore property.

   The Court also noted that legal opinions obtained by the District were not provided for the benefit or the guidance of the Councillor. Accordingly, the Court found that the Councillor would not have been entitled to rely upon any legal opinions obtained by the District where such opinions were manifestly directed to the District and not to the Councillor. This finding reinforces the importance of Council-

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lors obtaining their own independent legal advice where they may be in a position of conflict of interest. While the municipal corporation may obtain a general opinion regarding conflict for the purpose of ascertaining its own risk exposure to challenges of decisions, it is incumbent upon the individual Councillors to protect their own positions by obtaining separate opinions.

4. The Court found the Councillor attempted to influence the voting even after the District received a June 2004 legal opinion indicating that a conflict existed. He did so by prefacing a declaration to Council of a conflict of interest with statements suggesting that even though there was a common good for him to be able to consider the new comprehensive zoning proposal, he was not going to participate in the vote or discussion with respect to the Ardmore property because of harassment, intimidation and vandalizing of his home relating to this and other municipal issues.

The Court found that this statement itself contravened the prohibition in the Community Charter against attempting to influence the vote on any question in respect of the matter.

The Supreme Court in Godfrey carefully reviewed a number of different decisions to determine the purpose of the conflict of interest rules. The Court placed a very high emphasis on the preservation of the integrity of democratic institutions, which demands that private interests should not affect the discharge of public responsibilities.

The Court found that the ongoing business relationship between the parties was sufficient to create a pecuniary interest. In coming to this conclusion the Court stated the following:

> Just as the interest of an employee in a matter involving an employer will result in an employee being supportive of the employer not only by reason of the general obligation owed to the employer but also by reason of maintaining and improving the relationship between employer and employee, so also the interests of an agent and a principal, of good friends, of business partners, and of a frequent purchaser or vendor of properties and a real estate agent regularly employed can and have resulted in a councillor attempting to maintain and improve the relationship so that continued activity as a real estate agent and the possibility of continued business relationships would be likely.

Colin Stewart