

RECENT BC DECISIONS QUASHES REZONING AND LAND SWAP

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On January 27, 2015 the British Columbia Supreme Court issued its decision in *Community Association of New Yaletown v. Vancouver (City)*, 2015 BCSC 117, in which it decided that the City of Vancouver (the "City") did not act fairly with respect to public hearings concerning a proposed development.

The action was launched by the Community Association of New Yaletown ("CANY"), a group of Yaletown residents and business-owners who sought a judicial review of two bylaws and a development permit that were passed by the City. The City had entered into a deal with Brenhill Developments Ltd. ("Brenhill"), the owner of an existing building at 1077-1099 Richards Street ("1099") containing its offices, a pre-school and a restaurant. Brenhill wished to purchase the property across the street at 508 Helmcken Street ("508"), known as Jubilee House, a social housing project containing 87 dwelling units which was in a state of disrepair. The deal stipulated that Brenhill would build a 13-storey building at 1099 consisting of 162 social housing units in exchange for the City-owned property at 508, which the City would then rezone to allow for a 36-storey tower and the closure of an adjacent lane. Brenhill also gave the City \$1 million towards tenant relocation costs, and agreed not to begin construction at 508 until it had fitted out and delivered 'turn-key' all units at 1099 to the City.

CANY grounded its petition on allegations that the City had breached the *Vancouver Charter* and the rules of procedural fairness by failing to disclose relevant documents at the public hearing concerning the development permit for 1099. It also sought a declaration from the Court that the agreement entered into by the City and Brenhill unlawfully fettered City Council, and that the bylaw rezoning of 508 was inconsistent with the Downtown Official Development Plan ("DODP").

CANY argued that the disclosure surrounding the public hearing for 1099 was inadequate because the City failed to divulge key documents including the agreements entered into between the City and Brenhill. While a land site is exempt from public tender if it is being used for "social purposes", CANY submitted that the land exchange meant that 508 would no longer be used for such purposes and so it should not be exempt.

The City countered that entering into the agreement with Brenhill was within its authority and that the agreement was not material to zoning issues so it served no useful purpose to tender it at a public hearing. It further argued that the land exchange itself was for "social purposes", and that City Council had not been

fettered by the agreement because there was no guarantee to Brenhill that the rezoning application would succeed.

Brenhill submitted that even if the quashing of the zoning bylaw was warranted it should not be granted because of CANY's delay in bringing the petition and the consequential prejudice to Brenhill, which had incurred an estimated \$7 million in expenses since construction of the 1099 project began in September 2013.

The Court found that the petition turned on whether the City had provided enough information in a comprehensible form to enable the public to fairly evaluate the pros and cons of both of the proposed developments as well as the land exchange itself. The Court stated that the package of material available to the public was highly technical, voluminous (nearly 100 pages), and full of peripheral information while only "interlaced" with the material vital to the issues. Furthermore, the dollar value estimates that the City provided to the public in touting the benefits of the social housing project were arbitrary, having no intelligible financial basis. The Court held that treating 508 and 1099 as separate and distinct issues for public hearing did not reflect the true substance of the project and residents should have been given a fair opportunity to make submissions related to the overall arrangement and whether the land exchange resulted in a net benefit or loss to the public, rather than being limited to a discussion on the density and dimensions of the two buildings.

The Court concluded that the public hearing and development permit processes were flawed, and ordered that the zoning bylaw pertinent to 508 as well as the development permit for 1099 be quashed and new public hearings held for each. It also quashed the City's bylaw amendment to the DODP, on the basis that the DODP cannot be amended to allow for a project that otherwise conflicted with the DODP.

The result of this decision on future public hearings and development permit processes is that the City:

- must provide intelligible and understandable information to the public to allow for scrutiny and consideration;
- must provide the public with a fair opportunity to communicate with City Council about the advantages and disadvantages of the proposal; and
- must scrupulously consider the input from the public and cannot arrive at a pre-ordained conclusion.

Following the release of the Court's decision on January 27, 2015, the City issued a Stop Work Order on the construction at 1099 effective January 30, 2015.

While Brenhill has incurred an estimated \$7 million in expenses with respect to the construction of the 1099 project the situation could have been worse had Brenhill also began marketing the development of the 508 project to the public under B.C.'s *Real Estate Development Marketing Act* ("REDMA").

This decision has resulted in a state of uncertainty amongst the City and developers. Extended public

disclosures mandated by the Court could result in all discussions and negotiations between the City and developers being made public, even those discussions that were believed to be confidential, in order to discharge the City's responsibilities for a more fulsome public disclosure to demonstrate fairness. This could lead to a cooling effect on a developers willingness to enter into negotiations with the City on density or land swap deals if such discussions were to late be made public as part of the public hearing process.

The City and Brenhill have sought an appeal of this decision and are expected to seek an expedited appeal process.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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