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4 February 2014

City of Chilliwack
Administration
8550 Young Rd,
Chilliwack BC, V2P 8A4

***** BY FAX @ 604-792-2561 AND MAIL *****

Attn. Mayor and Council

Attn. City Solicitor (c/o City of Chilliwack)

Dear Sirs/Mesdames:

Re: Zoning Bylaw Amendment Bylaw, 2013, No. 3970

I have been asked to express an opinion on the adequacy of the public notice and hearing process for the rezoning to allow a proposed toxic waste recycling facility at 7582 Cannor Rd., Chilliwack, BC. I make no comment on the substance of the rezoning bylaw, and limit myself to commenting on the procedures used, which I believe do not comply with the *Local Government Act* and, if not rectified, open the Bylaw up to potential legal challenge.

At this time I limit my observations to:

- Adequacy of the Notice of Public Hearing published in respect of the Rezoning hearing; and
- The fact that the Good Neighbours Agreement and the Covenant referred to in the Notice of Public Hearing were completed after the public hearing was completed.

The Notice of Public Hearing (the "Notice") reads:

> The proposal is to rezone a 1.78ha portion of the subject 9.1ha property, as shown on the map below, from an M4 (Heaw Industrial) Zone to an M6 (Special Industrial) Zone to facilitate the construction of a waste recycling and transfer facility.
>
> The proposal includes the registration of a restrictive covenant to restrict the range of uses, as well as a good neighbour agreement, to provide a process to deal with any complaints with respect to the operation of the facility.

It was accompanied by a map – or rather two maps – as the version appearing in the Council's agenda package contains a slightly different map than the one appearing in the *Chilliwack Times* (although both show the property in question).

Adequacy of the Notice of Public Hearing

Section 892 of the *Local Government Act* sets out the legal requirements for public notice of a rezoning, including that:

> The notice must state the following: … (c) in general terms, the purpose of the bylaw;[1]

And:

> If the bylaw in relation to which the notice is given alters the permitted use or density of any area, the notice must … subject to subsection (5), include a sketch that shows the area that is the subject of the bylaw alteration, including the name of adjoining roads if applicable…[2]

The notice requirements have been held by the courts to be a "a legal requirement and a condition precedent to a valid bylaw,"[3] and there are many examples of bylaws being invalidated due to failure to abide by these requirements.

Now, a central question is whether the Notice states "in general terms" the purpose of the bylaw. The purpose is, according to the Notice, "to facilitate the construction of a waste recycling and transfer facility."

The purpose of the notice, according to the courts, is to "inform those reasonably affected by the proposed bylaw of its intent so they may decide whether to seek further information or make representations."[4]

So the question is whether "construction of a waste recycling and transfer facility" adequately conveys information about the nature of the facility – and in particular, whether there was any obligation to convey that toxic chemicals would be handled in the recycling facility.

Based on the public uproar that has occurred since the public hearing, it is clear that many residents of Chilliwack, as well as others in the region, are deeply troubled by the fact that the facility in question will be handling toxic substances.[5] The facility will apparently require approvals to handle hazardous waste from the BC Ministry of Environment. And so it is striking that the Notice makes no mention of hazardous waste, toxins or any other term that might flag for a member of the public that the facility is not handling newspapers, bottles and cans, or other non-hazardous materials.

The courts have interpreted "general terms" as creating an obligation to convey the main and important features of the proposal. They have made reference to the definition of "general": "Comprising, dealing with, or directed to the main elements, features, etc."[6]

In *Mosaic Enterprises v. Kelowna*, then, a by-law that described the purpose of the bylaw as the construction of a "parkade" was held to be inadequate because it "does not give a general description of the work which council intended."

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1 *Local Government Act*, R.S.B.C. 1996, c. 323, s, 892(2)(c).
2 Ibid., s. 892(4).
3 *CHMC v. North Vancouver*, 45 M.P.L.R. (2d) 214, 51 B.C.L.R. (3d) 351 (SC), affirmed 2000 BCCA 142, leave to appeal denied, 264 N.R. 397 (note).
4 *Peterson v. Whistler*, 39 B.C.L.R. 221, cited with approval in CHMC (BCSC), ibid.
5 P. Henderson. "Mercury, PCBs to be recycled near Fraser River in Chilliwack", Chilliwack Times, 3 December 2013; P. Henderson. "Opposition mounts to hazardous waste facility on Fraser River in Chilliwack", Chilliwack Times, 17 December 2013; M. Hume. "Fraser River not the place for hazardous waste plant." Globe and Mail, 3 Feb 2014.
6 Shorter Oxford English Dictionary, cited with approval in *Mosaic Enterprises Ltd. v. Kelowna*, 1979 CarswellBC 315 (BCSC) and in *Peterson*, above, note 4.

> The use of the word "parkade" gives no indication of the size or capacity of the building. "Parkade" does not denote a building of known standard size or capacity; one would expect size and capacity — main features of the work — to be included in a general description. A substantial and important feature of the building was 15,400 sq. ft. of space for retail stores on a frontage of 300 ft. Certainly, this is a main feature of the building, which, likewise, one would expect to be noticed in a general description. Having regard, again, to the purpose of the notices — to provide information to property owners in the specified area so that they may consider whether to petition — it cannot be said that failing to give any description, other than "parkade", meets the standard set of "a general description".[7]

In my view, some reference to the fact that the recycling facility was intended to handle toxic waste was an essential part of any "general" description of the facility, and that therefore the Notice was invalid.

The Notice does go on to mention a good neighbour agreement and a covenant, but there is nothing in this paragraph that indicates that hazardous waste will be handled at the facility. Indeed, the detail included this paragraph, concerning precautions being taken, contrasts with the vagueness of the previous paragraph, which concerns the nature of the facility.

Further, I note that while the Notice in question did contain a sketch of the property, as required by s. 892(4)(a), neither sketch indicated the close proximity of the site to the Fraser River, and the sketch that appeared in the *Chilliwack Times* was very oddly cropped, so that the relevant portion of the property appeared at the top edge of the sketch. Section 892(4) does not explicitly require a sketch to include rivers, or to be of a particular scale, but merely to show the "area" of the proposed rezoning. By itself, it does not seem likely that the failure to scale the map to indicate the proximity of the Fraser would be grounds to set aside the bylaw. However, the proximity of the Fraser is clearly a very relevant factor in the minds of critics of the proposed facility. Alongside the failure to mention that the facility would be handling hazardous waste, it creates the perception that the City did not want to draw certain features of the project, and the surrounding area, to the attention of the public.

The question is always whether the Notice as a whole is sufficiently detailed that members of the public will have a sense of the ways in they might be affected and decide whether to gather more information. In our view, the Notice failed to convey the rather critical facts that the facility would be handling hazardous waste, and that it would do so in close proximity to the Fraser River.

As such, we would recommend that the City of Chilliwack correct the public notice and re-open the public hearing.

Incomplete key documents

The Notice refers to "the registration of a restrictive covenant … as well as a good neighbour agreement," thereby identifying these two documents as key to understanding the proposal and the rezoning application. However, I am advised that the text of the restrictive covenant may not have been available at the public hearing, because it was still being negotiated by the City and the Developer. At a minimum, it is clear that the final text of these two documents were not available, since they were not finalized until January.

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7 *Mosaic Enterprises Ltd., v. Kelowna (City)*, 15 B.C.L.R. 327, [1979] 3 A.C.W.S. 234 (C.A.).

This raises two important issues.

First, it is well established in law that all key documents should be available to the public at the public hearing, so that they can adequately make comment on the proposal.[8]

Second, it is also well established that the Council should have no communications from the Developer or the public after the close of the public hearing.[9]

Both of these principles need to be considered in the context of procedural fairness: the real question is whether the failure to provide documents that will be relied upon by Council undermined the ability of the public to meaningfully comment on the proposed rezoning.

Where there is no evidence of unfairness, efforts by municipal staff to address concerned raised at a public hearing, and without fundamentally altering the proposal, can occur without giving rise to the need for a further hearing. Thus, in *Jones v. Delta*[10] the BC Court of Appeal declined to require a further public hearing after covenants were registered in respect of a development after the public hearing had occurred. However, the majority opinion emphasized that if the substance of the proposal had been altered, or there had been evidence that the petitioners had particular submissions related to the covenants, that the situation might have been different, and, in a dissenting opinion, Wood J.A. would have quashed the bylaw.

However, I think that the situation is different here, in that the public notice directly identifies both the covenant and the good neighbour agreement as key documents. While negotiations of these documents may have been influenced by the public hearing, it can hardly be argued that they are an attempt to respond to the public input, or that they are only a superficial part of the proposal.

In my view the extent to which the practice of finalizing and registering the covenant, with the good neighbour agreement as an attachment, after the December 3rd public hearing accords with the requirements of procedural fairness will depend upon the degree to which drafts of both, or detailed information about their contents, were available to members of the public on December 3rd, 2013. Mr. David Blain of the City of Chilliwack has kindly provided a copy of the final covenant, and the good neighbour agreement, and I have requested clarification about the extent to which these documents were available to the public on December 3rd.[11]

Conclusion and recommendations

Based upon my view that the Notice is inadequate in that it does not indicate that the "waste recycling and transfer facility" will be handling hazardous waste, I would recommend that the City of Chilliwack not proceed with fourth reading of the bylaw at this time, and instead publish a new public notice and re-open public hearings in respect of the bylaw.

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8 *Fisher Road Holdings Ltd. v. Cowichan Valley Regional District*, 2012 CarswellBC 2402 (CA);
9 Re Bourque, 1978 CarswellBC 43 (CA).
10 1992 CarswellBC 205 (CA).
11 This request was made only this morning.

This would have the added benefit of allowing the City to hear public submissions on the final version of the covenant and good neighbour agreement signed between the City and the developer.

Sincerely,

Andrew Gage,
Staff Lawyer

cc. Davin Blain (by email only at blain@chilliwack.com)