# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Virdis v. North Vancouver (City),* 2009 BCSC 1118

Date: 20090814
Docket: S084910
Registry: Vancouver

Between:

**Sabrina A. Virdis**

Petitioner

And

**The Corporation of the City of North Vancouver and Jordan Kutev Architect**

Respondents

Before: The Honourable Mr. Justice Hinkson

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioner: | Johannes H. Schenk |
| Counsel for the Respondents: | Daniel R. Bennett<br>Adeline Kong |
| Place and Date of Hearing: | Vancouver, B.C.<br>June 16-18, 2009 |
| Place and Date of Judgment: | Vancouver, B.C.<br>August 14, 2009 |

[1] The petitioner is a resident and elector in the respondent Corporation of the City of North Vancouver (the "City"). At the hearing of this petition, she petitioned for orders related to two bylaws: Bylaw No. 7924, ***City of North Vancouver Official Community Plan Bylaw, 2002, No. 7425, Amendment Bylaw, 2008 (1404 – 1456 Bewicke Avenue, Level 2 Low Density to Level 3 Low Density)*** (9 June 2008) [***Bylaw 7924***]; and Bylaw No. 7925, ***Zoning Bylaw, 1995, No. 6700, Amendment Bylaw, 2008 (Ronald W. McIntyre, Barbara E. McIntyre, Iraj B. Khorzoughi, Fatameh Heydari, Michelle C. Graham, Hasan S. Monfared, Giti Eslamian, Mahdi Heidari/Jordan Kutev, Architect, 1404 – 1456 Bewicke Street, CD-553, Sch 82)*** (9 June 2008) [***Bylaw 7925***] (collectively, the "Impugned Bylaws"). At the hearing Ms. Virdis sought declarations that the Impugned Bylaws are invalid and orders quashing the Impugned Bylaws.

[2] In her original and amended petitions Ms. Virdis had sought an order that the City produce certain records relating to the passage of the Impugned Bylaws, but at the hearing she abandoned that portion of her application.

[3] In her original petition, the petitioner had also sought a declaration that the City undercharged fees and development cost charges properly payable with respect to the Impugned Bylaws, but abandoned that portion of her application in her amended petition. Ms. Virdis added a further remedy in her amended petition to prohibit the City from allowing any construction to occur relating to the Impugned Bylaws, yet she made no submissions with respect thereto, and so I will make no decision on that portion of her application.

**Background**

[4] On March 6, 2007, the City received a rezoning application (the "Initial Application") from the respondent Jordan Kutev on behalf of the owners of six separately owned properties (the "Applicants") located on the east side of Bewicke Avenue between 14th Street and 15th Street within the City of North Vancouver, British Columbia (the "1400 Block Bewicke Properties"). The application was with

respect to the 1400 Block Bewicke Properties. It is not disputed that the 1400 Block Bewicke Properties are within the jurisdiction of the City.

[5] The petitioner resides four street addresses north of the 1400 Block Bewicke Properties.

[6] At the time of the Initial Application, five of the six 1400 Block Bewicke Properties were zoned RS-1, or one unit residential, pursuant to the City's Bylaw No. 6700, ***Zoning Bylaw*** (August 28, 1995) [the ***Zoning Bylaw***]. The sixth property was zoned CD-478, or Comprehensive Development 478, under the ***Zoning Bylaw***. All of the 1400 Block Bewicke Properties were designated as "Residential Level Two: Low Density" under the City's Bylaw No. 7425, ***City of North Vancouver Official Community Plan Bylaw*** (October 21, 2002) [the ***OCP Bylaw***].

[7] The effect of the zoning of the 1400 Block Bewicke Properties was that five were limited to one dwelling unit and one accessory suite per lot, and the sixth was zoned to permit a duplex unit. All of the 1400 Block Bewicke Properties were limited to a 0.5 floor space ratio ("FSR"), which meant that the total floor area of the building on each lot could not be more than 50% of the total area of the lot, plus permitted gross floor area exclusions.

[8] The Initial Application sought two bylaw amendments. It first sought an amendment to the ***OCP Bylaw*** to change the land use designation for the 1400 Block Bewicke Properties to "Residential Level Three: Low Density", which would allow for a maximum 0.75 FSR. The Initial Application also sought an amendment to the ***Zoning Bylaw*** to reclassify the properties to a site-specific zoning, which would permit construction of three dwelling units plus one accessory suite on each of the 1400 Block Bewicke Properties.

[9] The Initial Application proposed, and the City drafted, amendment bylaws to achieve these goals: Draft Bylaw No. 7875, ***City of North Vancouver Official Community Plan Bylaw, 2002, No. 7425, Amendment Bylaw, 2007, (1404 – 1456 Bewicke Avenue, Level 2 to Level 3 density)*** (not adopted) [***Bylaw 7875***]; and

Draft Bylaw No. 7875, ***Zoning Bylaw, 1995, No. 6700, Amendment Bylaw, 2007 (Ronald W. McIntyre, Barbara E. McIntyre, Ali Daei, Iraj B. Khorzoughi, Mohammadreza Madani, Fatameh Heydari, Michelle C. Graham, Hasan S. Monfared, Giti Eslamian, Mahdi Heidari/Jordan Kutev, Architect, 1404 – 1456 Bewicke Street, CD-543, Sch 79)*** (not adopted) [***Bylaw 7876***] (together, the "Initial Amendment Bylaws").

[10] The City staff also prepared a report dated July 18, 2007 respecting the Initial Application (the "July 18 Report") which was submitted to the Mayor of the City of North Vancouver (the "Mayor") and the members of the North Vancouver City Council (the "Council"). The recommendations included a Public Hearing of the Initial Application (the "2007 Public Hearing"), and a number of requirements, including the payment of an amenity contribution of $50,000.00 by the Applicants toward greenway improvements in the area.

[11] On July 30, 2007, the Council unanimously endorsed the July 18 Report, and referred the Initial Amendment Bylaws to a public meeting at the applicant's expense and a public hearing thereafter. The Initial Amendment Bylaws were introduced and given first reading. As the application progressed through the various stages of the Municipal approval process it was, from time to time, revised.

[12] The Initial Application was the subject of two community information sessions, and then on September 27, 2007, City staff mailed a Notice of Public Hearing for the Initial Amendment Bylaws to residents who resided within 100 metres of the boundaries of the 1400 Block Bewicke Properties (the "Mail-Out Radius"). The 2007 Public Hearing was scheduled for and took place on October 15, 2007. At the conclusion of the 2007 Public Hearing, Council deferred the vote on the Initial Amendment Bylaws until all Council members could be present.

[13] On November 5, 2007, the full Council met and deferred consideration of the Initial Amendment Bylaws to allow City staff time to meet with the developer, to address the comments made at the 2007 Public Hearing, and to report back to Council.

[14] On November 26, 2007, motions to read the Initial Amendment Bylaws a second and third time were carried, subject to reconsideration. The practice of the City is to place bylaw amendments over for reconsideration after they are given third reading, as somewhat of an historical anomaly.

[15] The Council's next meeting was on December 3, 2007 (the "December 3 Council Meeting"). The petitioner and the City disagree as to what took place at this meeting with respect to the Initial Amendment Bylaws. The petitioner argued that the application to amend the Official Community Plan ("OCP") by ***Bylaw 7875*** was defeated by a vote of four to three. The City contended that only the motion for reconsideration and final adoption of ***Bylaw 7875*** was defeated, and that no vote was taken on ***Bylaw 7875*** itself, leaving it open for the Council to reconsider and adopt ***Bylaw 7875*** at some later date. Both sides agree that reconsideration and adoption of ***Bylaw 7876*** was deleted from the agenda after the vote with respect to ***Bylaw 7875***.

[16] The petitioner filed both a transcript and a DVD of the proceedings at the December 3 Council Meeting. Both the transcript and the DVD revealed the following comments by Ms. Barbara Dowey, the City Clerk; Mr. Richard White, the Director of Community Development for the City; and Mayor Darrell R. Mussatto ("Mayor Mussatto"):

| | |
|---|---|
| Ms. Dowey: | Thank you, Your Worship. Uh the next item on the agenda is Reconsideration and Final Adoption of the first Bylaw is Bylaw No. 7 and its item 7 Bylaw No. 7875 which is the City of North Vancouver Official Community Plan Bylaw, 2002, No. 7425 Amendment Bylaw, 2007, No. 7875, 1404 – 1458 Bewicke Avenue, Level 2 to Level 3 density Your Worship. |
| Mayor Mussatto: | I'm just going to ask Mr. White if Mr. White um could we just have one of our staff members grab Mr. White. |
| Mr. White: | I'm here. |
| ... | |
| Mayor Mussatto: | ... I just want to be very clear about uh if we have seven members of council here. I want to be very clear about we're, we're voting on here and um I think I might have been confused last uh meeting so I'm just |

going to ask Mr. White if he could just explain on what we're voting on and what's and where we're at.

Mr. White: ... where we're at right now based on the resolutions that council made uh last meeting is the final – Reconsideration and Final Adoption of the Official Community Plan Amendment Bylaw which was the same Bylaw that uh was viewed by the public at the Public Hearing and the Zoning Bylaw but that has been amended. The, the, the amendments relate to um the parking change, uh but they do not eliminate uh something that the applicant was agreeable to, but was not agreed to by Council at the last meeting which is the elimination of ah the um additional uh suite potential in those uh in those projects. That uh was a bit confusing at the Council Meeting because it failed on a three-three vote that, that motion to remove failed on a three-three vote, therefore, the clauses stay in the Bylaw and that I think might have been something that uh people may have missed at that time because it was a motion that failed which had the consequences of leaving something in which was anticipated of being removed. So that's where we're at. So the Bylaw for the zoning change has only two of the four clauses removed that were agreeable to the applicant.

Mayor Mussatto: Right. So if we were to vote on this item here, uh the OCP, it, it does not really relate to the suites at this time am I correct Ms. Dowey or not Mr. White?

[17] After some further exchanges, Councillor Keating moved for reconsideration of what was referred to as Item 7 and his motion was seconded by Councillor Schechter. Councillor Keating then clarified his motion by saying:

> Just to reinforce the point that uh you made through uhh with Mr. White, Your Worship. Uh at this stage Item 7 is about the Official Community Plan Bylaw it is not about the particulars of the rezoning application, it is simply about whether or not uh Council sees it in its wisdom to move from Level 2 to Level 3 density uh on this site.

[18] Councillor Perrault then said:

> Uh Your Worship uh last week I supported this and um I have given it a great deal of thought this week. I've asked the Clerk for um a copy of the transcript of the Public Hearing and I've been down to the neighbourhood and I have decided and reconsidered how I'm going to approach this and as I said earlier in the discussions there were a number of things here that I didn't have a comfort level with and I just feel that um allowing this increase in density is

> just a little too much, a little higher than I would like to see it go. So for that reason Your Worship I will be voting uh against this.

[19] The Mayor then asked Ms. Dowey "where does that put us". She replied, "[w]ell Your Worship we need four votes uh to pass the OCP if the OCP is not passed Your Worship then we don't move on to the Zoning Bylaw."

[20] The various Council members expressed their views. Councillor Bookham said:

> ... I realize this is the OCP um amendment that we're talking about at this point. So again I will not be supporting this amendment.

[21] Councillor Heywood commented:

> ... We make exceptions for the community plan to a little bit over height or a few feet here or there but this is a pretty significant change to the OCP and I think it's the kind of changes we shouldn't be making one off at uh and own the only reason being that six lots have got together so I, I too will not be supporting this uh motion.

[22] The Mayor expressed disappointment stating:

> ... I want to see this go through, but I can count the votes. If it wasn't gonna go through maybe it would've gotten through with elimination of the rental suite. I guess I was willing to sacrifice that even just to try and find some compromise to get it through, but I can see that's not on the table either so, um, I guess people in that area are going to be quite disappointed....

[23] Among the comments of Councillor Keating, after stating that he too could count votes, was the observation that:

> ... any reasonable observer would say now that what's going to occur here is that somebody will go in and they will, without any public process whatsoever, extract from the Community Development par uh Department a building permit, to knock down the existing houses and build a monster house...

[24] The Mayor then called for the vote, and Ms. Dowey stated "[t]hank you Your Worship this is on Reconsideration of the OCP."

[25] There then ensued a brief discussion for clarification, and the motion was defeated four to three. The minutes of this meeting respecting the motion state:

**BYLAWS – Reconsideration and Final Adoption**

7. City of North Vancouver Official Community Plan Bylaw, 2002, No. 7425, Amendment Bylaw, 2007, No. 7875 (1404 – 1456 Bewicke Avenue Level 2 to Level 3 density).

Moved by Councillor Keating, seconded by Councillor Schechter

**That** the said ***Bylaw 7875*** be reconsidered.

A recorded vote was taken on the motion

...

The motion was **DEFEATED** by a vote of 4 to 3.

[26] On December 17, 2007, the Applicants appeared before Council as a delegation. Thereafter Council unanimously carried a resolution that the group's presentation be referred to staff to discuss options with the Applicants' representative and report back to Council.

[27] On February 14, 2008, Mr. Kutev and the Applicants presented a new overview of their proposal at a development information session, and on March 19, 2008 they held an open house regarding the proposed development. The Applicants submitted a revised application for their proposed construction in April 2008 (the "Revised Application"). In response, City staff drafted the Impugned Bylaws.

[28] On April 30, 2008, Gary Penway, the City's Deputy Director, Community Development, prepared a report to Council concerning the Revised Application. He recommended, among other things, that Council pass resolutions referring the Impugned Bylaws to a public hearing.

[29] The Council then met on May 5, 2008, and the Impugned Bylaws were introduced and given first reading. A public hearing was scheduled for May 26, 2008 (the "2008 Public Hearing"), and appropriate notice of the meeting was mailed to residents within the Mail-out Radius on May 15, 2008.

[30] The 2008 Public Hearing proceeded as scheduled, and that day the Council gave second and third reading to the Impugned Bylaws.

[31] At the Council meeting on June 9, 2008, motions were carried reconsidering and adopting both of the Impugned Bylaws.

[32] Some of the Applicants spoke with and met with Mayor Mussatto on a number of occasions between December 3, 2007 and June 9, 2008.

**The Statutory Framework**

[33] Section 894(1) of the ***Local Government Act***, R.S.B.C. 1996, c. 323, sets out the actions which a municipal council may take after a public hearing. The council may, "without further notice or hearing":

> (a) adopt or defeat the bylaw, or
>
> (b) alter and then adopt the bylaw, provided that the alteration does not
>
> (i) alter the use,
>
> (ii) increase the density, or
>
> (iii) without the owner's consent, decrease the density of any area from that originally specified in the bylaw.

[34] In s. 895(1), the same ***Act*** requires that local governments which have "adopted an official community plan bylaw or a zoning bylaw" define by further bylaw the "procedures under which an owner of land may apply for an amendment to the plan or bylaw". Subsection (3) then sets out that:

> If a bylaw under subsection (1) establishes a time limit for reapplication, the time limit may be varied in relation to a specific reapplication by an affirmative vote of at least 2/3 of the local government members eligible to vote on the reapplication.

[35] Section 25(1) of the ***Community Charter***, S.B.C. 2003, c. 26, prohibits a municipal council from providing "a grant, benefit, advantage or other form of assistance to a business" unless "expressly authorized under this or another Act." A "grant, benefit, advantage or other form of assistance" under this subsection includes:

> (a) any form of assistance referred to in section 24 (1) [*publication of intention to provide certain kinds of assistance*], or
>
> (b) an exemption from a tax or fee.

[36] The definition of a business, as set out in s. 1 of the Schedule to the ***Community Charter***, includes "carrying on a commercial or industrial activity or undertaking of any kind".

[37] Section 131 of the ***Community Charter*** addresses the power of a mayor, as set out in subsection (1), to "require the council to reconsider and vote again on a matter that was the subject of a vote". This is in addition to a council's other powers to reconsider a matter. Subsection (2) sets out the following restrictions on the mayor's authority under subsection (1):

> (a) the mayor may only initiate a reconsideration under this section
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> (i) at the same council meeting as the vote took place, or
>
> (ii) within the 30 days following that meeting, and
>
> (b) a matter may not be reconsidered under this section if
>
> (i) it has had the approval of the electors or the assent of the electors and was subsequently adopted by the council, or
>
> (ii) there has already been a reconsideration under this section in relation to the matter.

[38] Under subsection (3)(a), the council "must deal with the matter as soon as convenient", while subsection 3(b) gives the council on reconsideration "the same authority it had in its original consideration of the matter, subject to the same conditions that applied to the original consideration."

[39] The 1400 Block Bewicke Properties are subject to an OCP as set out in the ***OCP Bylaw***. The procedures for amending the OCP are set out in the City's Bylaw No. 7343, ***Development Procedures Bylaw*** (30 July 2001). Section 3(a) of the ***Development Procedures Bylaw*** provides that an application to which this bylaw applies "shall be submitted in writing to the Community Development Department by the owner of the real property ... and shall be accompanied by ... a fee as set forth in Schedule A."

[40] Section 12 of the ***Development Procedures Bylaw*** deals with re-application. Pursuant to this section, where Council rejects an application to which this bylaw

applies, “no re-application for the same amendment shall be considered within one year from the date of Council's rejection.”

[41] Section 37(2) of the City’s Bylaw No. 7590, ***Council Procedure Bylaw*** (26 April 2004), sets out the procedure for Council to bring back a resolution which was defeated. The procedure is as follows:

> (a) The motion to reconsider a defeated resolution shall require a majority vote to adopt and may be made during the same day of the original vote by a member who voted on the resolution in the negative. If the motion to reconsider is adopted, the defeated resolution shall be re-opened for debate and vote.
>
> (b) If the Council meeting adjourns and it is thereby too late to move to reconsider, (which only occurs at the same meeting), the defeated resolution may be re-introduced as new business at a subsequent Council meeting provided that sufficient notice was given to have the resolution included with the notice of the meeting.
>
> (c) The same or substantially the same resolution which was defeated a second time in 3 (three) months may not be brought back before Council for 6 (six) months from the date of the latest vote, except with the unanimous consent of all the members of Council.

[42] Section 37(3), however, gives the Mayor the power to bring “a resolution, bylaw or proceeding back before the Council for reconsideration” despite the provisions of s. 37(2), subject only to s. 131 of the ***Community Charter***.

**Analysis**

**a) Standard of Review**

[43] When construing local government jurisdiction, a court is to give the enabling legislation a broad and purposive approach: see ***United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)***, 2004 SCC 19, [2004] 1 S.C.R. 485 at para. 6. The reviewing court is to approach the review with a presumption of good faith on the part of the local government, and of validity in favour of the bylaws: ***MacMillan Bloedel Ltd. v. Galiano Island Trust Committee*** (1995), 10 B.C.L.R. (3d) 121, 126 D.L.R. (4th) 449 (C.A.), leave to appeal ref’d [1996] 1 S.C.R. viii, 20 B.C.L.R. (3d) xxxv.

[44] The standard of review with respect to the local government's jurisdiction is one of correctness, whereas the standard of review of decisions made by a local government within its jurisdiction is one of reasonableness: ***Hastings Park Conservancy v. Vancouver (City)***, 2008 BCCA 117, 79 B.C.L.R. (4th) 72 at para. 34, leave to appeal ref'd 2008 CarswellBC 1819 (S.C.C.) [***Hastings Park Conservancy***]; ***O'Flanagan v. Rossland (City)***, 2009 BCCA 182, 56 M.P.L.R. (4th) 1 at para. 19.

**b) Was the Bylaw Amendment Voted Upon on December 3, 2007?**

[45] In his April 30, 2008 report to the Council, Mr. Penway stated that a motion to adopt the Initial Amendment Bylaws had been defeated, although this is clearly incorrect insofar as ***Bylaw 7876*** is concerned.

[46] The petitioner pointed to other statements by City Councillors and City staff to a similar effect. The City pointed to other "after the fact" statements made by City staff and by Councillors to the contrary. While the views of specific Councillors and City staff following the vote of December 3, 2007 may reflect their perception of what transpired that night, I am prepared to place little weight on these statements, particularly as they became separated in time from the vote.

[47] I have not ignored the fact that at its meeting of June 9, 2008, the Council reconsidered and approved ***Bylaw 7924*** in separate steps, and did the same for ***Bylaw 7925***. However, the recorded discussion of December 3, 2007 does not, in my view, support the view that reconsideration and adoption of ***Bylaw 7875*** were dealt with disjunctively on that date.

[48] I am unable to interpret the vote of Council at the December 3 Council Meeting as it is described in the City's minutes from that meeting. To do so would render the discussion that I have excerpted above from that meeting meaningless. I conclude that the members of Council who attended and voted that night believed that they were voting, and did vote, on whether or not to reconsider and adopt ***Bylaw 7875***, not simply upon whether or not to reconsider the matter. I conclude

that they voted not to reconsider and not to adopt that bylaw and that in so voting, they considered that they were defeating ***Bylaw 7875*** and putting an end to the application at that time.

**c) Was Council Precluded from Reconsidering the Impugned Bylaws?**

[49] The petitioner argued that the combined effect of ss. 895(1) and (3) of the ***Local Government Act***, s. 12 of the ***Development Procedures Bylaw***, and s. 131 of the ***Community Charter*** is that the adoption of the Impugned Bylaws was in excess of the City's jurisdiction, and thus invalid.

[50] The definition of "local government" in s. 5 of the ***Local Government Act*** includes a municipal council. Section 890 of the ***Local Government Act*** requires that a local government hold a public hearing to consider every application to amend an OCP or zoning bylaw.

[51] Section 894 of the ***Local Government Act*** is permissive, and allows a city council to take certain steps following a public hearing. However, it does not require that any of the steps listed in that section must be taken.

[52] ***Bylaw 7875*** and ***Bylaw 7924*** are worded in the same way. They cannot be seen as different applications for the purposes of overcoming s. 12 of the ***Development Procedures Bylaw***.

[53] There is no evidence in this case that the time limit for a reapplication of the application respecting the 1400 Block Bewicke Properties was varied by a vote of 2/3 of the Council as provided for in s. 895(3) of the ***Local Government Act***.

[54] In response to these arguments, the City argued that even a defeated motion can be brought back for reconsideration, relying upon s. 37(2) of the ***Council Procedure Bylaw***.

[55] The City further argued that it had an inherent right to reconsider defeated motions, relying on the reasoning of Donald J., as he then was, in ***Royal Oak***

***College v. Burnaby (District)*** (1993), 14 M.P.L.R. (2d) 137 at paras. 46-48 (B.C.S.C.):

> In *Bay Village* [*Bay Village Shopping Centre Ltd. v. Victoria (City)*, [1971] 5 W.W.R. 684 (B.C.S.C.)], Seaton J. said at pp. 686-7:
>
> > Pursuant to The Municipal Act, R.S.B.C. 1960, c. 255, this Corporation has a procedural bylaw and it authorizes reconsideration. The Act contemplates the bylaw being passed or otherwise dealt with in accordance with the procedural bylaws after the public meeting has been held. I see no reason to exclude that part of its procedure dealing with reconsideration, any more than that part of The Vancouver Charter, 1953 (B.C.), c. 55, dealing with who might vote: see *McMartin et al. v. Vancouver*, supra. The reconsidering of a lost resolution is not exceptional; on the contrary, "the right of reconsidering lost measures inheres in every body possessing legislative powers" (*Jersey City v. State* (1863), 30 N.J.L. 521 at 529, quoted with approval by Boyd C. in *Re Dewar and East Williams* (1905), 10 O.L.R. 463 at 465 (C.A.)). Our Municipal Act recognizes reconsideration as valid in s. 180(4) [now s. 240].
> >
> > Anglin J. in *Re Dewar*, supra, said at p. 468:
> >
> > > The fullest right of reconsideration is generally recognized as one of the inherent rights of every deliberative body, unless such right is denied it or is limited by the power creating such body, or is relinquished, or is restricted by its own internal regulations.
>
> Seaton, J.'s decision was overturned on appeal, supra, and, therefore, I am unable to give the passage quoted above precedential effect. Nevertheless, since the Court of Appeal did not disapprove of his finding on the power to reconsider, and since I find the reasoning persuasive, I intend to adopt it for the purposes of this case.
>
> The specific enactment of rules in s. 240 for reconsideration of an adopted by-law does not imply the exclusion of a power to reconsider a defeated by-law. The reason lies in the fact that a defeated by-law does not change the law, it perpetuates the status quo; whereas an adopted by-law alters rights and establishes a new state of affairs. It is easy to see why the legislature would impose specific restrictions on who can move for reconsideration of an adopted by-law and within what time limit. Were it otherwise, a new council, after an election, could wipe out the work of its political rivals who controlled the previous council.

[56] I am unable to accept this submission by the respondent. It presumes that the motion that was defeated at the December 3 Council Meeting was only a motion to reconsider the application in question. I have found that the defeated motion was to reconsider and adopt ***Bylaw 7875***. Section 37(2) of its ***City Council Procedure Bylaw*** thus does not assist the City.

[57] However, the combination of s. 37(2) of the City's Bylaw No. 7590, ***Council Procedure Bylaw*** and s. 131(2)(a)(ii) of the ***Community Charter*** permits a Mayor to initiate the reconsideration of a matter that was the subject of a vote within 30 days of the meeting at which the vote was taken. I conclude that the process which led to the reconsideration and ultimate passage of the Impugned Bylaws began on December 17, 2007, when Council voted to refer the presentation made at that Council meeting by the Applicants to City staff, to discuss it with the Applicants and other neighbourhood residents and report back to Council.

[58] On the basis of the evidence before me, I find that Mayor Mussatto initiated that reconsideration. As such, I conclude that the reconsideration falls within s. 37(2) of the City's Bylaw No. 7590, ***Council Procedure Bylaw***.

[59] In the alternative, the City argued that if it acted contrary to its procedural bylaws, the failure to follow those bylaws should not invalidate the Impugned Bylaws.

[60] While Melvin J. held that bylaws passed based upon procedural defects can be declared void by a court in the exercise of its discretion in ***Cenam Construction Ltd. v. Cowichan Valley (Regional District)*** (1992), 13 M.P.L.R. (2d) 232 (B.C.S.C.), there are a number of cases where courts have held that the failure of a council to observe its own procedures is only an irregularity and not fatal to the bylaw passed, unless the required procedure is a statutory procedural requirement. See, for example, ***Botterill et al. v. Cranbrook (City of)***, 2000 BCSC 1225, (*sub nom.* ***Botterill v. Cranbrook (City)***) 13 M.P.L.R. (3d) 153 at para. 41; ***Silverado Land Corp. et al. v. City of Courtenay et al.***, 2000 BCSC 1667, (*sub nom.* ***Silverado Land Corp. v. Courtenay (City)***) 15 M.P.L.R. (3d) 278 at para. 46 [***Silverado***]; and ***Hidber, Koopman, and Munroe v. Regional District of Bulkley-Nechako***, 2006 BCSC 789, (*sub nom.* ***Hidber v. Bulkley-Nechako (Regional District)***) 23 M.P.L.R. (4th) 300 at para. 24.

[61] Further, the inclusion of a procedural rule in a procedural bylaw does not make the rule "statutory": see ***Silverado*** at para. 47. I conclude that the fact that

s. 895 of the ***Local Government Act*** requires the City to provide for a development procedure bylaw does not give that bylaw "statutory" status, and does not detract from the general rule that the failure of a local government to follow a procedural bylaw does not invalidate a bylaw that is not passed in accordance with the procedural bylaw.

[62] I conclude, therefore, that even if the respondent City did not comply with s. 131 of the ***Community Charter***, any defects in the adoption of the Impugned Bylaws on June 9, 2008 were merely procedural irregularities, which were not fatal to their adoption. As a result, those bylaws should not be declared invalid, and cannot be quashed.

**d) Did the City Provide a Grant, Benefit, Advantage or other Form of Assistance to the Applicants?**

[63] The petitioner argued that the City provided a number of benefits, advantages, and other forms of assistance to the Applicants, contrary to s. 25(1) of the ***Community Charter***.

[64] The applicant contented that the City's decision to charge only one application fee for the Initial Application constituted a benefit to the Applicants contrary to s. 25(1) of the ***Community Charter***. In support of this argument, they point out that the term "owner" is singular in s. 3 of the ***Development Procedures Bylaw*** and the fee schedule referred to therein.

[65] The City argued that s. 25 of the ***Community Charter*** applies only to a "business", and not to those such as the Applicants. I do not accept this submission. The very purpose of both the Initial and the Revised Applications was to permit the Applicants to develop multiple dwelling places on their properties. Whether the additional dwellings were intended for rental or sale, I consider the proposed development to be a commercial activity within the definition of "business" under the ***Community Charter***.

[66] The petitioner also argued that the lack of any application fee or resubmission fee for the Revised Application demonstrated that it was not a new application. Ms. Virdis additionally contended that if it was a new application, the failure to charge the required fee was a further benefit conferred on the Applicants contrary to s. 25(1) of the ***Community Charter***.

[67] I am unable to accept the petitioner's arguments regarding the application or resubmission fees. The City was asked to deal with one application with respect to six properties, and concluded that only one application fee was payable. In my view, this interpretation of s. 3 of the ***Development Procedures Bylaw*** was not only reasonable, it was correct. In addition, I consider that the City's failure to collect the resubmission fee is no more than a procedural irregularity, which, as I have already discussed, is not fatal to the Impugned Bylaws.

[68] The petitioner argued that in addition the City paid for the signs for the 2008 Public Hearing, which constituted a benefit conferred on the Applicants.

[69] Section 10 of the ***Development Procedures Bylaw*** requires that a "sign may be required to be posted at the development site for public information prior to a Public Hearing". It does not require that the sign, if required, be placed at the applicant's expense. I have concluded that it is within the discretion of the City to decide whether or not to charge applicants for public hearing signs, and I am unable to find that they acted unreasonably in not doing so in this case.

[70] The petitioner further argued that the City provided assistance to the Applicants, contrary to s. 25(1) of the ***Community Charter***, because the amenity contribution required of the Applicants by the City as a condition of their application was insufficient to cover the real amenities that the proposed redevelopment would necessitate.

[71] An amenity contribution is just that, a contribution, and not a fee that the City is obliged to require of an applicant. As a result, it does not fall within the ambit of

s. 25 of the ***Community Charter***, and the City did not confer a benefit on the Applicants by not agreeing to a larger amenity contribution than $50,000.00.

[72] The petitioner also argued that the failure by the City to require the Applicants to pay development cost charges, which she said should have been in excess of $100,000.00, was another benefit conferred upon the Applicants contrary to section 25(1) of the ***Community Charter***.

[73] I accept the submission of the City that under s. 2 of its Bylaw No. 6814, ***Development Cost Charges Bylaw*** (28 April 1997), as amended, these charges are not payable until the time of approval of a subdivision or the issuance of a building permit. Neither of these events has as yet occurred with respect to the 1400 Block Bewicke Properties.

[74] In any event, I do not consider that a failure on the part of the City to levy or collect fees or charges, as I have discussed beginning at above, can be seen as other than a procedural irregularity. For the reasons expressed above, this is not fatal to the adoption of the Impugned Bylaws.

**e) Conduct of the Mayor, Councillor Keating, and City Staff**

[75] The petitioner argued that the conduct of Mayor Mussatto at the December 3 Council Meeting and after, and his interaction with City staff, demonstrated a bias in favour of the Applicants. The petitioner argued that the Mayor ought to have refrained from participation in the final vote on June 9, 2008 due to his bias.

[76] The petitioner further alleged that Councillor Keating was biased and incapable of persuasion on this matter, and that City staff acted in a biased manner.

[77] Relying on ***Hastings Park Conservancy*** and ***Keefe v. Edmonton (City of)***, 2002 ABQB 1098, (*sub nom.* ***Keefe v. Edmonton (City)***) 16 Alta. L.R. (4th) 388, aff'd (*sub nom.* ***Keefe v. Clifton Corporation***) 2005 ABCA 144, (*sub nom.* ***Keefe et al. v. Edmonton (City) et al.***) 363 A.R. 384, the petitioner argued that the Mayor was acting in a quasi-judicial capacity with respect to the applications in question,

and as such he was obliged to observe the principles of procedural farness, and he failed to do so.

[78] The petitioner further argued that the Mayor's private communications, e-mails, and meetings with the Applicants on several occasions during the period of time that their applications were active were breaches of procedural fairness.

[79] The petitioner complained that Mayor Mussatto should have abstained from the discussion and vote respecting the Revised Application, considered as the Impugned Bylaws, because he had met with the Applicants between December 3, 2007 and May 26, 2008.

[80] While some case authorities refer to the role of a local government member as quasi-judicial, the authorities are clear that the conduct of a local government member is to be viewed in the context of his or her local government position. In ***Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)***, [1990] 3 S.C.R. 1170 at 1196-1197, Sopinka J., writing for the majority, held:

> Statutory provisions in various provincial Municipal Acts tend to parallel the common law but typically provide a definition of the kind of interest which will give rise to a conflict of interest....
>
> In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of Council who are capable of being persuaded. The Legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of Council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.

[81] While Mayor Mussatto advocated for the adoption of the Initial Amendment Bylaws and later the Impugned Bylaws, I am unable to conclude that any of the statements made by him are sufficient to show that his mind was incapable of change when the vote was taken on June 9, 2009.

[82] I reach the same conclusion with respect to Councillor Keating as I have reached with respect to Mayor Mussatto.

[83] In contrast to the Mayor and Councillors, City staff act at Council's direction. While they make recommendations to Council, the decisions which the petitioner attacks are Council's decisions. Therefore, it is unnecessary for me to decide whether City staff acted in a biased manner.

[84] I am also unable to conclude, in the generous context in which I must consider the procedural aspects of the City's actions, that there has been any breach of procedural fairness.

**Conclusion**

[85] The petition is dismissed.

[86] I make no order as to costs, as each side has had some measure of success. If any party wishes to make submissions as to costs, they may do so in writing up to two weeks after the date of these Reasons for Judgment.

[87] If any party makes such submissions, the party or parties opposing them may reply in writing within one week of the initial submissions, and the party who made the original costs submissions may then have one further week for any submissions in reply.

"Hinkson J."