

Original filed on May 6, 2014

No. S-143452
Vancouver Registry

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

JUL 03 2014

IN THE SUPREME COURT OF BRITISH COLUMBIA

Re: In the matter of an application pursuant to the Judicial Review Procedure Act

 BETWEEN:

COMMUNITY ASSOCIATION OF NEW YALETOWN

PETITIONER

AND:

THE CITY OF VANCOUVER and
THE DEVELOPMENT PERMIT BOARD

RESPONDENTS

AMENDED PETITION TO THE COURT

ON NOTICE TO:

City of Vancouver
Legal Services
453 W. 12th Avenue
Vancouver, B.C. V5Y 1V4

AND TO:

Development Permit Board
453 W. 12th Avenue
Vancouver, B.C. V5Y 1V4

AND TO:

Brenhill Developments Limited
19th Floor
885 West Georgia Street
Vancouver, BC V6C 3H4

AND TO:

The Attorney General for the
Province of British Columbia
PO Box 9290
Victoria, B.C. V8W 9J7

**This proceeding has been started by the petitioner(s) for the relief set out in
Part 1 below.**

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry
of this court within the time for response to petition described below,
and

(b) serve on the petitioner(s)

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at
the hearing.

**Orders, including orders granting the relief claimed, may be made against you,
without any further notice to you, if you fail to file the response to petition
within the time for response.**

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

(a) if you were served with the petition anywhere in Canada, within 21 days
after that service,

(b) if you were served with the petition anywhere in the United States of
America, within 35 days after that service,

(c) if you were served with the petition anywhere else, within 49 days after
that service, or

(d) if the time for response has been set by order of the court, within that
time.

(1)	The address of the registry is:
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	The Law Courts 800 Smithe Street Vancouver, B.C. V6Z 2E1
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(2)	<p>The ADDRESS FOR SERVICE of the petitioner is:</p> <p>c/o Baker & Baker, 1708-808 Nelson Street, Vancouver, BC V6Z 2H2</p> <p>Fax number address for service (if any) of the petitioner: 604-681-3504</p> <p>E-mail address for service (if any) of the petitioner: nbaker@bakerbaker.ca</p>
(3)	<p>The name and office address of the petitioner's lawyer is: Nathalie Baker, Baker & Baker, 1708-808 Nelson Street, Vancouver BC V6Z 2H2</p>

Claim of the Petitioner

Part 1: ORDERS SOUGHT

The petitioner applies for the following orders:

1. A declaration that the City of Vancouver unlawfully fettered its discretion pursuant to section 190 and/or section 566 of the *Vancouver Charter* by entering into a contract with Brenhill Developments Ltd. dated for reference January 28, 2013 (the "Land Exchange Contract") and that the Contract is of no force and effect.
2. A declaration that the City of Vancouver's public hearing held on July 16, 2013 relating to the rezoning of 508 Helmcken Street and the adoption of bylaw No. 10870, a bylaw to amend Zoning Bylaw 3575, is *ultra vires* section 566 of the *Vancouver Charter*;
3. A declaration that the City of Vancouver failed to disclose relevant documents and information at the July 16, 2013 public hearing relating to the rezoning of 508 Helmcken Street, as required by s. 566 of the *Vancouver Charter*.
4. A declaration that the City of Vancouver's failure to provide relevant information and documents at the public hearing relating to the rezoning of 508 Helmcken Street violated the principles of procedural fairness;
5. A declaration that the Council violated the principles of procedural fairness by accepting additional submissions and comments from the public after the close of the July 16, 2013 public hearing.
6. A declaration that the City of Vancouver's public hearing process relating to the adoption of By-law No. 10865, a Bylaw to amend Downtown Official Development Plan Bylaw No. 4912, was contrary to section 566 of the *Vancouver Charter* and violated the principles of procedural fairness;
7. A declaration that Council's March 11, 2014 decision to rezone 508 Helmcken Street to permit a maximum FSR of 17.19 and a building height of 320 ft. is contrary to the Downtown Official Development Plan (DODP) and the Downtown

South Guidelines (excluding Granville Street);

8. A declaration that the Development Permit Board's August 12, 2013 decision to approve Development Permit Application No. DE416775 relating to 1099 Richards Street is contrary to section 3.13 of the DODP and is *ultra vires*.
9. A declaration that Council's February 19, 2014 decision to endorse the development permit board's August 12, 2013 decision is *ultra vires*.
10. An order quashing Council's decision made on March 11, 2014 to adopt Bylaw No. 10870, a bylaw rezoning 508 Helmcken Street to CD-1 (562);
11. An order quashing Council's decision made on February 4, 2014 to adopt By-law No. 10865, a Bylaw to amend Downtown Official Development Plan Bylaw No. 4912.
12. An order quashing the decision of the Development Permit Board made on August 12, 2013 to approve Development Application DE416775 relating to 1099 Richards Street;
13. An order quashing Council's decision made on February 19, 2014 permitting an increase in density from 5.0 to 7.01 FSR at 1099 Richards Street.
14. An order quashing DE 416775 issued by the City on May 28, 2014.
15. Costs to the petitioner;
16. Such other orders as this Honourable Court deems just.

Part 2: FACTUAL BASIS

1. The Petitioner, the Community Association of New Yaletown ("CANY"), is a non-profit society incorporated under the Society Act, RSBC 1996, c. 433 and has its head office at #316-1082 Seymour Street, Vancouver, B.C. V6B-1X9.
2. The respondent, the City of Vancouver (the "City"), is a municipality incorporated pursuant to the *Vancouver Charter*, S.B.C. 1953, c. 55 as amended, with a business address of 453 West 12th Avenue, Vancouver, British Columbia, V5Y 1V4.
3. The respondent, the Development Permit Board, is created by bylaw and has a business address of 453 West 12th Avenue, Vancouver, British Columbia, V5Y 1V4.
4. CANY is non-profit society consisting of volunteers residing in the New Yaletown neighbourhood, which is located in the Downtown South Area of Vancouver ("New Yaletown").
5. CANY's Constitution sets out its purposes as follows:

The Community Association of New Yaletown is a non-profit, community-based organization that represents the interests of residents, businesses, and property owners in the downtown Vancouver neighbourhood of New

Yaletown. Our aim is to enhance the quality of life, the character and the livability of our neighbourhood, and to build connections within our community. We accomplish this through community engagement and by working to ensure that changes to our neighbourhood are aligned with our community's interests.

6. On March 13, 2013 the City of Vancouver held an open house regarding a proposed development at 508 Helmcken Street ("508 Helmcken"), located in New Yaletown.
7. Brenhill Developments Ltd. (the "Developer") proposed to rezone the property at 508 Helmcken from DD (Downtown), which provided a maximum Floor Space Ratio (FSR) of 3.00, to District CD-1 thereby authorizing a maximum FSR of 17.4. The rezoning would permit the construction of a 36-storey mixed-use building including 454 Residential units, with a total floor area of 365,334 sq. ft..
8. The proposed development at 508 Helmcken did not include any social housing or other social purposes uses on the site. However, the City of Vancouver's Notice of Rezoning Application and Community Open House regarding 508 Helmcken states:
"The applicant proposes to provide social housing at 1077-1099 Richards Street, including replacement housing for Jubilee House residents currently located at 508 Helmcken Street, as a public benefit associated with this rezoning."
9. The City of Vancouver is the owner of 508 Helmcken. The Developer is the owner of 1099 Richards. The proposed development included a "land swap" whereby the City and Brenhill would exchange lands following the construction of a social housing building at 1099 Richards by the Developer and the rezoning of 508 Helmcken.
10. 508 Helmcken and 1099 Richards are corner lots located directly across the street from each another. Both properties are subject to the Downtown Official Development Plan (DODP) and the Downtown South Guidelines (excluding Granville Street).
11. Both properties are also located in the L1 area pursuant to the DODP. Section 3-1(L) of the DODP provides that in areas denoted by the letter L1 and L2, which includes the subject properties, the maximum density for all uses shall be floor space ratio 3.00 except that:
 - the maximum density for all uses for a site with social housing shall be floor space ratio 5.00 provided that social housing comprises two-thirds of the floor space ratio;
 - the maximum density for all uses on a corner site with a minimum frontage of 175 feet and a minimum site area of 21,000 sq. ft. shall be floor space ratio 5.00.

12. Section 3.13 of the DODP also provided:

"Development Permit Board, may for any development which includes low cost housing, except within the areas denoted by the letters "K1", "K2" and "K3" on Map 1, permit an increase in floor space ratio, subject to prior approval by City Council and the securing of a Housing Agreement to ensure the inclusion of the low cost housing."

13. Approximately 135 people attended the Open House, including members of the Petitioner. The majority of the 135 people spoke against the proposal. The reasons for opposing the application included that proposed height and scale of the building, the proposed density of the building and its impact on views and livability generally. People were also concerned that insufficient information had been made available to the public about the proposed social housing at 1077-1099 Richards Street ("1099 Richards"). Some members of the public commented that it was not possible to make a decision about the proposed development at 508 Helmcken without knowing the details of the development of 1099 Richards.

Decisions of the Urban Design Panel

14. On March 27, 2013 the Urban Design Panel ("UDP") held a meeting to review the proposal to construct the 36-storey building at a density of 17.4, a height of 320 feet and a 10,367 sq. ft. plate size at 508 Helmcken.

15. Section 7 of the Urban Design Panel By-law No. 4722 provides:

The duties of the Panel shall be to advise Council, the Director of Planning, or the Development Permit Board from time to time on the Urban Design of any proposed development or any revisions of any proposed development or any substantial changes to any previously-approved development after a development permit has been issued. In addition to the foregoing, the Panel may advise the City Council or any of its Boards on any matter where urban design is involved.

16. Section 8 of the bylaw provides that for the purposes of the bylaw "urban design" shall include *the design and inter-relationship of all physical components of the City.*

17. The UDP was opposed to the proposed development by 7-0.

18. On April 24, 2013 the UDP considered a revised proposal for 508 Helmcken. The proposed density, floor plate size and impact on the park were almost identical to the previous proposal. The developer proposed a density of 17.1 (FSR) and a 10,130 sq. ft. plate size. The proposed height remained the same at 320 ft..

19. Although the purpose of the UDP is to advise Council and the Director of Planning on urban design issues, Brian Jackson, General Manager of Planning and Development, spoke in support of the proposed development and urged the

UDP to support it based on the proposed social housing component at 1099 Richards.

20. Notwithstanding the very minor changes to the proposal, the Panel supported the application 5-3. The rationale for the UDPs approval of 508 Helmcken, despite it being out of context, was the benefit achieved by the social housing units at 1099 Richards. The density and form of the proposed development at 1099 Richards were not considered or even mentioned by the UDP.
21. On June 5, 2013 the UDP held a meeting regarding the proposed development of a 13-storey residential building at the 1099 Property for 162 units of non-market housing. The proposed density was 7.12 FSR. The Panel supported the application 5-0.

Public Hearing regarding the proposed rezoning of 508 Helmcken

22. On June 11, 2013 Council referred the application to rezone 508 Helmcken to permit an increase in FSR from 3.0 to 17.17 (equivalent to 360,000 sq. ft.) to public hearing. It is clear from the City Staff Report in support of the rezoning that the development of 508 Helmcken was dependent on and inextricably linked to the proposed social housing development at 1099 Richards. This is acknowledged in the June 4, 2013 Staff Report which provides:

Report Summary

This report evaluates an application to rezone the site at 508 Helmcken Street from DD (Downtown) District to CD-1 (Comprehensive Development) District, to allow a 36-storey building containing 448 residential units, of which 110 are proposed as secured market rental, with retail use and private pre-school/kindergarten facility at grade.

This proposal was put forward in response to Council objectives to find innovative ways to facilitate the development of new social and affordable housing. The applicant has proposed to build social housing on land it owns across the street at 1077-1099 Richards; in exchange, the applicant proposed to develop a mixed-use residential building on the City-owned Helmcken Street site, including 110 secured market rental units. A social housing development, Jubilee House, with 87 social housing units, is currently located on the Helmcken Street Site.

(...)

If, after Public Hearing, Council approves this rezoning application, and subject to approval of the social housing on the Richards Street Site through the Development Permit Process, the social housing would be constructed on the Richards Street site and occupied prior to any demolition of Jubilee House, allowing for the relocation of the current Jubilee House residents in advance of construction proceeding at 508 Helmcken Street. (page 3)

23. The report also sets out the following background relating to the development:

3. Background

In 2011, Brenhill Developments Ltd. (Brenhill) approached the City with a land exchange proposal that would involve the transfer of its ownership of 1077-1099 Richards Street to the City in exchange for the City owned lands at 508 Helmcken Street, including the adjacent City lane. 508 Helmcken is currently occupied by Jubilee House, a social housing building containing 87 units, which is leased to and operated by a non-profit operator, 127 Society for Housing. Jubilee House was built in 1985 and is in need of significant repairs.

In consideration of the City agreeing to the land exchange, Brenhill would be responsible for all costs and risk of constructing, fitting out and delivering "turn-key" to the City 162 new non-market housing units on the Richards site, to be owned by the City and operated by 127 Society for Housing. These housing units would include replacement units for the residents of the Jubilee Housing. Development of the Helmcken site would not be started until after the Jubilee House residents take occupancy of the new housing on Richards Street. The land exchange is subject to the approval in principle of the rezoning of 508 Helmcken Street, at Brenhill's sole risk and expense. (pg. 5)

24. The report provides as follows under "strategic analysis":

1. Proposal

"The application proposes a 36-storey mixed-use development that includes 338 residential market strata units and 110 secured market rental units. Uses at grade include approximately 111 m² (1,192 sq. ft.) of retail use along the Helmcken Street frontage, townhouses along the Richards Street frontage, and a two-storey 511 m² (5,505 sq. ft.) private pre-school/ kindergarten which faces onto Emery Barnes Park. The school space is proposed for use by the Montessori School that is currently located across the street in the building at 1077-1099 Richards Street. The Community Amenity Contribution (CAC) resulting from the rezoning is proposed to be allocated to the construction of the 162 social housing units at 1077-1099 Richards Street. Application for this social housing, under the site's existing zoning, is currently under review by the development permit process."

25. In addition, under the heading "Implications/Related Issues/Risks (if applicable)" the Report states that the City will contribute 6.6 million from the proceeds of sale of 508 Helmcken towards the construction of the new social housing project at 1099 Richards.

26. The Draft Conditions of Approval for 508 Helmcken (Appendix B of the June 4, 2013 Staff Report) provides that prior to the enactment of the CD-1 By-law, Brenhill Developments Ltd. must provide the City with "an in-kind CAC consisting of a standalone building at 1077-1099 Richards Street, containing 162 units of social housing and total floor area of 8,358 m² (89,965 sq. ft.), all to be

designed, constructed and finished by the applicant in turn-key condition;"

27. The Staff Report confirms that the 162 "social housing" units must be constructed and transferred to the City in turn-key condition and that the developer must receive final occupancy before prior to the enactment of the zoning bylaw and before the Developer may commence construction at 508 Helmcken. (Staff Report pages 11-12)
28. On or about June 25, 2013, the City of Vancouver mailed out to affected residents a "Notice of Public Hearing" regarding 508 Helmcken. It provides that the public hearing will be held on July 16, 2013. The reference map on the Notice, however, showed the wrong property. A revised Notice was mailed out on or about June 27, 2013. This time the Notice omitted important information about how to submit written comments. On or about July 12, 2013, shortly before the hearing, the City mailed out an "*Addendum* Notice of Public Hearing". The Addendum states that the public hearing will be held on July 16th but that the period for receiving written comments by the City was extended to July 22, 2013.
29. The public hearing relating to 508 Helmcken was held on July 16, 2013. Members of the Petitioner attended the hearing. The majority of the speakers were opposed to the proposed development, in particular the proposed increase in density at 508 Helmcken.
30. Notwithstanding that the rezoning of 508 Helmcken was dependent upon the redevelopment of 1099 Richards Street, the City of Vancouver treated the two developments as separate and unrelated applications. This prevented the public from understanding the effect and full impact of the proposed development of 508 Helmcken and 1099 Richards on the neighborhood.
31. There was no presentation or discussion by staff and/or council regarding the proposed density or form of development at 1099 Richards at the July 16th public hearing, even though its redevelopment was a precondition of the rezoning of 508 Helmcken.
32. The City did not make available to the public any documents relating to the proposed development of 1099 Richards even though the Developer had, at the time of the public hearing, already submitted a completed Development Permit application for 1099 Richards (DE416775) and had received the support of the UDP to build a 13-storey social housing building at an FSR of 7.14. While the minutes of the UDP meetings regarding 508 Helmcken were made available to the public, the minutes of the UDP's decision regarding 1099 Richards were not.
33. In addition, the City also did not disclose to the public:
 - Land Exchange Contract between the Developer and the City dated for reference January 18, 2013 ("Land Exchange Contract");
 - Development Agreement dated for reference May 15, 2013 between the Developer, the City, 127 Society and BC Housing ("Development Agreement");
 - A Lease Surrender Agreement between the Developer, the City and 127

- Society dated for reference January 31, 2013 (“Lease Surrender”);
- An administrative Report by Michael Flanigan dated April 3, 2013 to City Council (“Brenhill Report”);
- Council’s decision with respect to the Brenhill Report (“April 9, 2013 Resolution”)
- Council’s policy regarding the direct sale of property without a public tender (“Disposal of City Owned Land Policy”)

Hereinafter collectively referred to as the “Undisclosed Documents”

34. The Land Exchange Contract includes the following:

- That the “Brenhill Exchange Land” has a deemed market value of \$8,400,000;
- That the “City Exchange Land”, which includes the City Property and City Land collectively has a deemed market value of \$15,000,000;
- That the City and Brenhill’s obligation to complete the transaction contemplated by the Contract is subject to the mutual condition that on or before July 29, 2013;

The rezoning of the City Exchange Land will have been approved in principle by City Council (after a public hearing to consider the said rezoning) with respect to the construction of a new development by Brenhill on the City Exchange Land following the Closing Date, containing approximately 365,000 square feet of density (or such additional square footage of density as may be required by Brenhill as part of its rezoning application”);

35. The Development Agreement includes detailed development plans for the proposed social housing building at 1099 Richards.

36. The Brenhill Report explains the details of the proposed rezoning and land swap and states:

- “Council policy is to dispose of City-owned land through a public tender process. Council policy further provides for the direct sale of property without a public tendering in certain circumstances, such as those set out in this report”.

37. The Disposal of City Owned Land Policy provides that it is normal procedure for the City to dispose of lands through public tender. “Direct sales of City land generally only come about in three situations”:

- (a) the disposal relates to surplus sites that are too small to be developed on their own;
- (b) Sites essential to an assembly or expansion of a project;
- (c) “Sites to be used for social purposes. In this case, sales or lease are

negotiated based upon the market value of the site and the City's write-down policies. Prior to negotiations taking place, the matter is presented for Council approval-in-principle of the proposed use. After negotiations have been completed, the results are reported for Council approval."

38. **The Lease Surrender Agreement** provides:

- That the Agreement and Surrender is conditional upon the leased premises being rezoned in principle with respect to the construction of a new development by Brenhill on the Lease lands containing approximately 385,000 Sq. ft. of density (or such additional square footage of density as may be required by Brenhill as part of its rezoning)

39. These Undisclosed Documents were not mentioned, referred to or otherwise disclosed in the Staff Report or at the public hearing. Members of the petitioner were unaware of the existence of the Undisclosed Documents until in or about May 2014 and did not obtain copies until in or about June 2014, after the filing of the Petition.
40. However, while members of the Petitioner did not have access to the Undisclosed Documents, some members of the public who spoke in favor of the application, in particular the proposed social housing at 1099 Richards, did. Certain members of the public, including Hilda Gregory and Jim O'Dea, were part of the negotiation and execution of the Development Agreement, which included detailed plans for the proposed 1099 Richards development. These plans were not available at the public hearing.
41. In addition, when members of the public who were opposed to the application tried to speak to or ask questions about the proposed development of 1099 Richards, staff and/or Council advised that 1099 Richards was not before Council at the public hearing and therefore they did not have the details of that development.
42. By separating the two developments and withholding documents relating to the development of 1099 Richards and 508 Helmcken, members of the Petitioner and the public generally were denied the opportunity to make submissions regarding the Undisclosed Documents and the combined impact of the two developments. were denied the opportunity to fully understand the exact nature of proposed developments and make meaningful submissions to Council about the impact of the rezoning of 508 Helmcken, and the proposed new social housing development at 1099 Richards, directly across the street.
43. In addition, after the close of the public hearing, Council continued to accept submissions from the public contrary to the City's Procedure Bylaw No. 9756 which provides that "Public comments received by the City Clerk later than fifteen minutes after the close of the speakers list will not be circulated to Council".

44. On July 23, 2013 Council considered the rezoning application. The minutes state "At the Public Hearing on Tuesday July 16, 2013 Vancouver City Council concluded hearing from speakers on the rezoning application for 508 Helmcken, and referred discussion and decision to the Regular Council meeting on Tuesday, July 23, 2013, as unfinished business". The minutes also confirmed that after concluding the public hearing on July 16, 2013 it received additional correspondence until 5 pm on July 22, 2013.
45. At the July 23, 2013 regular council meeting, Brian Jackson, General Manager of Planning and Development, provided information to Council in response to their requests for information at the public hearing and responded to questions. In response to a specific question from Council about the proposed density at 508 Helmcken and whether it could be reduced to address the concerns of the public Mr. Jackson stated:

Councillor Ball: Thank you. And the other quick question I had is, we had a number of questions asking if the building, moved forward, is there any possibility of alterations to the massing, or the look, or the size basically? The massing of the building.

Mr Jackson: Through the mayor, the report itself contains a number of design considerations that the applicant is asked to look at through the development permit process. And we take those directions very seriously as does the applicant. So there is the possibility to look at the building in terms of the architecture of the building.

Councillor Ball: so some of the suggestions that were made by the public could indeed be taken in to account?

Mr Jackson: That's correct, especially in the area of breaking down the mass of the building through the use of different building materials, and changing it so it does not appear as large as it does appear to some of the people who spoke.

Councillor Ball: In terms of one of the other developments that you had, that a large development was broken down in to smaller developments. Is that possible on this land? That's one other question that I had.

Mr Jackson: Through the chair, it's not really possible on this, given the relatively small size of the lot that it's located on.

Councillor Ball: OK. Thank you very much for your answers. Thank you.

46. In addition, staff and/or Council did not consider or address the proposed density or form of development for 1099 Richards. More specifically, Council did not approve an increase in density to 7.04 FSR for 1099 Richards.

47. Council voted in favour of approving "in principle" the rezoning of 508 Helmcken to permit a density of 17.19, subject to conditions. The Developer, must, among other things, provide an in-kind Community Amenity Contribution consisting of a stand-alone building at 1099 Richards for social housing with a total floor area of 8, 358 m2, prior to the enactment of the CD-1 Bylaw. Condition (a)-18 provides:

CONDITIONS OF BYLAW ENACTMENT

(a) That, prior to enactment of the CD-1 By-law, Brenhill Developments Ltd., as authorized by the registered owner shall on terms and conditions satisfactory to the Director of Legal Services and to the General Manager of Planning and Development, the Managing Director of Social Development, the General Manager of Engineering Services, the Managing Director of Cultural Services, the Director of Facility Design and Management and Approving Officer, as necessary, and at the sole cost and expense of Brenhill Developments Ltd., make arrangements for the following:

Community Amenity Contribution (CAC)

18 Prior to enactment, provide the City:

- (d) an in-kind CAC consisting of a standalone building at 1077-1099 Richards Street, containing 162 units of social housing and a total floor area of 8, 358 m2(89, 965 sq. ft.), all to be designed, constructed and finished by the applicant in turn-key condition; and
- (e) a \$1,000,000 cash contribution, to be allocated to the Affordable Housing Fund, to be used to fund the project management and related legal, tenant relocation, and administrative expenses associated with the development of the site at 1077-1099 Richards Street,

48. In addition, Council's resolution provides:

E. THAT A through E above be adopted on the following conditions:

(i) THAT the passage of the above resolution creates no legal rights for the applicant or any other person, or obligation on the part of the City; any expenditures of funds or incurring of costs is at the risk of the person making the expenditure or incurring the cost;

(ii) THAT any approval that may be granted following the public hearing shall not obligate the City to enact a bylaw rezoning the

property, and any costs incurred in fulfilling requirements imposed as a condition of rezoning are at the risk of Brenhill Developments Ltd.;

(iii) THAT the City and all its officials, including the Approving Officer, shall not in any way be limited or directed in the exercise of their authority or discretion, regardless of when they are called upon to exercise such authority or discretion.

Land Exchange Contract Between the City and the Developer

Closure and Sale of City Lane

49. Later in the July 23, 2013 hearing, by separate motion, Council voted to stop-up and convey to the Developer a portion of a City lane to be consolidated with 508 Helmcken and convey the City Lanes to "Brenhill subject to the Land Exchange Contract between the City and Brenhill dated January 28, 2013, and the approval in principle by Council after Public Hearing of the CD-1 Rezoning-508 Helmcken Street".

50. The June 19, 2013 Staff Report regarding the Closure and Sale of Lanes states that on October 31, 2012 Council authorized the Director of Real Estate Services to negotiate the sale of the city owned property at 508 Helmcken and the City Lanes, and the acquisition by the City of 1077-1099 Richards for redevelopment as an affordable housing site. The Report also states:

"Council also recommended that the closure and sale of the City Lane be subject to the approval in principle by Council of the Rezoning after the public hearing and approval by Council to stop-up, close and convey the City Lane to Brenhill.

In accordance with the above on January 28, 2013 the City entered into a contract with Brenhill (the "Land Exchange Contract"). The Land Exchange Contract contains a provision that on or before July 29, 2013, the City will have received City Council approval with respect to: (1) the closure and stop-up of the City Lanes; and (ii) the conveyance of the City Lanes to Brenhill."

51. Although Council considered the Land Exchange Contract at the July 23, 2013 Council meeting by separate motion unrelated to the decision to approve "in principle" the rezoning of 508 Helmcken, the City did not disclose the details of the January 28, 2013 Land Exchange Contract relating to the rezoning of 508 Helmcken and the redevelopment of 1099 Richards "as an affordable housing site" at the public hearing.

Decision of the Development Permit Board regarding 1099 Richards

52. Following the rezoning, in principle, of 508 Helmcken, on August 12, 2013 the Development Permit Board considered the developer's application for a development permit relating to 1099 Richards. The development permit requested an increase in FSR from 5.0 to 7.04 for "social housing".
53. At that time, section 3.13 of the Downtown Official Development Plan Bylaw provided that "the Development Permit Board, may for any development which includes low cost housing, except within the areas denoted by the letters "K1", "K2" and "K3" on Map 1, permit an increase in floor space ratio, *subject to prior approval by City Council* and the securing of a Housing Agreement to ensure the inclusion of the *low cost housing*."
54. The Development Staff Committee Report dated July 31, 2013 for the Development Permit Board provides:

EXECUTIVE SUMMARY

- **Proposal:** *to develop the site with a 13-storey multiple dwelling building with two and a half levels of underground parking accessed from the lane. The building will contain 162 social housing units, a portion of which will meet the definition of low cost housing (as defined in the Downtown Official Development Plan).*
55. In the Report, the Development Permit Staff Committee recommended the approval of the DP subject to 4 conditions: 1) that the design meet the minimum size of dwelling units; 2) provision of a draft Operational Management Plan; 3) a lease registered on title restricting the use to social housing units, a portion of which meets low cost housing; and 4) design development to provide a minimum of 5.7 cubic metres of separate storage.
56. The Report further states that "*Council approved the construction of 162 units and a total built floor space of 8, 358 sq. m (89, 965 sq. ft.) at 1099 Richards as an in-kind Community Amenity Contribution for the rezoning of 508 Helmcken on July 23, 2013*" (pg. 8).
57. At the August 12, 2013 DPB City Staff repeatedly advised the advisory panel and DPB that the Council had granted its approval for the increased density in connection with the rezoning of 508 Helmcken. In response, members of the public, including members of the Petitioner, repeatedly advised the Board that the density and form of development for 1099 Richards were not part of the rezoning of 508 Helmcken.
58. Ms. Maust, a member of the advisory panel, asked for clarification about Council's approval of the increased density and "the relationship between the two buildings". City Staff expressly advised the Board that Council had looked at the massing and form of development and had approved the increase in density

for 1099 Richards at the time of the rezoning of 508 Helmcken. A transcript of the meeting provides:

Moderator: To clarify that last point, even though the rezoning was for the other site, the form of development for this site was shown at the time?

Staff: Correct

Moderator: So council would have understood what that condition looked like?

Staff: Yes, they knew what they were approving, or the density that they were approving.

59. Based on the assurances of Staff that Council had approved the form and density of the building at 1099 Richards as part of the rezoning of 508 Helmcken, the Advisory Board supported the application. The Board, which included Brian Jackson, then approved Development Application No. DE416775 and unconditionally increased the permitted FSR for 1099 Richards to 7.04.
60. Mr. Jackson did not advise the advisory panel or the other Board members that the two developments had been considered separately and that the form and density of 1099 Richards Street were not part of the rezoning of 508 Helmcken. Instead, he voted in favour based on "council's actions in supporting the overall form and character".
61. On August 14, 2013 Peter Ostafichuk emailed Barbara Sage, Assistant to Councillors, asking for information regarding the rezoning of 508 Helmcken, in particular whether Council had in fact approved the increase in density for 1099 Richards at the July 23, 2013 Council meeting as claimed by City Staff at the DPB meeting on August 12, 2013. The email also requested information about what documents were provided to Council in advance of the July 16th Public Hearing and subsequent July 23rd vote. By email dated August 21, 2014 Ms. Sage advised:
*"Planning have clarified the information:
The increased FSR for 1099 Richards was not granted as part of the rezoning of 508 Helmcken. There are two separate addresses (508 Helmcken and 1099 Richards) and each must go through a separate approval process. The approval of one is not linked to the other."*
62. Notwithstanding the City's admission that *the increased FSR for 1099 Richards was not granted as part of the rezoning of 508 Helmcken* and that staff's advice to the DPB was wrong, the matter was not referred back to the DPB and/or Council for its prior approval. Instead, Council amended section 3.13 of the DODP.

Amendment of section 3.13 of the DODP

63. on November 1, 2013 the General Manager of Planning and Development Services prepared a Policy Report to Council regarding the "West End Community Plan." His Report recommends, among other things:

E) THAT the General Manager of Planning and Development Services be instructed to make application to amend the Downtown Official Development Plan, in Area E (Robson Village) to delete residential as a permitted use and increase the permitted FSR for commercial from 1.0 to 3.0, generally in accordance with Appendix E.

AND FURTHER THAT the application and By-laws be referred to public hearing.

64. Although not mentioned in the recommendation or report generally, Appendix E actually proposed text amendments to section 3.13 of the DODP, which at that time authorized the DPB to grant an increase in FSR only for “low cost housing” and only if it has Council’s “prior approval”. The proposed amendments included striking out the words “floor space ratio” and substituting “floor area” and to strike out the words “prior approval by City Council and”. It also proposed to amend the subsection to include the words “or social housing” after the words “low cost housing”.
65. A public hearing regarding various proposed amendments relating to the West End Community Plan was held on January 23, 2014. At the hearing Council approved the application to amend the DODP, “in Area E (Robson Village), to delete residential as a permitted use and increase the permitted FSR for commercial from 1.0 to 3.0, generally in accordance with Appendix E of the Policy Report dated November 1, 2013, entitled “West End Community Plan”;
66. Members of the Petitioner did not attend the public hearing because the staff report and related documents indicated that the amendments related to the West End Community Plan and that the proposed amendments to the DODP related to area E (Robson Village), not section 3.13.
67. On February 4, 2014, Council enacted By-law No. 10865, a bylaw to amend the DODP regarding the West End Community Plan and Social Housing. However, in adopting Bylaw No. 10865 Council not only deleted residential as a permitted use in Area E and increased the permitted FSR for commercial uses, it also amended section 3.13 of the DODP to strike out the words “floor space ratio” and substitute “floor area” and to strike out the words “prior approval by City Council and”. It was also amended to include the words “or social housing” after the words “low cost housing”.

Council’s endorsement of the DBP’s “conditional approval”

68. On February 18, 2014 Council was set to consider the “*Housing Agreement and Endorsement of Development Permit Board’s Conditional Approval of Floor Space Ratio for 1099 Richard Street*”. As a result of members of the public, including members of the Petitioner, wanting to speak at the hearing, the matter was

referred to the Standing Committee on Planning, Transportation and Environment meeting to be held on February 19, 2014.

69. Staff's February 6, 2014 Administrative Report reiterates that one of the conditions of approval in principle of the rezoning was a requirement for the applicant to build a stand-alone 162 unit "social housing" building at 1099 Richards Street. The report further recommends: *"THAT Council endorse the Development Permit Board's conditional approval of an increase in floor space ratio (FSR) to 7.04 FSR for the development at 1099 Richards Street (DE416775) containing low cost housing, which was duly considered under section 3.13 of the Downtown District Official Community Development Plan."*
70. Contrary to the statements made in the February 6, 2014 Staff Report, the DPB's August 12, 2013 approval of the increased FSR was not subject to Council's approval or otherwise "conditional". To the contrary, based on staff's assurances at the August 12, 2013 Board meeting that Council had approved the given prior approval of the form and density of the development in conjunction with the rezoning of 508 Helmcken, the Board unconditionally approved the increased FSR.
71. Members of the Petitioner attended the February 19th meeting hearing. At the February 19, 2014 meeting a motion was carried to endorse the DPB's "conditional approval" of the FSR. A motion to refer the matter to the next standing Committee on April 2, 2014 to "allow time to review video of the Public Hearing on July 16, 2013 for 508 Helmcken" to determine whether Council had considered or approved the density of 1099 Richards was defeated.
72. Notwithstanding that the Developer was required to build the social housing development at 1099 Richards as a precondition to enacting the zoning bylaw, on March 11, 2014 Council enacted Bylaw No. 10870, rezoning 508 Helmcken Street from DD to CD-1(562). City Staff's explanation to Council for the enactment of the bylaw provides:
- After the public hearing on July 23, 2013, Council resolved to amend the Zoning and Development By-law to create a CD-1 Bylaw for 508 Helmcken Street. The Director of Planning has advised that all prior to conditions have been met, and enactment of the attached By-law will implement Council's resolution. Council should only enact this By-law if it first enacts the Housing Agreement By-law pertaining to this address.*
- Director of Legal Services
March 11, 2014*
73. Since Council's July 23, 2013 Resolution expressly provides that the Zoning Bylaw would not be enacted until after the construction of 1099 Richards and as of March 2014 construction had not even begun, members of the Petitioner did not expect and were unaware that the Zoning Bylaw was enacted on March 11, 2014, contrary to Council's July 23, 2013 Resolution.

74. Development Permit DE 416775 for the construction of the building at 1099 Richards was issued by the City to the Developer on May 28, 2014 and excavation work at 1099 Richards commenced on or about May 30, 2014.

FOI Request and related requests for document disclosure

75. Members of the Petitioner have submitted 3 FOI requests to the City between December 2013 and April 2014. The FOI Requests were submitted on December 13, 2013, February 21, 2014 and April 1, 2014.
76. The documents in response to the December 13, 2013 FOI Request were due in or about the end of January 2014. Despite repeated attempts to obtain the requested records, the City did not provide them until after the filing and serving of the Petition. The City has not yet provided copies of any of the requested documents.
77. As of May 2, 2014, the Developer has not yet begun construction of the "social housing" building at 1099 Richards.
78. On or about May 20, 2014, the Petitioner, through its legal counsel, requested copies of the Undisclosed Documents. Members of the Petitioner did not request the Undisclosed Documents prior to or at the public hearing because they did not know of the existence of these documents at that time.
79. Members of the Petitioner only learned of the existence of the Undisclosed Documents, with the exception of the Land Exchange Contract, after the receipt of the FOI records on or about May 7, 2014. Members of the Petitioner knew about the existence of the Land Exchange Contract on or about March 30, 2014.
80. By letters dated June 6, 2014 and June 26, 2014 the City disclosed for the first time the Undisclosed Documents.

PART 3: LEGAL BASIS

1. This is an application for Judicial Review of Council's March 11, 2014 decision to enact Bylaw No. 10870, a bylaw rezoning 508 Helmcken Street from DD to CD-1 (562). The Petitioner also seeks judicial review of the Development Permit Board's August 12, 2013 decision to increase the FSR for 1099 Richards and Council's February 19, 2014 decision "endorsing" the Development Permit Board's decision. Lastly, the Petitioner's seek judicial review of the Council's February 4, 2014 decision to enact By-law No. 10865, a bylaw that amends section 3.13 of the DODP.
2. S. 2 of the *Judicial Review Procedure Act* ("JRPA") provides:

Application for judicial review

2 (1) An application for judicial review must be brought by way of a

petition proceeding.

(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:

(a) relief in the nature of mandamus, prohibition or certiorari;

(b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

3. In addition, s. 524 of the *Vancouver Charter* provides:

Illegal by-law or resolution may be quashed

524. *On the application of an elector or a person interested in the by-law or resolution, a Judge may declare the by-law or resolution void in whole or in part for illegality.*

4. Section 11 of the *Judicial Review Procedure Act* provides:

No time limit for applications

11 *An application for judicial review is not barred by passage of time unless*

(a) an enactment otherwise provides, and

(b) the court considers that substantial prejudice or hardship will result to any other person affected by reason of delay.

Standing

5. CANY has standing to bring this Petition pursuant to s. 524 of the *Vancouver Charter* and/or the *JRPA* as a person *interested* in the proposed rezoning bylaw and applicable development permits. The test to determine whether a person has standing under the *Judicial Review Procedure Act* is the same as the test under section 524 of the *Vancouver Charter*. The applicant must have “sufficient interest” in the decision that is subject to review and not be a mere busybody.

6. The Petitioner consists of residents and electors of the City of Vancouver, who live in New Yaletown. Accordingly, Council’s decision to approve the rezoning of 508 Helmcken Street and to increase the density at 1099 Richards Street directly affects CANY and its members.

Saanich Inlet Preservation Society v. Cowichan Valley (Regional District),
[1983] 4 W.W.R. 673 (B.C.C.A) paras. 15 and 25

Abbotsford Families United v. Abbotsford (City), 2009 BCSC 463

7. CANY also claims standing based on the effect on the public interest of the misuse of municipal powers.

Lambert v. Resort Municipality of Whistler 2004 B.C.S.C. 342 March 15, 2004,
Vancouver Registry L032807 pars. 18 – 20

Limitation period

8. Applications brought pursuant to the *Judicial Review Procedure Act* are not subject to a limitation period. However, pursuant to Section 11 the court has the discretion to deny the requested relief if the Court considers that substantial prejudice or hardship to any other person will occur as a result of delay.
9. When deciding whether or not to exercise its discretion, the most important consideration is the rule of law.

Cenam Contruction Ltd. v. Cowichan Valley Regional District,
[1992] B.C.I. No. 2580

10. Delay alone is insufficient to permit the Court to deny a remedy; what must be shown is *unreasonable* delay. Moreover, unreasonable delay will not preclude relief unless it is shown to have caused *substantial* prejudice or hardship.
11. In applying section 11(b) of the Act, the courts have adopted a two-step test to determine when it is appropriate to decline a remedy sought by a petitioner because of delay. The first step is to determine whether the Petitioner's delay is unreasonable. The second step requires a consideration of (a) whether the delay results in substantial prejudice to the respondent, (b) the prejudice to the Petitioner if the relief is denied, (c) the conduct of the respondent and (d) all other relevant factors.

Turnagain Holdings Ltd. v. British Columbia (Environmental Appeal Board)
2002 BCCA 564

12. What constitutes unreasonable delay will depend on the facts and circumstances of each particular case.

Carpenter v. Vancouver (City) Police Board, [1986] B.C.I. No. 1216

13. Under the circumstances, the Petitioner did not delay in bringing this application. Any delay was caused by the respondents' lack of disclosure, candidness and transparency.
14. In addition, there is no substantial prejudice or hardship to the Developer or any other person. The July 23, 2013 Resolution is clear that any expenditures of funds or incurring of costs to satisfy the prior to enactment conditions are at the sole risk of the person making the expenditure or incurring the cost and that the approval "in principle" in no way obligated the City to adopt the rezoning bylaw. All the expenditures were made entirely at the Developer's own risk.

The July 16, 2013 Public Hearing

a. Failure to disclose documents prior to the public hearing

15. Section 566 of the *Vancouver Charter* requires the City of Vancouver to hold a public hearing before adopting a zoning bylaw. The purpose of the public hearing is to allow the public to make representations respecting matters contained in the proposed bylaws. A reasonable opportunity to be heard “in matters contained in the proposed bylaws” must be afforded to every person who “deem themselves affected by the proposed bylaw”.

16. The standard of review with respect to the assessment of whether or not a local government has breached its duties of notice and procedural fairness to the public is correctness.

Fisher Road Holdings Ltd. v. Cowichan Valley (Regional District), 2012 BCCA 338

Kuciuk v. Sechelt (District), 2013 BCSC No. 594

17. The purpose of a public hearing on land use and zoning bylaws serves at least two important purposes: 1) it provides an opportunity to those affected by a decision to make their views known and 2) gives the decision maker the benefit of public examination and discussion of the issues surrounding the adoption or rejection of a bylaw.

Pitt Polder Preservation Society v. Pitt Meadows (District), 2000 BCCA 415,
77 BCLR (3d) 54, 12 MPLR (3d) 1, 189 DLR (4th) 299

Loucks v. Abbotsford (City) and 90617 BC Ltd. 2006 BCSC 1959

18. In order for the public to make meaningful representations to Council, the City is required to disclose all relevant documents pertinent to matters contained in the Bylaw that were considered by Council and which materially add to the public's understanding of the issues considered by Council. Anything less than full and frank disclosure of relevant information restricts the scope of analysis and the consequent representation a person might otherwise make to council.

Surfside R.V. Resort Ltd. v. Parksville (City) 1993 CarswellBC 715 15 M.P.L.R. (2d) 296

Re Karamanian and Township of Richmond (1982), 5 W.W.R. 407

19. Where a local government finds itself in a position of potential conflict it must act with greater care than usual to see that its purpose and motives remain directed towards the zoning and other regulations under consideration and not towards any improper purpose. The other requirements on a local government where it finds itself in a position of potential conflict is one of “scrupulous fairness in procedure” not only towards the applicant, but the public in general

as well.

Surfside R.V. Resort Ltd. v. Parksville (City), supra.

20. Although the rezoning of 508 Helmcken Street was inextricably linked to the redevelopment of 1099 Richards Street, the City separated the two proposals thereby preventing the public from understanding the full effect of the proposal and making representations to Council about their combined impact.
21. Members of the public, including members of the Petitioner, ~~generally~~ were denied a reasonable opportunity to be heard. Members of the public cannot make informed submissions to Council unless all relevant information and documents are made available prior to the hearing. The City failed to disclose documents that were considered by Council and were critical to the public understanding the proposed developments including 1) documents and information regarding the proposal at 1099 Richards Street; and 2) The Undisclosed Documents. the details of a contract between the City and the Developer relating to the rezoning of 508 Helmcken and the provision of social housing at 1099 Richards;
22. All of the documents fall within the types of documents that should have been disclosed to the public. They related directly to the proposed rezoning, in particular the proposed social housing building at 1099 Richards and the proposed density of 508 Helmcken. They were critical to understanding the rezoning application. However, none of these documents were disclosed until after the filing of the within Petition.

Rocky Point Metalcraft Ltd. v. Cowichan Valley (Regional District),

[2012] B.C.J. No. 1043

548928 Alberta Ltd. v. Invermere (District), [1995] B.C.J. No. 1055

23. Council's land use decision has far reaching implications, not only for members of the petitioners, but also others living in the area. Since the City failed to disclose relevant documents to the public it acted contrary to section 566 of the Vancouver Charter and the breached the rules of procedural fairness.
24. Bylaw No. 10870, a bylaw rezoning 508 Helmcken Street from DD to CD-1 (562), adopted by Council on March 11, 2014 must be set aside.

Loucks v. Abbotsford (City) and 90617 BC Ltd. 2006 BCSC 1959

b. Council received additional correspondence after the close of the public hearing

25. After a public hearing, Council may receive information and advice from municipal staff or experts retained by Council to advise it regarding matters

raised at the public hearing. It may not, however, receive new information or additional correspondence from proponents or opponents of the proposed bylaw.

Hubbard v. West Vancouver (District), 2005 BCCA 633

Cameron v. District of Sechelt, 2009 BCSC 1637

26. After the close the public hearing on July 16, 2013, up until July 22, 2013, City Council received additional correspondence relating to the rezoning of 508 Helmcken. It accepted letters and emails in support and in opposition as well as letters and emails relating to "other matters".
27. The public must be afforded the opportunity to comment on all information and submissions made to Council. By receiving additional submissions after the close of the public hearing, the public was denied the opportunity to do so.
28. The receipt of additional correspondence after the close of the public hearing is contrary to section 566 of the *Vancouver Charter* and constitutes a breach of the duty of procedural fairness. It is also contrary to the City's Procedure Bylaw, Bylaw No. 9756, which provides:

Deadline for public comments

18.10 Public comments received by the City Clerk later than fifteen minutes after the close of the speakers list will not be circulated to Council.

Public comments submitted during the public hearing by speaker

18.23 Despite the provisions of subsection 18.4, a speaker at a public hearing may also submit public comments, graphics and other materials to Council during the public hearing, except that the public comments must be submitted no later than fifteen minutes after the close of the speakers list, and, if written, must not exceed 1500 words.

Public comments submitted during the public hearing by person who does not attend

18.24 Despite the provisions of subsection 18.4, a person who does not attend a public hearing may also submit public comments, graphics and other materials to Council during the public hearing, except that the public comments must be submitted no later than fifteen minutes after the close of the speakers list, and, if written, must not exceed 1500 words.

The Land Exchange Contract unlawfully fetters Council's discretion

(a) Section 566 of the Vancouver Charter

29. Section 565 of the Vancouver Charter confers a discretion on Council to enact zoning bylaws. The Land Exchange Contract constitutes an unlawful fettering of Council's discretion.
30. The City is in effect selling density. The June 4, 2013 Staff Report provides that in consideration of the City agreeing to the Land Exchange, Brenhill would build a new social housing site at 1099 Richards (pg. 6). Although not mentioned in the staff report or at the public hearing, the Land Exchange Contract provides that if 508 Helmcken is rezoned, it must be rezoned permit approximately 365,000 sq. ft. of density.
31. The Land Exchange Contract provides that the City and Brenhill's obligation to complete the transaction contemplated by the Contract will be subject to the mutual condition that on or before July 29, 2013:
- The rezoning of the City Exchange Land will have been approved in principle by City Council (after a public hearing to consider the said rezoning) with respect to the construction of a new development by Brenhill on the City Exchange Land following the Closing Date, containing approximately 365,000 square feet of density (or such additional square footage of density as may be required by Brenhill as part of its rezoning application"):*
32. In *Pacific National Investment Ltd. v. City of Victoria*, [2000] 2 S.C.R. 919, 193 D.L.R. (4th) 385, 83 B.C.L.R. (3d) 207, 15 M.P.L.R. (3d) 1 the Supreme Court of Canada held:

55 As the authorities make clear, a limitation on a municipality's legislative power is a very serious matter. As Rogers, *The Law of Canadian Municipal Corporations*, puts it at para. 199.4, "Unless expressly authorized to do so local authorities have no power to enter into an agreement the effect of which will be to restrict or divest the legislative powers of succeeding councils in respect of any matter affecting the public at large". Rogers goes on to note that this does not mean that a council acting in its proprietary or business capacity cannot make contracts. But it does mean that a council cannot somehow give up its legislative powers: cf. *Birkdale District Electric Supply Co. v. Southport (Corp.)*, [1926] A.C. 355 (U.K. H.L.), at pp. 364 and 371-72.

56 Eloquent echoes of this principle have rung out through Canadian case law:

Our municipal councils are just as truly legislative bodies within the ambit of their jurisdiction as Parliament or the Legislature; and any contract which would interfere with the due exercise of the discretion

and judgment of a member of such a council must equally be void as against public policy.

(Eastview (Town) v. Roman Catholic Episcopal Corp. of Ottawa (1918), 44 O.L.R. 284 (Ont. C.A.), at pp. 297-98.)

[M]unicipalities must be free to amend or alter their by-laws as circumstances dictate. They cannot bind themselves or their successors by contract with a third party to the status quo. (Capital (Regional District) v. Saanich (District) (1980), 115 D.L.R. (3d) 596 (B.C. S.C.), at p. 605.)

[A] municipality cannot bargain away its legislative powers in advance. (Galt Canadian Woodworking Machines Ltd. v. Cambridge (City) (1982), 135 D.L.R. (3d) 58 (Ont. Div. Ct.), at p. 63, aff'd(1983), 146 D.L.R. (3d) 768n (Ont. C.A.)

Municipal legislative powers are an integral part of governance that municipalities cannot give up. Municipal councils cannot fetter the discretion of successor councils to engage in the legislative process without undue influences.

57 An implication of this is that in the absence of provincial legislation implementing a different public policy, municipalities cannot sell zoning: Jones & de Villars, Principles of Administrative Law (3rd ed. 1999), at p. 181; Vancouver (City) v. Vancouver (Registrar Land Registration District), supra; Ingledew's Ltd. v. Vancouver (City), supra. They cannot agree to change zoning in return for particular consideration, and they cannot agree to keep zoning unchanged in return for particular consideration.

(b) Section 190 of the Vancouver Charter

33. Section 190 of the Vancouver Charter states:

Council acquisition and disposal of property

190. (1) The Council may provide

(a) for acquiring such real property (within or without the city) and personal property as may be required for the purposes of the city;

(b) for disposing of any real or personal property of the city by sale, conveyance, lease, or licence when in the opinion of the Council such property is not required by the city, upon such terms and conditions as may be deemed expedient, and to accept in payment either money or other property; provided, however, that no parcel of real property which exceeds

four hundred thousand dollars in value shall be sold to any person other than Her Majesty in her right of Canada or the Province, or any agency of the Crown, except by the affirmative vote of two-thirds of all the members of Council.

34. The Land Exchange Contract provides that 508 Helmcken has a deemed market value of \$15,000,000 and that the Brenhill's property at 1099 Richards as a deemed market value of \$8,400,000. Council may only dispose of property valued at more than \$400,000 by affirmative vote of two-thirds of all members of Council.
35. The Land Exchange Contract binds the current Council and future Councils to dispose of 508 Helmcken upon the satisfaction of the conditions set out in the Contract, contrary to section 190.
36. The Land Exchange Contract is *ultra vires* section 190 of the *Vancouver Charter* and of no force and effect.

Bylaw No. 10870, a bylaw rezoning 508 Helmcken Street to CD-1 (562), was enacted on March 11, 2014 contrary to Council's July 23, 2013 Resolution and for an improper purpose

37. Council's July 23, 2013 Resolution provides that prior to the enactment of the zoning bylaw the Developer must provide an in-kind CAC consisting of a standalone building at 1099 Richards Street, all to be designed, constructed and finished by the applicant in turn-key condition.
38. This "prior to" condition was not fulfilled prior to the enactment of the Zoning Bylaw on March 11, 2014 and therefore Council's decision to enact the Zoning Bylaw is contrary to its July 23, 2013 Resolution and unlawful.
39. In addition, Council's decision to enact the zoning bylaw on March 11, 2014, three weeks after Council's February 19, 2014 decision to endorse the DPB's "conditional approval" of the increase in FSR for 1099 Richards and before the development permit had even been issued, was made for the improper purpose of preventing the Petitioner and/or other members of the public from bringing an application to quash the enactment of the zoning bylaw pursuant to section 524 of the *Vancouver Charter*.
40. Since the July 23, 2013 Resolution requires that the construction of 1099 Richards be completed prior to the enactment of the rezoning and construction at 1099 Richards had not even begun at the time of the rezoning, members of the Petitioner did not expect and were completely unaware that the rezoning bylaw had been adopted by Council.
41. Had the Petitioner known about Council's March 11, 2014 decision, it could have brought its application pursuant to section 524 of the *Vancouver Charter*. The Court does not have the discretion to refuse relief with respect to applications

brought pursuant to section 524 of the *Vancouver Charter*. Accordingly, delay and prejudice would have been irrelevant to the application.

Harris v. Richmond (City), (1993) B.C.J. No. 826

Council's proposed decision to rezone 508 Helmcken Bylaw No. 10870, a bylaw rezoning 508 Helmcken Street to CD-1 (562) is contrary to and at variance with the Downtown Official Development Plan and applicable guidelines.

42. Section 562 of the *Vancouver Charter* provides:

Council powers respecting official development plan

562. (1) The Council may, by by-law,

(a) adopt as the official development plan, or as a part of the official development plan, any development plan prepared under section 561, or

(b) revise or amend the official development plan or any part of the official development plan.

43. Section 563 of the *Vancouver Charter* provides:

563. (1) The adoption by Council of a development plan shall not commit the Council to undertake any of the developments shown on the plan.

(2) The Council shall not authorize, permit, or undertake any development contrary to or at variance with the official development plan.

(3) It shall be unlawful for any person to commence or undertake any development contrary to or at variance with the official development plan.

44. Council can only revise or amend an ODP by bylaw. Council did not amend the DODP in conjunction with the rezoning application and it remains applicable to the site, notwithstanding the rezoning to DD.

45. Council's decision to rezone 508 Helmcken to permit a maximum FSR of 17.19 and maximum building height of 320 ft. is contrary to and at variance with the DODP which limits the maximum FSR to 3.0 and the maximum height to 70 ft.

Decision of the Development Permit Board made August 12, 2013

46. Section 3.13 of the DODP, as it existed on August 12, 2013, provided that:

“the Development Permit Board, may for any development which includes low cost housing, except within the areas denoted by the letters “K1”, “K2” and “K3” on Map 1, permit an increase in floor space ratio, *subject to prior approval by City Council* and the securing of a Housing Agreement to ensure the inclusion of the *low cost housing*.”

47. The DPB did not have the jurisdiction to permit an increase in FSR beyond 5.0 since the development at 1099 Richards is for “social housing”, not “low cost housing”.
48. In addition, section 3(L) of the DOPD limits the maximum permitted density for all uses on corner lots to FSR 5.0.
49. In the alternative, the DPB did not have the jurisdiction to increase the permitted FSR for the development at 1099 Richards to 7.04 without the *prior approval* of the City Council.
50. The Board’s decision to approve the increased FSR was based on Staff’s repeated assurances that Council had approved the specific form of development and density for 1099 Richards in connection with the rezoning of 508 Helmcken. However, contrary to staff’s comments at the DPB meeting, Council’s prior approval had not been granted.
51. The DPB did not have the jurisdiction to allow the increase in FSR without Council’s prior approval.
52. Neither Council’s decision to amend the DODP on February 4, 2014 or the City’s attempt to rename the DPB’s decision a “conditional approval” renders the DPB’s decision valid. The Board’s decision must be set aside.

Council’s decision made on February 19, 2014 endorsing the Development Permit Board’s “conditional approval” of an increase in FSR to 7.04

53. Contrary to the statements made in the February 6, 2014 Staff Report, the Development Permit Board’s decision was not a “conditional approval” of an increase in FSR. The Board unconditionally approved the increase in FSR based on Staff’s assurances that Council had granted its approval in connection with the rezoning of 508 Helmcken.
54. Council cannot retroactively make lawful the DPB’s decision by simply renaming it a “conditional approval” and then endorsing it. The DPB would not have and could not have approved the DP had Staff not advised the Board that Council had already given its approval for the increased FSR in connection with the rezoning of 508 Helmcken.
55. Council’s February 19, 2014 decision is based on misinformation about the Development Permit Board’s August 12, 2013 decision and must be set aside.

Amendments to section 3.13 of the DODP - By-law No. 10865, a Bylaw to amend Downtown Official Development Plan Bylaw No. 4912

56. The City of Vancouver failed to provide notice of the proposed amendments to section 3.13 of the DODP. The City did not disclose that the proposed amendments to the West End Community Plan also included amendments to section 3.13.
57. The City's failure to provide any notice of the amendments to 3.13 of the DODP or to mention the proposed amendments to section 3.13 in the November 1, 2013 Staff Report, resulted in members of the public, including members of the Petitioner, being misled into believing that they were not affected by the proposed amendments.
58. As a result, members of the petitioner did not attend the public hearing on January 23, 2014 and were denied the opportunity to be heard, contrary to section 566 of the *Vancouver Charter*.

MATERIAL TO BE RELIED ON:

- (a) The *Vancouver Charter*, S.B.C. 1953, c. 55;
- (b) The *Local Government Act*, R.S.B.C. 1996, c. 323;
- (c) The *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;
- (d) Rules 2(1)-(2), 14-1, and 21-3(1) of the *Supreme Court Civil Rules*;
- (e) The inherent jurisdiction of the court.

AFFIDAVITS IN SUPPORT:

- 1. Affidavit of Jon Green, sworn May 2, 2014
- 2. Affidavit of Kerry Corlett, sworn May 2, 2014;
- 3. Affidavit of Peter Ostafichuk sworn May 6, 2014;
- 4. Affidavit #2 of Jon Green, sworn July 2, 2014;
- 5. Affidavit of #2 Kerry Corlett, sworn July 2, 2014

The petitioner estimates that the hearing of the petition will take 3 days.

Dated at Vancouver, British Columbia July 2, 2014



Signature of

☐ petitioner ☒ lawyer for petitioner(s)
Nathalie Baker

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs of Part 1 of this petition

☐ with the following variations and additional terms:

Date:

Master

Signature of ☐ Judge ☐