IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Community Association of New Yaletown v. Vancouver (City),* 2015 BCSC 117

Date: 20140127
Docket: S143452
Registry: Vancouver

Between:

Community Association of New Yaletown

Petitioner

And

The City of Vancouver,
The Development Permit Board, and
Brenhill Developments Limited

Respondents

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for the Petitioner:	N. J. Baker
Counsel for the Respondent, City of Vancouver:	B. Parkin A. Kong
Counsel for the Respondent, Brenhill Developments Ltd.:	P. H. Kenward
Place and Date of Trial/Hearing:	Vancouver, B.C. August 25-28, 2014
Place and Date of Judgment:	Vancouver, B.C. January 27, 2015

I

The Parties

[1] The petitioner seeks judicial review of a number of decisions made by the City of Vancouver (the "City") and its Development Permit Board (the "DPB") in connection with the rezoning of city-owned property at 508 Helmcken Street, and the development of a property across the street at 1077-1099 Richards Street, in the New Yaletown neighbourhood.

[2] The City and the DPB are joined as the statutory decision-makers whose decisions are challenged.

[3] Brenhill Developments Ltd. ("Brenhill") is joined as the ultimately intended purchaser and developer of 508 Helmcken Street ("508"), and the developer and vendor of 1077-1099 ("1099") Richards Street.

II

The Facts

[4] The parties have assembled an extensive factual record.

[5] Brenhill was the owner of 1099, a building containing its offices, a pre-school and a restaurant. Across the street, at 508 was a housing project called Jubilee House, operated by an entity called the 127 Society for Housing ("127"). Its purpose was:

> to provide safe, affordable housing for low-income and/or seniors and/or individuals with disabilities and assist them with their personal and social needs through the Community Worker Program.

[6] Jubilee House was built in 1985 and contains 87 units occupied by 89 residents. Most of the residents receive war veterans' allowances, Canada Pension disability payments, guaranteed income supplement, spouses' allowances or income from the GAIN program.

[7] Jubilee House is in a state of disrepair, according to a 2009 engineering report in the possession of the City. Significant expenditures would be required to address its deficiencies.

[8] The City has, for some time, been concerned to encourage affordable housing. These concerns are expressed in a number of different policy instruments and statements. One example is found in the Downtown Official Development Plan which provides for the relaxation of floor space ratios for buildings with "low cost" housing.

[9] Brenhill saw an opportunity to build a tower on the lands occupied by the Jubilee building (508) in exchange for the property it owned across the street (1099), which would be suitable for a new building to replace the social housing at 508. It formulated a proposal, the key elements of which were that Brenhill would:

- build replacement premises for the 127 Society and the residents of the 87 dwelling units at Jubilee House by way of a low cost social housing project at 1099;
- build an additional 75 dwelling units of social housing at low end market (CMHC) rents at 1099, to further increase the City's supply of affordable housing;
- upon completion of the new building at 1099, turn it over to the City for lease to the 127 Society;
- transfer ownership of 1099 to the City in exchange for 508 and the closure of an adjacent lane; and
- proceed with its own development project at 508, which would further advance City policy by including a significant component of market rental units.

[10] The City, through its technical staff, was interested in the proposal. It negotiated a Land Exchange Contract with Brenhill. Although this document was referred to throughout the submissions, and will be referred to in these reasons as the "Contract", it is not a contract in the legal sense of that term. It is, in fact, specifically <u>not</u> a contract, in that it is clear throughout the text that its provisions are not enforceable unless and until the understandings it contains are duly approved by the City. The document embodies a series of operating assumptions and mutual

assurances that allow the parties to continue negotiations. Among other things, the Land Exchange Contract provides that:

- Brenhill would transfer its ownership of 1099 to the City in exchange for the City owned lands at 508, including the adjacent City lane;
- Brenhill would be responsible for constructing, fitting out and delivering "turn-key" to the City 162 new non-market housing units at 1099, to be owned by the City and operated by 127 Society; and that
- development of 508 would not start until after the Jubilee House residents took occupancy of the new housing at 1099.

[11] By February 8, 2013, this proposal had reached the point where Brenhill was in a position to apply for the rezoning of 508 (which was still owned by the City), from the DD (Downtown District) zone to the CD-1 zone, which is described as a site specific comprehensive development zone. The rezoning application was for a 36-storey, 320-foot high building, comprising 448 units (110 of which were to be low cost units), a two storey pre-school, and retail space, occupying a total floor area of 365,000 square feet. This is a much larger and taller building than the existing zoning permitted.

[12] On February 27, 2013, the City sent a notice of rezoning application and of an open house to surrounding property owners and renters, a distribution estimated at 9700 people.

[13] On March 13, 2013, the open house was attended by approximately 135 people.

[14] On April 24, 2013, the City's Urban Design Panel considered the proposal and supported it by a vote of five to three.

[15] On June 11, 2013, City Council considered the application for rezoning and referred the matter to public hearing.

[16] The City sent out different forms of notice. On June 25, 2013, it sent out a postcard but it contained an error, in that it showed a map that was not the property at 508 Helmcken. A second postcard sent on June 27, 2013, but it also contained an

error, in that it failed to provide the correct contact information for the City. On July 5, 2013, the City placed a notice in a local newspaper and sent postcards to residents of the area that had been notified of the open house. On July 6 and July 8, 2013, the City issued a notice of public hearing which satisfied the statutory notice requirement set out in s. 566 of the *Vancouver Charter*. The text of the notice was:

> Public Hearing: July 16
>
> A public hearing will be held Tuesday, July 16 at 6 pm at City Hall, 453 West 12th Avenue, Third Floor, Council Chamber to consider the following zoning amendment:
>
> 508 Helmcken Street: Lots 34, 35, 36, 37 and 38, Block 94.
> District Lot 541, Plan 210, PIDs: 015-482-073,015-482-081, 015-482-138, 015-482-162 and 015-482-260 respectively
>
> To rezone 508 Helmcken Street from DD (Downtown) District to CD-I (Comprehensive Development) District. The proposal is for a 36-storey, mixed-use building with 448 residential units, of which 110 are secured market rental, with retail and a private pre-school/kindergarten space at grade. A height of 97.5 metres (320 feet), a floor space ratio (FSR) of 17.19, and a total floor area of 33,444 square metres (359,984 square feet) are proposed.
>
> Anyone who considers themselves affected by the proposed by-law amendments may speak at the Public Hearing. Please register individually before 5 pm, July 16 by emailing *publichearing@vancouver.ca* or by calling 604-829-4238. You may also register in person at the door between 5:30 and 6 pm on the day of the Public Hearing. You may submit your comments by email to *mayorandcouncil@vancouver.ca*, or by mail to: City of Vancouver, City Clerk's Department, 453 West 12th Avenue, Third Floor, Vancouver, BC, V5Y 1V4. All submitted comments will be distributed to Council and posted on the City's website. Please visit *vancouver.ca/publichearings* for important details.
>
> Copies of the draft by-laws will be available for viewing starting July 5 at the City Clerk's Department in City Hall, 453 West 12th Avenue, Third Floor, and in the Planning Department, East Wing of City Hall, Third Floor, Monday to Friday from 8:30 am to 4:30 pm. All meetings of Council are webcast live at *vancouver.ca/councilvideo*, and minutes of Public Hearings are available at *vancouver.ca/councilmeetings*. (Minutes are posted approximately two business days after a meeting.)
>
> FOR MORE INFORMATION ON PUBLIC HEARINGS, INCLUDING REGISTERING TO SPEAK: vancouver.ca/publichearings

[17] The City sent out a third postcard on July 12, 2013, or only four days before the public hearing. City Council addressed this short notice by providing additional

time after the public meeting to make written submissions. The deadline for reception of these submissions was extended to July 22, 2013.

[18] The City prepared an agenda package for the public and posted it online. It included a summary and recommendation section, a draft of the proposed amending by-law, and a policy document prepared by city staff. The package ran to nearly 100 pages.

[19] At the public hearing held on July 16, 2013, city staff outlined the nature of the project underlying the application for rezoning in the following terms:

> In response to council's housing and homelessness strategy, and the city's challenges of providing affordable housing, Brenhill Developments, which owns the site across the street at 1099 Richards, approached the city with a land exchange proposal. In exchange for the city-owned lands at 508 Helmcken, including the adjacent city lane, Brenhill would build a new social housing on the Richards St. site, including replacement housing for the residents of Jubilee House, and once completed would transfer the ownership of that site to the city.
>
> The application for the social housing building on Richards St. is currently going through the development permit process. The application before council this evening proposes to rezone the site at 508 Helmcken to allow for a 36 story mixed-use tower. It includes 448 residential units, of which 110 are market rental units, a two story private preschool/kindergarten facing in to the park, and some retail space at ground level. The rezoning involves an increase in density, from 3 to 17.19 FSR, and an increase in height from 70' to 320'.
>
> Under council's policy report, potential benefit capacity in downtown, an increase beyond the 300' prescribed under the Downtown Official Developments Plan, can be considered to the underside of approved view corridors as is being proposed in this application to achieve public benefits.
>
> The key public benefit of this application would be the new and replacement social housing that is proposed at 1099 Richards St. valued at $25 million. This includes an in-kind community amenity contribution of $24 million towards the $30.6 million cost of construction in turnkey social housing building at 1099 Richards St. as well as a cash community amenity contribution of $1 million towards the city's affordable housing fund. The balance of the cost of the social hosing would be funded by the city from the proceeds of the sale of the 508 Helmcken St. site to Brenhill development.
>
> The proposed in-kind CAC would result in the construction of 162 social housing units by Brenhill, and upon completion the ownership of the land at 1099 Richards, as well as the newly constructed building would be transferred in turnkey condition to the city. Also at this time, the Jubilee residents would be relocated from their current location to the new building.

> The social housing would be operated by a nonprofit operator, the 127 Society for Housing, the current operator of the Jubilee House.
>
> Ms Clerk, could you back it up one? Under the home, housing, and homelessness strategy, long term and short term targets for non-market housing have been established. This application would add 75 new social housing units to the inventory.
>
> [From the Minutes of the Public Hearing].

[20] A number of people associated with the existing Jubilee House spoke in favour of the land exchange, that is, in favour of the erection of a new building for "social housing" across the street from the existing building at 508.

[21] A number of people also spoke at the public hearing in opposition. Concerns included the size of the proposed building and its impact on views and sunlight. Its presence next to a park was also noted and some felt that if the land were to be redeveloped it should be to enlarge the park.

[22] The City kept a tally of the written submissions. On July 12, 2013, the city clerk posted 15 items of correspondence on the internet, seven in favour, seven against, and one other. On July 15, 2013, 17 items were posted, 12 for, and 5 against. On July 16, 27 items were posted, 10 in support and 17 against. On July 18, 17 items were posted, 3 for, one against, and one other. On July 22, 121 items were posted, 7 in support, 110 against, and one other.

[23] On July 23, 2013, following receipt of these further submissions, City Council met and gave approval in principle to the rezoning by-law, subject to the condition that a stand-alone building would go up at 1099, comprising 162 units of "social housing", with a total floor area of 89,965 square feet, and including a further cash contribution of $1,000,000.

[24] On March 4, 2014, the City posted the agenda for a Council meeting on its website notifying the public that the rezoning by-law would be coming before council for enactment.

[25] City Council enacted the by-law after it had been advised that the $1,000,000 contribution had been received, and a “no development” covenant had been registered on 508 pending the completion of the building on 1099.

III

1099

[26] On or about April 24, 2013, Brenhill applied to the DPB for a development permit for 1099. This was for the building described as a community amenity contribution of 13 storeys, 120 feet in height, comprising 162 units totalling 89,965 square feet.

[27] The development permit process applied to 1099 because the property did not need to be rezoned.

[28] The development permit staff committee sent 5,792 notification postcards advising the neighbourhood property owners and residents of the application and of an open house that was to be held May 29, 2013. Fifty-eight people attended and 35 comment sheets were handed in.

[29] On June 5, 2013, the Urban Design Panel voted 5-0 in favour of the issue of the development permit.

[30] In early August 2013, the City issued a notice of an upcoming DPB meeting at which the application for 1099 would be considered. It also released a development permit staff committee report about the proposal.

[31] On August 12, 2013, 11 members of the public attended the meeting of the DPB. Four submissions were in favour and seven were against.

[32] At that meeting Brenhill’s development permit application for 1099 was approved.

[33] On February 19, 2014, City Council endorsed the DPB’s approval.

IV

[34] On April 25, 2014, the petitioner was incorporated, and on May 6, 2014, it brought this petition for judicial review seeking to set aside the DPB resolution, City Council's confirming resolution and the rezoning by-law.

[35] The petitioner alleges a series of procedural missteps by the City and the DPB and seeks the following orders and declarations:

> 1) A declaration that the City of Vancouver contravened section 566 of the *Vancouver Charter* and breached the rules of procedural fairness by:
>
> i. Failing to disclose relevant documents at the July 16, 2013 public hearing;
>
> ii. Accepting submissions from the public after the close of the July 16, 2013 public hearing;
>
> iii. Failing to provide proper notice of the January 23, 2014 Public Hearing relating to the amendment of s. 3.13 of the DODP [Downtown Official Development Plan].
>
> 2) A declaration that the Land Exchange Contract unlawfully fetters Council's discretion under section 565 of the *Vancouver Charter* and is of no force and effect.
>
> 3) A declaration that Bylaw 10870, a bylaw rezoning 508 Helmcken is inconsistent with the DODP (Bylaw No. 4912).
>
> 4) A declaration the Development Permit DE416755 is void.
>
> 5) An Order quashing Council's decision made on March 11, 2014 to adopt Bylaw No. 10870, a bylaw rezoning 508 Helmcken to CD-1(562).
>
> 6) An Order quashing Council's decision made on February 4, 2014 to adopt s. 3(b) of Bylaw No. 10865, a bylaw to amend the DODP (Bylaw No. 4912).
>
> 7) An Order quashing Development Permit DE416755 issued on May 28.
>
> 8) Costs to the Petitioner.

[36] The effect of such orders and declarations would be, according to the petitioner, that the court would remit the matter back to City Council to hold a new public hearing with full and frank disclosure as required under s. 566 of the *Vancouver Charter*.

[37] The City suggests that the declarations and orders sought by the petitioner break down into three substantive issues. In the course of submissions, I took the

petitioner and the City to agree that it is sensible to approach the issues in those terms. The three substantive issues are:

(a) whether the petitioner has shown that the rezoning by-law affecting 508 should be quashed;

(b) whether the decision of the DPB ought to be quashed; and

(c) whether By-law 10865 amending s. 3.13 of the Downtown Official Development Plan ought to be quashed.

[38] Brenhill has some different issues which I will address after I set out the issues between the petitioner and the City.

[39] No issue is taken by the City respecting the petitioner's standing. This accords with the case law (See: *Saanich Inlet Preservation Society v. Cowichan Valley (Regional District)*, [1983] 4 W.W.R. 173 (B.C.C.A.); *Abbotsford Families United v. Abbotsford (City),* 2009 BCSC 463.

[40] The City does not assert any limitation period. This is not the case for Brenhill.

V

[41] The relevant provisions of the *Vancouver Charter* are as follows:

> Section 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;
>
> *Disposal of real property*
>
> > (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.

Section 565.(1) The Council may make by-laws

(a) dividing the city or any portion thereof into districts or zones of such number, shape, or size as Council may deem fit;

(b) regulating, within any designated district or zone, the use or occupancy of land and land covered by water for or except for such purposes as may be set out in the by-law;

(c) regulating, within any designated district or zone, the construction, use, or occupancy of buildings for or except for such purposes as may be set out in the by-law;

(d) regulating the height, bulk, location, size, floor area, spacing, and external design of buildings to be erected within the city or within designated districts or zones;

(e) establishing, in any district or zone, building lines and the area of yards, courts and open spaces to be maintained and the maximum percentage of the area of land that can be covered by impermeable material;

(e.1) regulating, in any district or zone, the maximum density of population or the maximum floor-space ratio permissible;

(f) designating districts or zones in which there shall be no uniform regulations and in which any person wishing to carry out development must submit such plans and specifications as may be required by the Director of Planning and obtain the approval of Council to the form of development, or in which any person wishing to carry out development must comply with regulations and guidelines set out in a development plan or official development plan;

(f.1) requiring, where it creates a zone pursuant to this section, that as a condition of approving a form of development a person provide public amenities, facilities or utilities or provide land for such purposes or require that the person retain and enhance natural physical features of a parcel being developed;

(g) delegating to the Director of Planning or such other persons as are authorized by Council the authority to certify the authorized use or occupancy of any land or building;

(h) providing for certificates of use or occupancy and providing that the use or occupancy of any land or building other than in accordance with the certificate of use or occupancy applicable to such land or building shall constitute a violation of the by-law and shall render the owner of the land or building liable to the penalties provided in the by-law;

(i) authorizing the collection of a fee for a certificate of use or occupancy, which fee may vary according to the type of use or occupancy or the value of the land or building used or occupied;

> (j) describing the zones or districts by the use of maps or plans, and the information shown on such maps or plans shall form part of the by-law to the same extent as if included therein.

(2) A by-law regulating the use or occupancy of land, land covered by water or buildings may

> (a) permit uses or occupancies existing at a date specified in the by-law as outright uses, and
>
> (b) make uses or occupancies existing at a date specified in the by-law conditional approval uses as of that date.

(3) The regulations under subsection (1) may be different for different protected heritage property, as specified in the by-law.

Section 566 requires Council to hold a public hearing before the enactment or amendment of a zoning by-law.

> Amendment or repeal of zoning by-law
> 566. (1) The Council shall not make, amend, or repeal a zoning by-law until it has held a public hearing thereon, and an application for rezoning shall be treated as an application to amend a zoning by-law.
>
> (…)
>
> (3) Notice of the hearing, stating
>
> > (a) the time and place of the hearing, and
> >
> > (b) the place where and the times when a copy of the proposed by-law may be inspected,
>
> shall be published in accordance with section 3, with the last publication appearing at least 7 days and not more than 14 days before the date of the hearing.
>
> (4) At the hearing all persons who deem themselves affected by the proposed by-law shall be afforded an opportunity to be heard in matters contained in the proposed by-law, and the hearing may be adjourned from time to time.

Sections 524-563 provide:

> 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.
>
> Notice and security
> 525. Notice of the application shall be served on the city at least ten days before the day of the hearing, and before the hearing the applicant shall furnish security for the city's costs in such amount and in such manner as the Judge shall think proper. After the determination of the proceedings, the Judge may make such order as to costs as shall be just.

> Service on city within one month
> 526. No application to quash a by-law or resolution, or part thereof, under this part shall be entertained unless notice of the application is served on the city within one month after the passing of the by-law or resolution complained of.
>
> Particulars to be given
> 527. The notice of application shall set out particulars of the illegality alleged.

Section 561.(1) The Council may have development plans prepared or revised from time to time.

(2) A development plan under this section may

> (a) relate to the whole city, or to any particular area of the city, or to a specific project or projects within the city;
>
> (b) be altered, added to, or extended;
>
> (c) designate
>
> > (i) land for streets, lanes and other public thoroughfares, and for the widening of streets, lanes and other public thoroughfares,
> >
> > (ii) sites for parks, schools and public buildings,
> >
> > (iii) areas for special projects, including projects that require development or redevelopment as a whole, and
> >
> > (iv) for the purposes of heritage conservation, heritage conservation areas in accordance with section 596A.

(3) A development plan under this section must include housing policies of the Council respecting affordable housing, rental housing and special needs housing.

(4) A development plan under this section may include the following:

> (a) policies of the Council relating to social needs, social well-being and social development;
>
> (b) policies of the Council relating to the preservation, protection, restoration and enhancement of the natural environment, its ecosystems and biological diversity;
>
> (c) a regional context statement, consistent with the rest of the development plan, of how matters referred to in section 850(2)(a) to (c) of the Local Government Act, and other matters dealt with in the development plan, apply in a regional context.

(5) To the extent that a development plan under this section deals with these matters, it should work towards the purpose and goals referred to in section 849 of the Local Government Act.

Section 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.

[42] The relevant provisions of Procedure By-Law No. 9756 are as follows:

Procedure By-law no. 9756: A By-law to regulate the procedures of Council and its committees and other bodies. Section 18 regulates the procedure at public hearing and includes:

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
8.23 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.

[43] The relevant provisions of the Downtown Official Development Plan are as follows:

Section 3 - Density

Vancouver's Downtown is and will remain the highest-density commercial area within the City and within the Greater Vancouver Region. However, in order to achieve objectives which include:

- participation with and encouragement of the Greater Vancouver Regional District's policies for Regional Town Centres;
- encouragement of residential use within the Downtown;
- encouragement of a mixture of uses in single developments; and
- high standards of design throughout the Downtown;

the permitted maximum density is varied throughout this District.

1. Subject to conformity with the guidelines and subject to subsections 2, 3 and 4, the maximum permitted density (floor space ratio) shall in no case exceed the amount shown for each of the density areas within the district as illustrated on Map 1 and described below:

…

> L. in the areas denoted by the letter 'L1', 'L2', 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 ration 5.00 provided that social housing comprises more than 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 square feet shall be floor space ratio 5.00;
> - the maximum density for all uses on an interior site with a minimum frontage of 200 feet and a minimum site area of 24,000 square feet shall be floor space ratio 5.00.

[44] Map #1 of the Downtown Official Development Plan shows both 508 Helmcken and 1099 Richards as being within the L1 zone.

[45] Before February 4, 2014 section 3.13 of the Downtown Official Development Plan 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 the City Council and the securing of a Housing Agreement to ensure the inclusion of low cost housing."

[46] The relevant provisions of the Development Permit Board and Advisory Panel By-Law No. 5869 provide:

> Section 6
>
> (a) the duty and function of the Board is to receive and approve, subject to conditions, or refuse such development permit applications as may by bylaw be prescribed to be brought before the Board,
>
> In consideration of the applications brought before it,
>
> (b) the Board shall hear any representations of the applicant as well as other person interested in the application, and before rendering its decision shall consult with and receive any submissions of the Advisory Panel.
>
> Section 8
>
> The function of the Advisory Panel is to act in an advisory capacity to the Board with respect to development permit applications that are brought before the board.

[47] The relevant provisions of the Urban Design Panel By-Law No. 4722 provide:

> 7. 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.
>
> 8. For the purpose of this By-law, "urban design" shall include the design and inter-relationship of all physical components of the City.
>
> 9. In fulfilling its duties and presenting its advice and recommendations, the Panel shall have regard to the guidelines set out in Schedule "A" hereof and the Zoning and Development By-law.

VI

[48] So much for the basic outline of events, the petitioner's legal characterization of its concerns and the applicable legal framework.

[49] The parties' submissions are detailed and extensive. In coming to terms with the issues at the heart of case, I think it necessary to make some attempt to outline the submissions of the parties, and their references to the documentary record.

[50] There are several grounds on which the petitioner challenges the rezoning of 508 and the redevelopment of 1099. The first is that:

> The City failed to disclose relevant documents to the public prior to the public hearing that was held July 16, 2013 (in particular details of a land exchange contract between the City and Brenhill and documents related to the redevelopment at 1099 Richards Street which the [petitioner] says was inextricably linked to the rezoning of 508 Helmcken).

[51] The documents the City provided to the July 16, 2013 public meeting did not include many of the documents related to the 1099 project because the City takes the position that those documents are not relevant to use and density at 508, which, the City submits is the proper scope of a rezoning proposal.

[52] The documents the City *did* provide included a 14-page document titled "Summary and Reconsideration" including a description of the rezoning proposed:

> Summary: To rezone 508 Helmcken Street from DD (Downtown) District to a CD-1 (Comprehensive Development) District. The proposal is for a 36-storey

> building containing 448 residential units, of which 110 are proposed as secured market rental, with retail use and a private pre-school/kindergarten facility at grade. A height of 97.5 m (320 ft.), a floor space ratio (FSR) of 17.19, a residential floor area of 32,833 m^2 (353,287 sq. ft.), a retail floor area of 111 m^2 (1,192 sq. ft.) and an institutional floor area of 512 m^2 (5,505 sq. ft.) are proposed.

It also included a description of the "Community Amenity Contribution" that was proposed, namely, the redevelopment of 1099:

> Community Amenity Contribution (CAC)
>
> 18. Prior to enactment, provide the City:
>
> (a) 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 m^2 (89,965 sq. ft.), all to be designed, constructed and finished by the applicant in turn-key condition; and
>
> (b) 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.
>
> Housing Agreement
>
> 19. Make arrangements to the satisfaction of the Managing Director of Social Development and the Director of Legal Services to enter into a Housing Agreement securing 110 residential units with a minimum total area of 5,900 m^2 (63,512 sq. ft.), and related parking and other amenity space, for 60 years or the life of the building, whichever is greater, as rental housing, and subject to the following additional conditions in respect of those units:
>
> (a) that all such units will be contained within a separate air space parcel;
>
> (b) that such air space parcel may not be subdivided by deposit of a strata plan;
>
> (c) that none of such units may be separately sold;
>
> (d) that none of such units will be rented for less than one month at a time;
>
> (e) at least 26 of the 110 units will be two bedroom units; and
>
> (f) no occupancy permit will be issued for the market residential units to be sold until the occupancy permits for all the market rental units have been issued.
>
> (g) on such other terms and conditions as the Managing Director of Social Development and the Director of Legal Services may in their sole discretion require.

> Note to applicant: This condition to be secured by a Housing Agreement to be entered into by the City by by-law enacted pursuant to section 565.2 of the Vancouver Charter.

[53] Among the documents included in the package made available for the public hearing was a June 4, 2013 policy report that included the following description of the proposal, including what was envisioned for 1099:

> 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 for a 36-storey building containing 448 residential units, of which 110 are proposed as secured market rental, with retail use and a 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 Street; in exchange, the applicant proposes 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.
>
> Staff have assessed the application and support the proposed uses and form of development, subject to the design development and other conditions outlined in Appendix B. The report recommends that the Community Amenity Contribution (CAC) from this rezoning be allocated towards the construction of 162 social housing units at 1077-1099 Richards Street, comprised of 87 replacement units for the current Jubilee House residents and 75 new social housing units, which would contribute towards affordable housing objectives in the Downtown South neighbourhood.
>
> 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.
>
> Prior to enactment of the rezoning the General Manager of Engineering Services will bring a further report to Council to obtain authority to stop-up, close and convey the portions of lane adjacent to 508 Helmcken Street site to Brenhill Developments Ltd. for consolidation and formation of the rezoning site.
>
> Staff recommend that the application be referred to a Public Hearing, with the recommendation of the General Manager of Planning and Development Services to approve it, subject to the Public Hearing, along with the conditions of approval outlined in Appendix B.

[54] In the same document, in a background section, the proposal was described:

> 2. Housing Policy
>
> On July 29, 2011 Council endorsed the Housing and Homelessness Strategy 2012-2021 which includes strategic directions to increase the supply of affordable housing and to encourage a housing mix across all neighbourhoods that enhance quality of life. The Three-Year Action Plan 2012-2014 identifies priority actions to achieve some of the Strategy's goals. The priority actions that relate to this application are to refine and develop new zoning approaches, development tools and rental incentives to continue the achievement of secure purpose built rental housing, and to use financial and regulatory tools to encourage a variety of housing types and tenures that meet the needs of diverse households. This application also responds to the recommendations of the Mayor's Task Force on Housing Affordability, including the use of City lands to deliver affordable rental and social housing.
>
> 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 Street 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 risks 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 Jubilee House. 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 s risk and expense.

[55] Under a section entitled "Offered Public Benefits", the project was further described:

> Offered Public Benefits
>
> Rental Housing (508 Helmcken Street) – As part of the proposed development, up to 110 units of secured market rental housing (non-stratified) are proposed. This application has not come in under the City's rental housing programs, and no incentives are being requested. The public benefit accruing from these units is their contribution to Vancouver's rental housing stock for the life of the building or 60 years, whichever is greater. If this rezoning application is approved, the rental housing would be secured through a Housing Agreement with the City, and would be subject to the conditions noted in Appendix B.

> Community Amenity Contribution (CAC) – In the context of the City's Financing Growth Policy, an offer of a Community Amenity Contribution from the owner of a rezoning site to address the impacts of rezoning can be anticipated. Such a CAC is typically made through the provision of either on-site amenities or a cash contribution towards other public benefits in the neighbourhood. Contributions are negotiated and are evaluated by staff in light of the increase in land value expected to result from rezoning approval.
>
> As part of this rezoning application for 508 Helmcken Street, the applicant has offered a CAC package, valued at $25 million, consisting of:
>
> - In-kind CAC — $24 million towards the $30.6 million construction cost of the "turn-key" social housing building, with 162 residential units, at 1077-1099 Richards Street; and
> - Cash CAC — $1 million contribution to the City's affordable housing fund.
>
> The balance of the $30.6 million construction cost of the "turn-key" social housing building at 1077-1099 Richards Street (up to $6.6 million) would be funded by the City from the proceeds of the sale of 508 Helmcken Street to Brenhill.
>
> The proposed in-kind CAC of $24 million, if accepted will result in the construction of 162 social housing units (a total of 8,358 m^2 (89,965 sq. ft.) of built floor space) being constructed by the Brenhill Developments Ltd. and, upon completion, the ownership of the land at 1077- 1099 Richards Street as well as the newly constructed building will be transferred in "turnkey" condition to the City. The new building at 1077-1099 Richards Street must receive the final occupancy permit, and the Jubilee House residents must be relocated to the new building before Brenhill Developments Ltd. may commence construction of the building at 508 Helmcken Street.
>
> The new social housing would be operated by 127 Society for Housing, the non-profit organization currently operating Jubilee House. The proposed tenant mix would ensure preservation of housing for the existing 87 Jubilee residents who have fixed incomes, while dedicating all 75 additional units to serve individuals at low-end-of-market (LEM) rates to achieve overall operational viability and financial sustainability.
>
> [Emphasis added.]

[56] Under the heading "Financial", the impacts of the proposal were described:

> Financial
>
> 508 Helmcken Street
>
> As noted in the Public Benefits section, this application proposes an in-kind CAC of $24 million towards a turn-key, 162-unit social housing project at 1077-1099 Richards Street and a $1 million cash CAC contribution to the Affordable Housing Fund. Construction of that project will cost approximately $30.6 million, and the City will contribute up to $6.6 million from the proceeds of sale of the 508 Helmcken Street site. Brenhill will assume all financial risks associated with the construction of the social housing project, and any

> savings arising from lower than expected construction costs will be retained by the City.
>
> The 508 Helmcken site is within the Downtown South DCL District. If the rezoning application is approved, it is anticipated that the applicant will pay approximately $6,159,600 in DCLs and make a public art contribution of approximately $651,600 towards new on or off-site public art.
>
> Social Housing Project at 1077-1099 Richards Street
>
> The proposed 162-unit social housing project will replace and renew 87 existing units at the Jubilee House and add 75 new non-market units. Consistent with Council policies on most non-market housing projects, the project is expected to be self-sustaining and does not require further operating subsidies, property tax exemptions, and/or financial guarantees from the City. The operator, 127 Society, and the City have agreed to an operating model and a tenant mix of 53% tenants receiving shelter assistance, old age security or other fixed-income and 47% LEM that optimizes long-term operational viability and financial sustainability of the project, while providing opportunities to advance Council's housing objectives in Vancouver. The proposed tenant mix will preserve housing affordability for all existing Jubilee tenants at existing subsidized rates. In addition, the project will support a pre-paid lease and generate future operating surplus which will be shared between the Society and the City, providing funds that the City can use to further its housing goals.

[57] There is more, along with considerable detail respecting the specifics of the 508 proposal *per se*, but I think the excerpts I have quoted accurately outline the gist of the information that was available to the public before the public meeting.

[58] The petitioner suggests that this disclosure was inadequate and that the City was obliged to include *all* the materials it considered, including the Land Exchange Contract and supporting documents, the policy regarding sale of city lands, the development agreement and the development permit application for 1099 Richards, along with the Urban Design Panel's decision.

[59] The petitioner submits that these documents were:

1) pertinent to matters contained in the by-law;
2) considered by council in its determinations whether to adapt the by-law;
3) matter that would have materially added to the public's understanding of the issues.

[60] In making those assertions, the petitioner tracks the language of *Surfside R.V. Resort Ltd. v. Parksville (City)*, 15 M.P.L.R. (2d) 296 at para. 29, a decision of

Wilkinson J. adverting to interpretations of the statutory requirements under the *Municipal Act:*

> 29 A further requirement of procedural fairness in this province is the requirement that municipalities furnish documentation beyond that called for under the bare wording of section 956 of the Municipal Act. The requirement now includes documents:
>
> (a) pertinent to matters contained in the by-law;
>
> (b) considered by council in its determinations whether to adopt the by-law;
>
> (c) which materially add to the public understanding of the issues considered by council.
>
> See Karamanian v. Richmond (1982), 19 M.P.L.R. 102 (S.C.B.C.), Eddington v. Surrey, supra, and Esposito Restaurants v. Abbotsford, [1990] B.C.J. No. 1658, S.C.B.C., Vancouver Registry, A900600, July 12, 1990. In this case council directed generous access, and the Petitioner received at least 250 documents. They complain, however, that the decision of the city to withhold "in camera" minutes as privileged and some documentation concerning purchase negotiations as irrelevant was improper. In the context of what I have already said as to the heavy duty cast upon a council which finds itself in a position of potential conflict, I agree in principle. In camera minutes or portions thereof, notwithstanding statutory privilege, ought to be produced if they fulfil the descriptions set out above, and it would seem to me that purchase negotiation documents would always be germane on the issue of motive or purpose if attempts to purchase had taken place. The failure to produce either may constitute a denial of a fair hearing. [emphasis added.]

[61] That case immediately goes on to express a pragmatic approach to disclosure, where sufficient information was known to obviate any prejudice:

> 30 That is, however, not an end to the matter here. The view I take in this case is the same as that taken by Finch J., as he then was, in Harrison v. Richmond, supra. This whole matter was aired for months beforehand in the community, and the Petitioners were thoroughly familiar with it. I am not persuaded in the slightest by anything I have seen or heard that the Petitioners were prejudiced in any way in their right to be heard or in their ability to make effective representations by the city's refusal to disclose other documents.

[62] The petitioner’s concerns appear to be largely with the failure of the City to provide the Land Exchange Contract and the lease surrender document, documents showing the City’s working engagement with the developer, and documents specifically pertinent to the 1099 development, which were not, strictly speaking, part of the rezoning application for 508.

[63] The prejudice the petitioner allege is identified in various parts of its submission:

> 194. Many members of public, including members of petitioner, repeatedly urged Council to reduce the density and amend the proposed bylaw. These documents were not only relevant to the approval or rejection of the bylaw but also, to its amendments. The public did not know that after almost two years of negotiations Brenhill and the City had entered into a contract for a specific amount of density in exchange for the new social housing building and that the deal was dependent upon Council's approval in principle by July 29, 2013.
>
> …
>
> 202. In the case at bar, the City was in a clear conflict of interest. On the one hand it had to consider the appropriateness of rezoning of 508 Helmcken, while on the other hand, by entering into the agreements with Brenhill, 127 Society and BC Housing, the City had clearly made its mind up that it wanted to sell its property for $15,000,000 and get a new social housing building at 1099 Richards. Given this clear conflict, the City was required to move with “scrupulous care" (*Eddington*). Instead it withheld the contract and other pertinent information from the public.
>
> …
>
> 204. The public hearing and subsequent decision to approve the rezoning in principle was nothing more than a rubber stamp on a development that Council had already decided to approve. The City’s purpose and motives were not directed toward the rezoning at all, but rather what it would get for it.
>
> …
>
> 214. The fact that the City is trying to create more social housing does not lessen its disclosure obligations or its duty to act fairly. The Petitioner submits that the worthiness of the cause does not trump the public’s right to a fair and impartial public hearing. Council's desired objective, no matter how noble, is not the determining factor.
>
> 215. In addition, while Council *may* consider matters relating to the disposition of property in closed meetings (s. 165.2), there is no exception in law that permits the City to withhold relevant executed agreements or the fact of their existence on the theory that the City has chosen to make them "confidential". Such an exclusion would defeat the purpose of a public hearing and undermine the well-established disclosure requirements.
>
> 216. Although local government may not be obliged to disclose agreements that are in the process of being negotiated (*Langford* and *Hastings Park),* the City is required to disclose executed agreements that were considered by Council in making its decision *[Loucks).*
>
> …
>
> 218. Firstly, the Staff Report does not "fully” describe the terms of the transaction. It does not even mention the Land Exchange Contract. Furthermore, neither Council, Staff nor Brenhill mentioned the existence of a

> contract at the public hearing. Nowhere in the report does it say that the City and Brenhill have already entered into a contract that provides for the exchange of their respective properties if Council approves the "in principle" rezoning of 508 Helmcken on or before July 29, 2013 and if Brenhill builds a new social housing building at 1099 Richards.
>
> 219. The fact the City called it a “proposed” land exchange is extremely misleading. Calling this a proposal certainly does not suggest to the public that the City and Brenhill have already negotiated and entered into an agreement with very specific terms.
>
> [Emphasis added.]

[64] The petitioner submits that the City has misinterpreted its policy regarding the disposition of city lands which exempts land from public tender where the site disposed of will be used for social purposes. It submits that 508 is *now* being used for social purposes, but that after the land exchange it will *not* be, and that accordingly the exchange is improper, and impairs the possibility of a “fully informed and reasoned discussion.”

[65] The petitioner submits that the City should have disclosed the development permit application plans and the Urban Design Panel decision pertinent to 1099 as part of the rezoning process on 508. It claims that:

> 237. The public was denied the opportunity to make meaningful submissions about the combined impact and effect of both developments and 1099 because:
>
> the two developments were considered separately;
>
> When members of the public attempted to speak about the combined impact, they were instructed to constrain their comments to just 508 Helmcken;
>
> there were no documents available at the public hearing relating to the proposed density of 1099 Richards or the development generally.

[66] The petitioner submits that it is no answer to say that the documents pertinent to 1099 were available at the meetings relative to 1099.

[67] The petitioner also submits that an example of material non-disclosure was the failure of the City to provide the lease surrender agreement. Three people who attended the public meeting were aware of the negotiations and the fact that the lease surrender agreement was contingent upon the developer getting the density

proposed in the rezoning application of 508. The petitioner asks how there could be a fair hearing when some members of the public in support of the application know more than those who are opposed.

[68] The petitioner submits that the City had a duty to ensure that *all* citizens could inform themselves of the basic questions at issue in the application, not just the petitioner. In *Pitt Polder Preservation Society v. Pitt Meadows (District)*, 2000 BCCA 415, the Court of Appeal observed:

> [66] Finally, the District argues that the appellant has not provided any evidence that it or any member of the public was prejudiced in any way by the non-disclosure in their right to be heard or in their ability to make effective representations and that the chambers judge did not err in concluding that evidence of prejudice was required. In the District's submission, the decisions in *Harrison v. Richmond*, *supra*, at 272; *Surfside R.V. Resort Ltd. v. Parksville*, supra, at 307; *Wild Salmon Coalition v. North Vancouver* (1996), 34 M.P.L.R. (2d) 122 at 130-31; and *Jones v. Delta*, supra, at 27-30, support its position in that regard.
>
> [67] With deference, the cases to which the District has referred do not assist in determining whether the absence of evidence of prejudice is fatal to the appellant's complaint. In my respectful view, the appellant was not required to marshal evidence of what its members or other members of the public might have done had the impact reports and other relevant documents been made available in advance of the public hearing. Such self-serving evidence would not promote an objective analysis of the requirements of procedural fairness. In my opinion, the question that ought to have been asked was whether the timing of the disclosure of the impact reports was adequate to permit members of the public to prepare an intelligent or reasoned response. In view of the far-reaching nature of the decision being made about land use in this case and the technical nature of the impact reports, I would think it unreasonable to assume that members of the public had adequate time for preparation.

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

[69] The petitioner submits that on a consideration of the relevant factors, the disclosure was inadequate. It submits that the City was in breach of s. 566 of the *Vancouver Charter* in failing to give the public a fair opportunity to be heard, and that, accordingly, the by-law must be set aside.

VII

[70] With respect to the petitioner's ground for challenging the rezoning of 508 on the basis that the City failed to disclose relevant documents to the public hearing that was held July 16, 2013 the City first outlined aspect of the rezoning process, most of which have been set out as "facts" in these reasons. The City points out that the process respecting privately initiated rezonings commences when the prospective applicant approaches the City, following which the City Planning Department will study the proposal, and advise the applicant if it will be supportive of the application. If the Planning Department is supportive, a rezoning application will normally be submitted to City staff, which then reports to City Council recommending either refusal or a referral to public hearing. A public hearing must be held before City Council can approve a rezoning. Notices are then sent out. A draft of the rezoning by-law is posted.

[71] Following a public hearing, City Council may approve, amend, or decline to approve a rezoning by-law.

[72] In Brenhill's case, the City submits that the development potential of 1099 Richards was limited because there were already "two towers on that block face providing challenges for appropriate tower separation and because of the height restrictions on that property arising from a view cones." The City submits that the site at 508 Helmcken was not so constrained under existing City policy because there were no other towers on the block.

[73] The City says that the decision to dispose of property in the form of the land exchange between the City and Brenhill was within its authority. It was approved in October 2012.

[74] Following further negotiations, the City and Brenhill entered into the land exchange contract which has already been briefly described (see para. 10 herein). The City submits that the petitioner's submission that the land exchange contract should not have been entered on a "sole source" basis, but put out to public tender

pursuant to the City's internal policies, and that the policy document should have been available at the public hearing, are irrelevant: "it is submitted that the document is clearly not material to the zoning and no useful purpose would have been served by having it as part of the disclosure package (simply so that the public could challenge the validity of the land exchange)."

[75] The City submits that contrary to the petitioner's submission (at para. 62 herein), the exchange was for a "social purpose" because the land for which 508 was being exchanged was to be used for a "social purpose".

[76] The City submits that, in any event, policies are not statutes or by-laws and are not binding on City Council.

[77] Lastly, on this subject the City submits that these proceedings do not address the land exchange specifically.

[78] The City submits that in order for development to proceed on 508, the property would have to be taken out of the DD zone, that is, subject to the Downtown Official Development Plan, and rezoned CD1. The City submits that it is not at all unusual for a land exchange to be followed by a rezoning application.

[79] It is a matter of some interest that in *explaining* how rezoning in the context of land exchange works in Vancouver, the City resorted to the Land Exchange Contract. I quote from the submission:

> 48. In his approximately fourteen years experience working for the City, Mr. Jerry Evans, the Acting Director of the Real Estate Department, has been involved in a number of real estate transactions that were subject to a subsequent rezoning application. In his experience it is not uncommon for the City to sell or otherwise dispose of land to a developer on the basis that the developer will apply to rezone that land.
>
> 49. In such cases, according to Mr. Evans, <u>the contract regarding the disposal of the land is made explicitly subject to a successful rezoning application.</u> This is done so that if the rezoning application is unsuccessful for any reason the developer is not committed to completing the purchase of the land, the City is not committed to selling the land and the transaction will not proceed.

> 50. In Mr. Evans' experience it is also made clear to the developer that the City acts in two separate capacities when conducting land transactions and hearing rezoning applications. When the City in its capacity as a landowner enters into a land transaction it does not commit the City when acting as legislator to deciding a zoning application in any particular manner. In his experience it is made clear to developers that when City Council considers a zoning application it will do so with an open mind and will not be constrained in any manner by the conditional contract that may exist between the City as landowner and the developer. Indeed, this is spelled out explicitly in the land transaction contract.
>
> 51. As is usual, the land exchange contract in relation to the transaction between the City and Brenhill contains a clause at 4.3.2 on page 11 that states that the contract is subject to City Council approving in principle the application to rezone the lands at 508 Helmcken Street following a public hearing.
>
> 52. Also, the land exchange contract contains a clause at 5.9 on page 14 stating that Brenhill acknowledges that it will proceed with the rezoning application at its own risk and expense and that nothing in the contract will fetter City Council's discretion in considering the rezoning application.
>
> [Emphasis added; affidavit references removed.]

[80] It is precisely this document, among others, that is at the heart of the petitioner's argument respecting failure to disclose. The City's position is that the production of the Land Exchange Contract was not necessary in order for the public to make meaningful submissions regarding the use and density issues pertaining to the 508 rezoning.

[81] The objection is set out in the City's submission:

> 96. …[T]he City does not usually make public the specific details of a land transaction with a developer until all the conditions have been met and the transaction has closed. It could be detrimental for other developers to know the terms of the proposed purchase and sale contract that are unrelated to the zoning, but which could affect the City's bargaining position if the transaction does not close. In other words, if the transaction did not close for any reason, other developers would have information which could affect the City's bargaining position in future negotiations.
>
> 97. These considerations reflect that the interest of the City in its role as a corporation and land owner are distinct from the City's role as regulator. Section 165.2 of the Vancouver Charter recognizes that distinct role, by providing that a part of a Council meeting may be closed to the public if the subject matter being considered relates to "(e) the acquisition, disposition or expropriation of land or improvements, if the Council considers that disclosure could reasonably be expected to harm the interests of the City."

> 98. Generally speaking the terms of land purchase agreements are not relevant to zoning applications. Usually developers have purchased land from parties other than the City, and they are not expected to provide the purchase agreements or related documents to the City in connection with the consideration of their rezoning applications.
>
> 99. In the case that is the subject of this proceeding, the basic terms of the land exchange contract between the City and Brenhill were in fact disclosed to the public as part of the public hearing package for the rezoning of the land at 508 Helmcken Street. This disclosure was made because the CAC offered by Brenhill to the City consisted of a cash payment and an in-kind CAC consisting of the construction of a social housing project at the land at 1099 Richards Street. The basic terms of the land exchange were disclosed in so far as they were relevant to the CAC at pages 11 - 14 of the Policy Report appearing in the public hearing package (see para. 45 herein).
>
> [Affidavit references removed.]

And further:

> 121. Counsel for the Petitioner suggested in oral argument that the land exchange contract, the lease surrender, the development agreement and the proposed lease were “critical” documents based on staff’s description of them in the in camera reports, and therefore should have been made available to the public. While it is true that they were critical to the overall business dealings between the City, Brenhill and the 127 Society, they were not critical, or even material, to the issues in the rezoning of the property at 508 Helmcken.
>
> 122. It is submitted that the details of the agreements and of the proposed deal generally that were set out in the Policy Report gave the public ample information about those matters. It is not the role of the public at the public hearing into a rezoning to comment on or take a position on the business dealings of the City or the intricacies of its social housing strategy. These are not zoning matters.
>
> 123. It should also be noted that even where a document relevant to a rezoning bylaw is not made available to the public prior to the public hearing, this does not necessarily constitute a breach of the rules of procedural fairness. Our Court of Appeal has held that even where a report that was directly relevant to the rezoning was presented by a developer during the public hearing, and the public had access only to an executive summary of the report, and no advance notice of it, it was acceptable for council to consider the report: *Pollard v. Surrey (District)* (1993) 25 BCAC 81, City Brief of Authorities Tab 19.
>
> 124. The general terms of the land swap and CAC, relevant to the rezoning of the Helmcken property, were made available to the public and it is clear that the public was able to comment on them.
>
> 125. As such, the City’s disclosure obligations were clearly met in the circumstances of the case at bar.
>
> [Affidavit references removed.]

VIII

[82] The petitioner's second ground for seeking relief is that:

> The City breached the rules of procedural fairness by accepting submissions after the close of the July 16, 2013 public hearing.

[83] I will deal with this shortly and without explication of the positions of each party. Despite the erroneous series of notifications (detailed in para. 16 herein), I am satisfied that the City met the basic statutory requirements for notice through the advertisements of July 6 and 8, 2013. The fact that until July 12, the public did not have notice as to where to send written comments was addressed by extending the time for written submissions to July 22. This cured a defect in a notice that was not required. As the numbers showed (see para. 22 herein), the opportunity worked in favour of those opposed to the rezoning, in any event. In the circumstances of this case, it would permit form to triumph completely over substance to give credence to such a trifle and I will not consider it.

[84] The petitioner next submits that the City breached the rules of procedural fairness by:

> Failing to provide proper notice of the January 23, 2014 public hearing relating to the amendment of section 3.13 of the Downtown Official Development Plan.

[85] This submission concerns a notice of a public hearing to consider zoning amendments described as "West End Zoning Amendments". The notice states:

> The West End Community Plan was approved by Council on November 2, 2013. As part of the implementation of that plan, zoning amendments will be considered by Council at the Public hearing on January 23. The proposed amendments are to the Zoning and Development By-law, Section 2 (definitions); RM-5, RM5A, RM-5B and RM-5C (residential) District Schedule; C-5 and C-6 (commercial District Schedule; Downtown Official Development Plan; and Rental Housing Stock Official Development Plan.

[86] The notice fails to identify the fact that the New Yaletown area will be affected by the amendments to section 3.13.

[87] The petitioner submits that the amendment affects density for low-cost housing outside the west end, including 1099 Richards.

[88] The petitioner submits that the timing of this amendment is suspicious in that it appears to cure a defect in City Council's endorsement of the DPB's conditional approval of an increase in the floor space ratio required to build a 162 unit, 89,965 square feet social housing building at 1099.

[89] The position of the City is that regardless of the label, the fact that the Downtown Official Development Plan was included in the amendments was evident, and that an appropriate notice was given as well as an opportunity to read the by-law. On this basis, they submit there are no grounds for the petitioner to object to the notice that was given.

[90] The petitioner next submits that the Land Exchange Contract:

> unlawfully fetters City Council's discretion under s. 565 of the *Vancouver Charter* and is of no force and effect.

[91] The petitioner submits that it is unlawful for the City Council to agree that if Brenhill were to build social housing at 1099, it would rezone 508. These problems are avoided in the text of the agreement itself in provisions outlining the fact that "approval in principle" does not oblige the City to rezone. The submission continues:

> 268. However, notwithstanding Council's July 23, 2013 Resolution, the City fettered its discretion by entering into the Land Exchange Contract. This Contract is not simply a contract relating to the purchase and sale of 508 and 1099, as submitted by the Respondents. It is both a contract of purchase and sale and a contract to rezone in exchange for a new social housing building.
>
> 269. Land Exchange Contract provides that:
>
> - if Council rezones "in principle" to permit 365,000 sq. ft. of density (s.4.3);
> - then Brenhill will build the "New Affordable Housing Project" at 1099 Richards, (s. 4.1.5(a))
> - and once the building at 1099 is completed and other conditions are met Council and Brenhill swap lands; and
> - enact the zoning bylaw

270. The Land Exchange Contract is not conditional on the enactment of the zoning bylaw, but rather on Council's approval "in principle". Once approved in principle, Brenhill agrees to build 1099 and then swap lands. Once the lands were exchanged, Council was bound to rezone and, if rezoned prior to the land swap, bound to keep the zoning in place. Section 5.22 provides:

Brenhill Development on the City Exchange Land

The City acknowledges that Brenhill intends to develop and construct a new development project on the City Exchange Land following the Closing Date. The City agrees that, following the completion of the transfer of the City Exchange Land from the City to Brenhill on the Closing Date, and subject to the City's customary developer permit process for similar development in the City, Brenhill will be permitted to proceed with its development project on the City Exchange Land in an unfettered manner and without any interference from the City, provided that Brenhill is otherwise in compliance with the City's regulatory requirements.

271. This section expressly states that once 1099 Richards is completed and the lands are transferred the City will allow Brenhill to proceed with his planned development project "in an unfettered manner" and "without interference". Accordingly, Council must rezone.

272. Despite Council's July 23, 2013 Resolution that the "in principle" approval does not bind council to enact the zoning bylaw, the contract confirms that this is the bargain.

273. This is why the October 2012 Staff Report states that the contracts would provide Brenhill with a "strong level of "in principle" approval by Council". If the contract was subject to enactment of the zoning bylaw, the "level" of approval or assurance wouldn't have been any different than the approval "in principle" it received on July 23, 2013 i.e. Council is likely to rezone but there is no guarantee. The Contract gives Brenhill a guarantee that the City will enact the zoning bylaw, despite any Resolution giving Council a discretion.

274. Brenhill needed the assurance that the current or future council would enact the zoning bylaw once 1099 was constructed. The contract says to the developer: if we approve of the rezoning "in principle" to permit the density you want, you will build us a new building at 1099 and we will swap lands and rezone. This is unlawful.

275. A local government cannot enter into a contractual arrangement that fetters its discretion. In *Vancouver Island Entertainment Inc. v. Victoria (City),* [2006] B.C.J. No. 1719 the Court held at para. 97:

> The prohibition against fettering municipal legislative discretion in a contractual context is discussed in Vancouver v. Registrar Vancouver Land Registration District, [1955] 2 D.L.R. 709 (B.C.C.A.); Ingledew's Ltd. v. City of Vancouver (1967), 61 D.L.R. (2d) 41 (B.C.S.C.); and Pacific National Investments Ltd. at paras. 59-65. In each case, the municipality had fettered its discretion by entering a contract that limited council's ability to pass future bylaws. The courts found that

> these agreements were contrary to public policy, as they restricted the freedom of individual councillors to decide the merits of any bylaw solely upon relevant considerations in the context of the applicable municipal legislation. Circumstances, councillors, and councillors' views may change. Elected representatives must therefore remain free to exercise their legislative powers as they deem appropriate, in the best interests of the community.

276. The Courts have held that even the threat of damages may constitute an unlawful fettering. In *Vancouver v. Registrar Vancouver Land Registration District, [1955] 2 D.L.R. 709 (B.C.C.A.)* the Court held:

> 22. Nevertheless, by its unqualified covenant to pass the amending by-law the City effectively tied the hands of the members of the council upon consideration of the merits of the by-law when submitted, for there might be aldermen who would consider the by-law unwise in the light of the facts as they then appeared but who would not be prepared to expose the City to a claim for damages by defeating it.
>
> 23. Looking at it in another way, a contract of a municipal corporation by which it engages in advance that its council will pass a by-law involving the exercise of a discretion such as that vested in it by the Town Planning Act is contrary to public policy, for by introducing the extraneous consideration of a possible claim against the City for its failure to pass the by-law the contract tends to restrict the freedom of the individual members to decide the merits solely upon the relevant circumstances, as the law requires. I do not think the law will support any such prejudgment by contract of the question to be decided upon the submission of such a by-law any more than it will the judgment of a Judge delivered before he had heard the evidence.

277. The problem with the Contract is clear: if the current council or a future council wants to repeal the zoning or downzone 508 before Brenhill begins construction on that property, it may feel it cannot do so, even it if would be the public interest, because of the contract and for fear that Brenhill will sue the City if it exercises its discretion.

[92] The City's response to this is that the petitioner simply misreads the contract:

> 53. Petitioner suggests that the Land Exchange Contract constitutes an unlawful fettering of Council's discretion to zone the property at 508 Helmcken. This is based on the premise that the contract binds this Council, and future Councils, to rezone the land to a particular density.
>
> 54.With respect, this is simply an incorrect reading of the contract. It is very clear from the language of the land exchange contract that this agreement between the City as owner of the Helmcken property and Brenhill will not act in any manner to fetter City Council's discretion, when acting as regulator, to make a decision on Brenhill's application to rezone the property (clause 5.9)

> …. It is clear throughout the contract that Brenhill bears the risk that the Helmcken property may not ultimately be rezoned.
>
> 55. The contract also clearly provides that it is contingent on a number of factors, including Brenhill applying for and being successful in obtaining approval in principle of the rezoning of the land (clause 4.3.2).
>
> 56. While counsel for the Petitioner suggests that once approval in principle is granted Council then must enact the zoning by-law, in order to comply with the contract, this is, again, not the case. The contract does not make any such provision promising enactment. Clause 5.22 pointed to by counsel for the Petitioner says that the City will not interfere with Brenhill developing the property as long as it is in regulatory compliance. This is not a promise to enact the rezoning by-law.
>
> [Affidavit references removed.]

[93] The petitioner next asserts that:

> By-Law 10870, a by-law rezoning 508 Helmcken is inconsistent with the Downtown Official Development Plan.

[94] The petitioner's submission is as follows:

> 314. Council's March 11, 2014 decision to rezone 508 Helmcken is also in direct conflict with the DODP.
>
> 315. The maximum permitted FSR for this site is 3.0 and the maximum height is 70 ft. The City's June 4, 2013 Staff Report explains that 508 Helmcken is located in the DODP Area L-I, "within which density and building height are prescribed based on site area and street frontage....508 Helmcken has a site area of 1,945.8 m2 (20,945 sq.ft.) and a frontage of 44.2 m (145 ft), including the adjacent lane. As the site does not meet the minimum requirements for 5.0 fsr. development under the current zoning would be limited to 3.0 FSR and height of 21.3 m (70 ft.)"
>
> See also DODP, pg. 10 15-16 and 19-21 (BOA Tab 37)
>
> 316. The City has permitted a density of 17.19 and a height of 320 ft. Although the City applied the DODP to the site in connection with the rezoning application, the Respondents now argue that the DODP does not apply. The Respondent argues that the DODP only applies to lands zoned (DD) and that since Council rezoned the lands, it no longer applies.
>
> 317. However, throughout the June 4, 2013 Staff Report the City applied the DODP and Downtown South Guidelines to the site. There was no suggestion by the City that the DODP would no longer be applicable once it was rezoned. To the contrary, in its Staff Report the City considered the DODP but then justified bending the rules *("pushing the envelope")* for this particular development.
>
> 318. Furthermore, if the Respondents are correct, this is another basis for setting aside the public hearing. The public was not advised that in rezoning the site from DD to CD-I, the DODP would no longer apply and that the City

was effectively amending the DODP at the same time. As a result, many submissions were made on the various violations of the DODP in response to the City's staff report.

319. Lastly, whether or not the DODP applies to a particular property depends on whether or not the property is within a specified area, not its zoning. To interpret it otherwise would defeat the purpose of an official development plan and would also permit Council to unilaterally amend an ODP without adopting a bylaw as required by section 562.

320. Pursuant to section 561 of the *Vancouver Charter,* Council may have development plans prepared that relate to the whole city, to a particular area or to specific projects within the City. Pursuant to section 562 Council may, by bylaw, adopt a plan as official development plan and may also, by bylaw. amend it. Pursuant to section 563, Council shall not authorize or permit or undertake any development that is contrary to the ODP.

321. Downtown District Map 1, outlines the different "Downtown District Zoning Areas" including the LI and L2 areas. (DODP pg. 10) The properties are included in the LI Area.

322. In order for 508 to be excluded from the application of the DODP the City would have to amend the plan, by bylaw.

323. Council did not amend the DODP to take the subject property out of the LI area. Since the City did not amend the DODP and the rezoning bylaw is in direct conflict maximum height and density for the site, the rezoning bylaw must be set aside.

[95] The City makes the following submission:

173. The Petitioner alleges that the CD-1 by-law that is now enacted in relation to the property at 508 Helmcken is contrary to the provisions of the Downtown Official Development Plan ("DODP"). In particular it is alleged that the DODP restricts maximum FSR to 3.0 and maximum height to 70 feet while this development has an FSR or 17.19 and a maximum height of 320 feet.

174. The Petitioner relies upon the *Sevin v. Prince George* case which held on an interpretation of certain sections of the *Local Government Act*, that a zoning by-law should be quashed where it was not consistent with the Official Community Plan of the city. While it is correct that Council may not, pursuant to s. 563 of the *Vancouver Charter*, authorize a development that is at variance with an applicable Official Development Plan, that is not what has occurred in the circumstances of this case.

175. The DODP applies only to property that is zoned Downtown District ("DD") according to the "Application and Intent" statement appearing on page 3 of the document.

176. When Council in this case amended the zoning by-law to remove the subject property from the DD zone, and rezoned it to CD-1 zone, by definition the subject property ceased to be subject to the DODP.

> 177. Accordingly, the current CD-1 zoning of the subject property is not at variance with the DODP, because the DODP does not apply to CD-1 zoned properties.
>
> 178. Counsel for the Petitioner suggested in oral argument that staff indicated in the Policy Report that the property at Helmcken was subject to the DODP and would continue to be so. This is simply not the case. While the report indicates that the DODP is a relevant policy for the site, it is submitted that this is based on the historic DD zoning prior to the rezoning to CD-1 being completed. It is clear (for example in the discussion on page 8 of the report - that under the historic DD zoning the proposed building would exceed the height and FSR guidelines that apply. It is for that reason that a rezoning of the property to CD-1 is being applied for.
>
> [Affidavit references removed.]

[96] In oral argument, I understood the City's position to be, essentially, that the Downtown Official Development Plan is a "plan" in the sense that a map is a "plan", that is, a description of an existing state of affairs but not meant to be understood as an attempt to regulate development subject to amendment of the Plan. The City says this, notwithstanding the prefatory statement of "Application and Intent" on page 3 of the document, which describes the Downtown Official Development Plan as "a by-law to *regulate* the development of that part of the City of Vancouver for which the Zoning District is described as Downtown District (DD)."

[97] The petitioner next submits that Development Permit DE416755 is void.

[98] This issue is best addressed through the submission of the City which sets out the nature of the development permit application process:

> 181. A development permit is required in order to proceed with most new developments. Development permits for major developments are issued by the Development Permit Board (the "Board").
>
> 182. A major development is one which, due to its location, scale and context, may have significant impact on its surroundings, or which may be contentious in the community.
>
> 183. Staff members prepare a report to the Board that describes and presents an analysis of the development. Their recommendations are forwarded to the Board. This written report is made available to the applicant and the public approximately five days prior to the Board meeting.
>
> 184. All meetings of the Board are public. The applicant or their representative(s) may attend and discuss the application. Neighbours or anyone interested in the development may attend and make representations.

> Written submissions are also considered. A decision is usually made by the Board at the same meeting.
>
> 185. The Board comprises the Director of Planning (Chair), the General Manager Engineering and the Deputy City Manager. The Board makes all decisions but is given advice in its deliberations by an Advisory Panel consisting of nine members appointed by City Council. The Advisory Panel consists of two members from the Development industry, two from the design profession, four from the general public, the Chair of the Urban Design Panel and the Chair of the Vancouver Heritage Commission. The Advisory Panel sits in deliberation with the Board and renders advice to the Board; however, it does not vote.
>
> [Affidavit references removed.]

[99] Turning specifically to 1099, the City submits:

> 186. Part of the CAC offered as part of the rezoning of 508 Helmcken is the development by Brenhill of a social housing project on 1099 Richards. No rezoning of 1099 Richards was required for this project but as the proposed development constituted a “major development” the application for a development permit was referred to the Board.
>
> 187. In accordance with the usual practice, a report was prepared by staff to the Board outlining the details of the application. Mr. Greer was one of the authors of that report.
>
> 188. On August 12, 2013 the Board met and considered the application. The Board issued a conditional approval for a Development Permit for 1099 Richards Street.
>
> 189. The conditions of approval of the development permit were set out in a letter sent to the architects for Brenhill on August 14, 2013.
>
> 190. One of the conditions set out by the Board was that prior to issuance of a development permit arrangements had to be made to the satisfaction of the City to enter into a lease registered on title that will restrict the uses of the property to social housing units, a portion of which meet the definition of low cost housing as it was then defined in the Downtown Official Development Plan as it existed at that time. This condition is set out in point 1.3 on page 1 of Exhibit “C”.
>
> 191. Although a lease has not yet been entered into in relation to the property, because the building has not yet been constructed, the City has secured the above referenced obligation by way of another instrument, a No Occupancy Covenant, which is registered on title and ensures that the building will not be occupied until the condition has been satisfied.
>
> 192. On or about April 7, 2014 this covenant was registered against the title to 1099 Richards which requires Brenhill to enter into a lease with the City that will restrict the use of 1099 Richards to social housing units, a portion of which meets the definition of low cost housing (as defined in the Downtown Official Development Plan (“DODP”)). This covenant ensures that condition 1.3 of the “prior to” letter of August 14, 2013 is satisfied.

193. As of May 28, 2014, all of the conditions set out in the letter of August 14, 2013 had been met, or secured by way of suitable legal agreements, and therefore the development permit was issued on that date to Brenhill.

194. At the time when Brenhill's application was considered by the Board the DODP required that the Board have the prior approval of Council before issuing a development permit for a project that involved an increase in floor space ratio.

195. Because the CAC for the Helmcken rezoning included the development of the social and low cost housing project at 1099 Richards, Council did consider at the public hearing regarding the Helmcken rezoning the basic elements of the Richards project including the number of units and the square footage of the proposed development (which were set out in the Policy Report).

196. In addition, Council directly considered that issue again at a later meeting, on February 19, 2014, at which they passed a resolution that specifically endorsed the increased density and the Board's decision of August 12, 2013 to issue a permit subject to the fulfilment of various conditions.

197. This Council approval regarding an increase in floor space ratio was, therefore, clearly in place by the time the conditions were fulfilled, and the permit was issued, on May 28, 2014.

198. The Petitioner suggests, first, that the Development Permit Board lacked jurisdiction to grant a development permit in relation to the 1099 Richards Street application because the development includes "social housing" rather than "low cost housing" and that under s. 3.13 of the DODP as it existed at the time the Development Permit Board could only allow an increase in density if the development includes the latter.

199. The approval granted by the Development Permit Board on August 12, 2013 was conditional on a number of matters that were not satisfied until very recently. The Development Permit was not issued to Brenhill until May 28, 2014.

200. One of the conditions of approval was that the City and Brenhill enter into an agreement securing the provision of low cost housing in the project. This was done by way of the registration of the No Occupancy Covenant referred to in the evidence of Mr. Greer at paragraphs 12 to 14 of his Affidavit.

201. As such, it is clear that in fact the development at 1099 Richards Street does include a component of low cost housing and therefore satisfied s. 3.13 of the DODP as it existed in August 2013.

202. Further, the Petitioner suggests that the Development Permit Board required, and did not have, the prior approval of Council to increase the permitted density on the lot. They suggest, relying on the *Maple Ridge v. British Columbia* case, that an unfulfilled statutory condition cannot be fulfilled by ratification of an earlier unauthorized act.

> 203. Again, this is an incorrect interpretation of the facts of the case at bar. The phrase "prior approval by City Council" which appeared in the DODP at the time was not defined. It is not required, in our submission, that there be a formal approval by way of resolution or by-law. Rather, it is sufficient if Council has in fact turned its mind to the issue and indicated approval. Council did turn its mind to the density of the development at 1099 Richards when dealing with the CAC issue during the rezoning of the Helmcken property.
>
> 204. By making it a condition of the enactment of the rezoning by-law that the developer provide a building at 1099 Richards Street with a certain amount of square footage, on a site of known size, it was clear that they were accepting of an increased density at that site.
>
> 205. In addition, as stated above, the approval of the development permit was conditional on a number of factors and the development permit was not actually issued until May 28, 2014.
>
> 206. In the meantime, on February 19, 2014 Council endorsed the Development Permit Board's conditional approval of the development permit, and increase in density on the site.
>
> 207. It is clear that the development permit in this case was not actually issued until Council had, in fact, approved the increased density.
>
> 208. Finally, even if it were to be found that there was a procedural defect in the manner in which the approval was given in this case, it is submitted that this is a situation in which This Honourable Court should exercise its discretion not to interfere with the issuance of the development permit.
>
> [Affidavit references removed.]

[100] The petitioner's point is that before the February 4, 2014 amendment to the Downtown Official Development Plan, the DPB approved an increase in the FSR from 5.0 to 7.04 at 1099 on the basis that the City Council had given prior approval of the increase in the FSR for "low cost housing" while the approval was actually for "social housing". The petitioner submits that the amendments to s. 3.13 of the Downtown Official Development Plan striking out "prior approval of council", including the words "social housing" and changing "floor space ratio" to "floor area" is effectively confirmation that the DPB did not have the jurisdiction to grant the increase in FSR it purported to grant in August 2013.

[101] The City further submits:

> 221. The Petitioner suggests that the City did not provide proper notice to the public of its intent to consider an amendment to the DODP during a public hearing held January 23, 2014. In particular they complain that it was not clear in the advertisement of the public hearing that amendments to the

> DODP would be considered, and that it appeared that only amendments to the West End Community Plan were being dealt with at the public hearing.
>
> 222. The only legal requirement regarding notice of public hearings is that appearing in s. 3 and s. 566 of the *Vancouver Charter*. Those sections provide that notice of the hearing, specifying the time and place of the hearing and the place where and the times when a copy of the proposed by-law may be inspected shall be published in the newspaper on two occasions with the last publication appearing at least 7 and not more than 14 days before the date set for the public hearing. There is no requirement that notice be given of the specific amendments to the by-law that are contemplated, only that the proposed amended by-law be available for inspection.
>
> 223. The public advertising in this case clearly complied with the provisions of s. 566 of the *Vancouver Charter*. The advertisements set out that amendments to the DODP were to be considered and gave a time and place where the proposed by-law could be inspected. It is submitted that there is simply no basis for the Petitioner to object to the form of notice of the public hearing in these circumstances.

IX

[102] Brenhill made its own arguments respecting the petitioner's contention, after the close of the public hearing, that there was non-disclosure of relevant documents, and correspondence. Respecting the former, the submission is primarily a gloss on the case of *Haldorson v. Coquitlam (City of)*, 1999 CarswellBC 133, where the petitioner sought to oblige the city to keep land it owned for civic uses instead of social housing. The court there found that land sale documents need not be disclosed.

[103] For reasons I have already expressed (see para. 83 herein), I do not think more needs to be said about the acceptance of correspondence after the public hearing.

[104] Brenhill's substantively distinct submission is that even if quashing of the zoning by-law is warranted, it should not be granted because of the delay in the petitioner's bringing on its application, and the prejudice to Brenhill as a result of the delay, including expenditures it alleges total some 7 million dollars and are running at some $500,000 per month, since September 2013, the month after the DPB's approval.

[105] Brenhill relies on sections 524, 526, and 527 of the *Vancouver Charter*, which provide:

> 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.
>
> Service on city within one month
>
> 526. No application to quash a by-law or resolution, or part thereof, under this part shall be entertained unless notice of the application is served on the city within one month after the passing of the by-law or resolution complained of.
>
> Particulars to be given
>
> 527. The notice of application shall set out particulars of the illegality alleged.

[106] Brenhill submits that the text "British Columbia Planning Law and Practice" on page 2-2 is pertinent.

> These limitation periods are strictly adhered to, as the court does not consider that it has jurisdiction to hear the matter once the limitation period has expired, even though the respondent in the matter may be willing to waive their limitation defence. The short limitation periods are related to the public nature of the decisions involved in these types of legal proceedings. Local governments and citizens rely on the validity of bylaws after they are enacted, and setting them aside for illegality long afterwards can cause great inconvenience.

[107] Brenhill acknowledges that by-laws may be challenged under the *Judicial Review Procedure Act*. It notes, again quoting from "British Columbia Planning Law and Practice" at page 2-2, that the court has a discretion:

> Under the Judicial Review Procedure Act, decisions of…municipal councils and regional boards may be attacked on a variety of grounds through an application for judicial review to the B.C. Supreme Court…There is no limitation period on applications to set aside bylaws and resolutions when judicial review is sought on the basis of these more general provisions, but the Court has considerable discretion as to whether to grant a remedy if a great deal of time has passed since the bylaw was enacted or the resolution made.

[108] Brenhill cites *Meier v. Maple Ridge (District)*, [1993] 80 B.C.L.R. (2d) 349 at para. 3:

> the court must be slow to exercise the authority conferred by the Judicial Review Procedure Act when the result of doing so will be to abridge specific statutory time limits

[109] Factors Brenhill identifies as supporting refusal to grant relief include the following:

- there is a limitation period on quashing in the *Vancouver Charter,* which exists for reasons related to the specific kind of prejudice that has occurred here, and which our Court of Appeal has said should be given significant weight *(Meier)*;
- this case falls well within the principles applicable to the exercise of the Court's discretion as set out in BC Planning Law and Practice, per the eight cases referenced above;
- the substantial delay following Approval in Principle (July 23, 2013) and the Development Permit Board Resolution (August 12, 2013) and the enactment of the rezoning Bylaw (March 11, 2014) before the filing of the Petition (May 6, 2014);
- the fact that that failure to act occurred even though the Respondent Brenhill's demolition and construction activities were occurring immediately in front of the Petitioner's affiants over an extended period;
- the Respondent Brenhill has sworn that if the issue had been raised within the statutory period after the Approval in Principle and the Development Permit Board resolution, it would have considered how to address the issue at that time, rather than proceeding as it did;
- the Petitioner's delay has resulted in extreme prejudice to the Respondent Brenhill, noting its actions undertaken during the period of the Petitioner's delay, which include:
    - the termination of leases with the Montessori school and restaurant tenants;
    - demolition of numerous structures, including the premises for the Montessori school, restaurant and the Respondent Brenhill's office;
    - the purchase of replacement premises for the Respondent Brenhill's office;
    - expenditures in excess of $7 million on the foregoing, and design and site preparation work; and
    - the entering into of substantial construction contract and loan commitments.

[110] Brenhill submits that apart from prejudice to itself, there is prejudice to the residents of Jubilee House who occupy a building facing substantial "high priority deficiencies."

X

[111] The material assembled in this case is voluminous and the legal positions of the parties are somewhat involved. The questions *do* however come down to the three the City suggested:

> (a) whether there were flaws in the process respecting the 508 Public Hearing that the consequent by law should be set aside and a new public hearing ordered;
>
> (b) whether the issue of a Development permit on 1099 was flawed such that it should be struck;
>
> (c) whether the amendments to the Downtown Official Community Plan should be set aside and what its relationship is to the Zoning By-law.

[112] Standing back from the submissions, the essential question, it seems to me, is whether the City provided enough information for the public, in a form that was understandable, to fairly evaluate the pros and cons of the proposed development. Put in other terms, the issue might be described as whether the sacrifice the residents of that part of the City and the general public were expected to accept was worth the trade-off, or whether, as the petitioner appears to suspect, the net result would be, in essence, a private benefit to Brenhill at a loss to the public.

[113] What the petitioner has attempted to do is to identify a series of deficiencies having legal consequences. This is ordinarily how matters get before the court and I do not disparage the effort. But the case does not turn on which side of the case law this court applies as to whether or not the Land Exchange Contract, *per se*, is disclosed. The City may have valid reasons for not disclosing the contract, or parts of it, although I note that it resorted liberally to its terms to explain the circumstances in its submission to the court (see para. 79 herein).

[114] The real problem is evident when one reviews the package of material assembled by the City for the public hearing. The material is highly technical and organized in such a way that a large volume of information that is, at best, peripheral, interlaced with material that is vital to the issues. There is nothing that addresses the public in simple, direct terms. Rather, the material has the general

effect of allowing the public eavesdrop on correspondence between technical staff and City Council.

[115] It is obvious that the information required at a public hearing will vary with the nature of the project. Here, the City is giving up a parcel of City owned land that presently supports low income housing for a property across the street that the developer agrees to replace essentially bed for bed with a new facility. There is an allusion to an engineering report in 2009 identifying deficiencies in the old building, implying that a new building will be an advantage to the City.

[116] Certain values and estimates of value are put on the City owned property and the building cost of the new facility. These appear to be arbitrary: if they are not, there is no apparent attempt to offer objective standards from which these values have been derived. Perhaps there are none. If that is the case, however, the public has a right to know that the City has provided conclusory figures that are not objectively justified.

[117] The City takes the approach that the public hearing is essentially a chance for surrounding neighbours to express their views about the effects the building at 508 will have on them, divorced from the concerns related to 1099, which is subject to a different process, and that concerns about 1099 must be addressed apart from 508.

[118] While it is true that s. 566 of the *Vancouver Charter* (see para. 41 herein) suggests that a public hearing on a rezoning application relates to “matters contained in *the* by-law” the courts have taken a more expansive view of the range of considerations that may be relevant. Treating 508 and 1099 as distinct issues does not reflect the true substance of this particular project or the nature of the public interest involved. Residents of the City have a right to a voice in integrated projects of this kind, and a right to a fair opportunity to express themselves relative to the over-all advantages and disadvantages of the proposal. They have a right to make submissions on whether, at the end of the day, the City simply gets what it has and Brenhill gets a tower, to the overall detriment of the neighbourhood, or whether, in fact, the arrangement is a good deal, enhancing the City’s social housing and low

cost housing goals at minimal cost to those nearby. In this regard the position of the City set out in paras. 121-122 of its submission (see para. 81 herein) that "[i]t is not the role of the public at the public hearing into a rezoning to comment on or take a position on the business dealings of the City or the intricacies of its housing strategy" is unduly restrictive. The effect of the City's business dealings and housing strategy are materially represented in proposals such as the Brenhill project, and the citizens affected by it should not be limited to a narrow discussion of matters like the dimensions of the building.

[119] It should be obvious to the petitioner as well as to anyone else that the nature and complexity of such projects will almost inevitably mean that by the time a matter has reached the point where a public hearing is called, City staff and some members of council will be behind it. This is inevitable and should not be, in and of itself, grounds to be suspicious about the motives of those involved. Talk by city staff of a strong level of "in principle" approval (quoted in paras. 271-273 of the petitioner's submission, para. 91 herein) is almost unavoidable for a project to reach the point where a public hearing is required.

[120] It is, however, also obvious that, despite this, the public hearing should be a kind of counterweight, and as fair, open and transparent as the nature of the overall project dictates. To be fair, it cannot be conducted on the basis that the public will get just enough information to technically comply with the minimum requirements of a public hearing. The desire of those who have brought the project along to get past the approval stage cannot be allowed to truncate the process. A public hearing is not just an occasion for the public to blow off steam: it is a chance for perspectives to be heard that have not been heard as the City's focus has narrowed during the project negotiations. Those perspectives, in turn, must be fairly and scrupulously considered and evaluated by council before making its final decision.

[121] I have concluded in this case that the public hearing and the development permit processes were flawed in that the City has taken an unduly restrictive view of the discussion that should have been permitted to address the true nature and

overall cost/benefit of the 508/1099 project to the City and its residents. In this regard, I think the observations of Melnick J. in *548928 Alberta Ltd. v. Invermere (District)*, 28 M.P.L.R. (2d) 109, commenting on *Surfside*, at paras. 23-24, are pertinent. There, the Court considered documents that might be considered extraneous on a narrow view of disclosure and adopted a broader test of what was material:

> 23 In Surfside R.V. Resort Ltd. v. Parksville (City) (1993), 15 M.P.L.R. (2d) 296 (S.C.) at pp. 306-7, Mr. Justice Wilkinson observed:
>
> > A further requirement of procedural fairness in this province is the requirement that municipalities furnish documentation beyond that called for under the bare wording of section 956 of the Municipal Act. The requirement now includes documents:
> >
> > > (a) pertinent to matters contained in the by-law;
> > >
> > > (b) considered by council in its determinations whether to adopt the by-law;
> > >
> > > (c) *which materially add to the public understanding of the issues considered by council*.
> >
> > [emphasis added by Melnick J.]
>
> As authority, he referred to Karamanian and Paul Esposito Restaurants Ltd. v. Abbotsford (District), [1990] B.C.J. No. 1658 (12 July 1990), Vancouver Reg. A900600 (S.C.).
>
> 24 In this case, procedural fairness demanded that the respondent make available to those who were interested, including the petitioners, information concerning the development permit variance applications, even though, at the time of the public hearing on February 15, 1995, they had not been formally dealt with by council.
>
> [Emphasis added.]

[122] The process was also flawed in my view by presenting dollar values for the components of the land exchange that cannot be evaluated: it is impossible to tell whether the numbers have a real-world justification or are simply used to set up an offset that the proponents have chosen, to give the appearance of adequate consideration. In light of the scale of the zoning change and the trade-off of existing amenities for social housing, these things are more than just the City doing its "business."

[123] With the exception of this aspect of the case (the numbers), I think the court has been favoured with a more extensive and intelligible description of the project and its perceived benefits than the public got at the public hearing. I make no comment on whether I am persuaded, which has nothing to do with my task. I simply note that I think the public was entitled to an explanation that was more like what the court was given in this proceeding. The submission was a lucid and integrated explication of the factors involved in the process.

XI

[124] The question of remedy is contentious. Brenhill submits that the statutory limitation applicable to setting aside by-laws should be applied, and that the failure of the petitioner to serve the City with notice of an application for a declaration quashing the by-law within one week of its enactment is fatal to their case.

[125] All parties agree that judicial review is another way the passage of a by-law may be challenged and that such time limits do not apply, although the remedy is discretionary. I think it is the appropriate procedure in this case.

[126] I am fortified in this by the position taken by the City, which does not rely on a by-law limitation argument, although it submits that there are pertinent limits to judicial review. Section 148 of the *Vancouver Charter*, for example, provides that a by-law is not open to question on the grounds that its provisions or any of them are unreasonable. There is a presumption of validity (see: *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* (1995), 10 B.C.L.R. (3d) 121 (C.A.) at p. 144).

[127] The City has also pointed out that s. 565 of the *Vancouver Charter* sets out very few procedural requirements. It submits that the only statutory requirement is that the public be afforded an opportunity to be heard with respect to the contents of the by-law.

[128] The City has reminded the court that “while the public has a right to make its views known to Council the decision as to whether to enact a by-law, and the form that by-law will like, is left entirely to council.”

[129] That last observation – which is irrefutable – is not an argument for a minimalist reading of the City's obligations under s. 566. Rather, given Council's undoubtedly extensive powers to pass by-laws, the public should be given an opportunity to make the fullest submissions possible.

[130] The petitioner does not, in any case, attack the substance of the by-law, but the procedure leading up to the public hearing. For the reasons I have given, I think the City's limited approach to the public hearing was unfair.

[131] Whether "unfairness" meets the threshold for judicial review is, I think, answered in *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, [2013] B.C.J. No. 187 (C.A.). There, the Court of Appeal, relying on *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, found fairness to be the applicable standard in questions of procedural fairness:

> [51] I am not convinced that this attempt to apply the standard of review analysis to issues of procedural fairness is particularly helpful. The approach taken in *Moreau-Bérubé* and *Bentley* appears to me to be more easily applied. That approach is also, I think, consistent with the approach taken by the majority of the Supreme Court of Canada in analysing the procedural fairness issue in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and with the approach adopted in ss. 58(2)(b) and 59(5) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.
>
> [52] I agree with the submissions of Seaspan (with which BCFS is in substantial agreement) that the standard of review applicable to issues of procedural fairness is best described as simply a standard of "fairness". A tribunal is entitled to choose its own procedures, as long as those procedures are consistent with statutory requirements. On review, the courts will determine whether the procedures that the tribunal adopted conformed with the requirements of procedural fairness. In making that assessment, the courts do not owe deference to the tribunal's own assessment that its procedures were fair. On the other hand, where a court concludes that the procedures met the requirements of procedural fairness, it will not interfere with the tribunal's choice of procedures.

[132] The procedure the City adopted was unfairly restrictive, in presenting the public with a package of technical material that was opaque, compared to the material presented in court, in limiting comment on the integrated nature of the project, and in failing to provide an intelligible (i.e. where do the numbers come from?) financial justification for it.

[133] Accordingly, I agree with the petitioner that the appropriate order is to quash zoning By-law 10870, pertinent to 508, and the development permit pertinent to 1099 and direct new hearings on each, permitting concerned citizens to address the whole project, including the essence and value of the land exchange to the City and its residents.

[134] I also think the petitioner's concerns about the notice given concerning the amendment to s. 3.13 of the Downtown Official Development Plan are well taken. It is asking too much of residents of the City to expect them to look past advertisements that clearly identify one part of the City as the affected area, to see whether other areas have been included as well. That decision and By-law 10865 are quashed as well.

[135] I do not think it necessary in the circumstances to declare By-law 10870 inconsistent with the Downtown Official Development Plan, although clearly the issue may arise on the reconsideration. I will say that the City's suggestion that the Downtown Official Development Plan offers no restraint on zoning inconsistent with it was not wholly convincing.

[136] The petitioner is entitled to costs.

"T.M.M. McEwan"

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The Honourable Mr. Justice McEwan