N THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *3L Developments Inc. v. Comox Valley (Regional District),* 2019 BCSC 1342

Date: 20190812
Docket: S1811213
Registry: Vancouver

Between:

3L Developments Inc.

Petitioner

And

Comox Valley Regional District

Respondent

Before: The Honourable Madam Justice Duncan

Reasons for Judgment

Counsel for the Petitioner:	N.C. Preshaw D.P. Lucas
Counsel for the Respondent:	S. Manhas N. Falzon, Articled Student
Place and Dates of Hearing:	Vancouver, B.C. March 12-15, 2019
Place and Date of Judgment:	Vancouver, B.C. August 12, 2019

Introduction

[1] This petition for judicial review stems from the long-standing efforts of the petitioner, 3L Developments Inc. ("3L"), to develop a large tract of land it owns in the Comox Valley (the "Riverwood Land"). 3L's proposed development project would include a variety of residential units and commercial space, with 50% of the total area designated as park land. The Riverwood Land is adjacent to the Brown and Puntledge Rivers. The park land designation would provide public access to the two rivers and, most significantly, Stotan Falls, a local attraction. Currently, the falls are accessed by the public through the Riverwood Land via a private road.

[2] The Riverwood Land is within the Comox Valley Regional District (the "CVRD"). The CVRD is a federation of three municipalities and four unincorporated rural areas known as "electoral areas". Specifically, the Riverwood Land is located within electoral area C, commonly referred to as the Puntledge-Black Creek electoral area.

[3] The development of the Riverwood Land requires an amendment to the Comox Valley Regional Growth Strategy Bylaw No. 120, 2010 (the "RGS"). The RGS is a high level policy document, which guides the CVRD in planning for issues such as population growth and the establishment of residential settlements, also referred to as nodes.

[4] Section 428(1) of the *Local Government Act*, R.S.B.C. 2015, c. 1 [*LGA*] states that "[t]he purpose of a regional growth strategy is to promote human settlement that is socially, economically and environmentally healthy and that makes efficient use of public facilities and services, land and other resources." The development of a regional growth strategy requires public consultation and consultation with affected local governments. An RGS may be amended, but the process to do so is generally prolonged and intensive, unless the amendment falls under the minor amendment process prescribed in s. 437 of the *LGA*.

[5] 3L applied for a minor amendment of the CVRD RGS in 2014. The application was rejected (the "First RGS Refusal"). 3L applied for judicial review. On May 6,

2015, Madam Justice Burke set aside the First RGS Refusal and ordered that the CVRD consider 3L's amendment application in a manner consistent with the process set out in the RGS: *3L Developments Inc. v. Comox Valley Regional District*, 2015 BCSC 738.

[6] The respondent CVRD appealed. The Court of Appeal upheld the result, but for different reasons: *3L Developments Inc. v. Comox Valley Regional District*, 2016 BCCA 148.

[7] CVRD staff contacted 3L within weeks of the Court of Appeal's decision, to ascertain whether 3L wanted to move forward with its development proposal. 3L had discussions with CVRD staff, then "hit the pause button" before recommencing its efforts to obtain a minor amendment to the RGS in May 2018.

[8] On July 17, 2018, one level of the CVRD (the Committee of the Whole, or the "COW") voted in favour of 3L's development proposal proceeding as a minor amendment. The CVRD Board did not follow the COW's recommendation, and on July 24, 2018 voted in favour of the 3L development proposal proceeding as a standard amendment.

[9] As a standard amendment, the 3L proposal was required to proceed through several stages before it could be presented to the CVRD Board. In accordance with the standard amendment process, CVRD staff developed a consultation plan and informed local stakeholders, received further information from 3L and held a public open house at which 3L presented on the project. The 3L proposal proceeded through these stages with the goal of a CVRD vote on first reading of the proposed standard amendment at a CVRD Board meeting on October 2, 2018.

[10] On September 28, 2018, the CVRD Steering Committee, whose role was to provide advice to the CVRD Board, published its report, recommending against the standard amendment. 3L felt it had not received sufficient time to respond to the Steering Committee's report in advance of the October 2 vote and tried,

unsuccessfully, to have the first reading vote removed from the October 2 agenda before the meeting convened.

[11] At the meeting on October 2, 3L asked in writing for an adjournment or deferral of consideration of the first reading of the standard amendment. The CVRD Board refused 3L's request and voted against the standard amendment.

The Issues on Judicial Review

[12] The petitioner applies for judicial review of the CVRD's actions, seeking the following relief:

(a) a declaration that the CVRD's July 24, 2018 decision to deny 3L's minor amendment application is unreasonable and an order setting it aside;

(b) a declaration that the CVRD Board breached the rules of procedural fairness and natural justice by failing to provide 3L with sufficient notice of the RGS Steering Committee Report of September 28, 2018 in advance of the October 2, 2018 meeting;

(c) an order setting aside the decision of the CVRD at the October 2, 2018 meeting to deny 3L's application to amend the RGS;

(d) a declaration that the CVRD's October 2, 2018 decision to deny 3L's extension application, withdrawal application and/or amendment application are unreasonable and/or were made in bad faith;

(e) a declaration that the CVRD Board contravened ss. 89 and 90 of the *Community Charter* at the October 2, 2018 Board meeting by conducting a portion of the meeting in camera;

(f) a declaration that the CVRD Board breached the rules of procedural fairness and natural justice by failing to properly consider 3L's request

for an extension to its amendment application at the October 2, 2018 Board meeting;

(g) a declaration that the CVRD Board breached the rules of procedural fairness and natural justice by failing to properly consider 3L's request to withdraw its application at the October 2, 2018 meeting;

(h) a declaration that the conduct of the CVRD and its Board between mid-2013 and October 2018 in relation to the amendment application gives rise to reasonable apprehension of bias;

(i) an order that 3L's amendment application be remitted to the Board for consideration without the imposition of a date certain; and

(j) costs.

[13] The respondent, the CVRD, maintains that it followed the procedure mandated by the Court of Appeal and the applicable legislation and conducted all of its dealings with 3L in good faith. The outcomes of the CVRD Board votes were within a range of reasonable outcomes and the petitioner's allegations concerning bias are without foundation.

The Petition Record

[14] The petitioner's allegations concerning a reasonable apprehension of bias span a wide date range and necessitate a detailed examination of the parties' interactions over a number of years.

2007 to May 2013: The Genesis of 3L's Efforts to Develop the Riverwood Land

[15] In 2007, 3L's development manager, Kabell Atwall, discussed the development of the Riverwood Land with Carlos Felip, a staff member of the CVRD's local government predecessor, the Comox Strathcona Regional District (the "CSRD"). Mr. Atwall and Mr. Felip discussed the development of the Riverwood

Land into .5 acre lots with some seniors' housing and not less than 50% of the land as park land.

[16] Events overtook 3L's initial efforts concerning the Riverwood Land when the CSRD was subsumed by the CVRD in 2008. The CVRD adopted its RGS in 2010, which placed the Riverwood Land in an area designated a Rural Settlement Area ("RSA"). The RSA in which the Riverwood Land is located did not include settlement nodes, or areas of dense housing. The RSA permitted housing on much larger lots than the .5 acre lot minimum that had applied earlier. Thus, 3L was required to take steps to change the designation of the Riverwood Land if it wanted to proceed with its development.

[17] At that time, the RGS provided:

> **5.2 Amendments to the RGS**
>
> **1. Standard Amendments**
>
> An amendment to the RGS, other than those considered to be a minor amendment, is considered a standard amendment and will follow the same process that is required to adopt a RGS as set out in *Part 25 of the Local Government Act*.
>
> **2. Minor Amendments**
>
> Recognizing that the RGS will require some flexibility to respond to changing conditions in the region, the minor amendment process will provide a more streamlined amendment process for minor changes, while ensuring that amendments which substantially change the vision and direction of the strategy remain subject to acceptance by all affected local governments.
>
> …
>
> **3. Criteria for Minor Amendments**
>
> Criteria under which a proposed amendment to the RGS may be considered a minor amendment include the following:
>
> a. Where a land use or development proposal is inconsistent with the Regional Growth Strategy, and, in the opinion of the CVRD Board:
>
> • is not to be of regional significance in terms of scale, impacts or precedence;
>
> • contributes to achieving the goals and objectives set out in Part 3; and,
>
> • contributes to achieving the general principles contained in the growth management strategy Part 4.

b. Text and map amendments which are not directly related to enabling specific proposed developments may be considered minor if, in the opinion of the Board, the amendment is not of regional significance.

c. Boundary extensions for the purposes of incorporating designated Settlement *Expansion Areas* into a *Municipal Area*, consistent with MG Policies 1E-1 through 1E-6, shall be deemed in conformity with the RGS and not require either a minor amendment or standard amendment. …

d. For boundary extensions beyond the *Settlement Expansion Areas*, an RGS amendment will not be required….

e. Any proposal that does not meet the criteria set out above would be considered a standard amendment and will be required to follow the regular process as outlined in the *Local Government Act*, Part 25.

4. Minor Amendment Process

Minor amendments may be applied for by a member municipality, the regional district, external agency, **private land owner or developer**. **Once a minor amendment application has been received, the process for review and adoption is as follows:**

• Upon receiving a minor amendment application, **the CVRD will set up a Technical Advisory Committee (TAC) meeting** for review and discussion of the application and provide comments to CVRD staff.

• On receipt of an application with comments from the technical advisory committee, **CVRD staff will prepare a preliminary report for review by the RGS steering committee**. Steering committee comments and recommendations will be forwarded to the CVRD Board to assist in its decision on whether the application should be processed as a minor amendment.

• **The CVRD board will assess any proposed amendment in terms of the minor amendment criteria**. The Board **may** resolve, by an affirmative vote of 2/3 of the board members present, to proceed with an amendment application as a minor amendment. **Where the Board resolves to proceed with an amendment** application **as a minor amendment**, the Board will:

- Refer the application to TAC for comment.
- Determine the appropriate form of public consultation required in conjunction with the proposed minor amendment.
- Give 30 days written notice to each affected local government, including notice that the proposed amendment has been determined to be a minor amendment….
- Direct staff to prepare a report on the minor amendment with an analysis that examines the benefits of the proposed change, and how the proposed change is consistent with the principles and goals of the RGS and the relationship between targets and performance measures.

> • Consider the written comments provided by the affected local governments prior to giving first reading to the proposed amendment bylaw.
>
> • At the time of consideration of first reading, the Board will determine whether a public hearing on the RGS minor amendment bylaw is required.
>
> • Any minor amendment bylaw shall be adopted in accordance with the procedures that apply to the adoption of a RGS under section 791 of the *Local Government Act* and Comox Valley Regional District Procedure Bylaw No. 1, 2008.
>
> [Emphasis added]

[18] In May 2013, 3L applied to the CVRD seeking a minor amendment to the RGS to create a new settlement node in the Riverwood Land to enable smaller lot sizes.

July 2013 to May 2014: The Human Rights Complaint

[19] In July 2013, Mr. Atwall believed that Edwin Grieve, a member of the CVRD Board and its Chair from 2010 to 2015, told people he would not support any developments or applications by 3L for reasons based on race. In an affidavit sworn for this petition, Mr. Atwall deposes:

> In or about July 2013, I learned that Mr. Grieve had told a number of people at the CVRD that he would not support any developments or applications sought by 3L Developments because he refused to be "directed by an East Indian". As I am of Indian descent, I interpreted these comments to be referring to myself.

[20] On December 6, 2013, Mr. Atwall filed a human rights complaint against the CVRD Board, Mr. Grieve and Deborah Oakman, the Chief Administrative Officer of the CVRD.

[21] Mr. Grieve categorically denied, in both this proceeding and at the time the allegations first arose, making any racially discriminatory statements about Mr. Atwall.

[22] Mr. Atwall's complaint was settled in May 2014 without a hearing and without any admission of liability. The settlement specifically stated that it was a compromise made by the respondents as a matter of business efficacy and liability was expressly

denied. The settlement provided that the CVRD would pay Mr. Atwall a lump sum of $15,000 as compensation for injury to dignity, feelings and self-respect. The parties agreed to keep the settlement confidential.

[23] Further, the settlement provided that Mr. Grieve and Ms. Oakman would recuse themselves from any further involvement with the Riverwood Land and would refrain from discussing it or any applications respecting it with other members of the Board. Mr. Grieve would select an alternate director acceptable to Mr. Atwall to hear applications related to the Riverwood Land and the CVRD agreed to set up internal safeguards to ensure that Mr. Grieve had no further involvement. The CVRD was to advise counsel for Mr. Atwall of the internal safeguards established to ensure that Mr. Grieve and Ms. Oakman had no further dealings with the Riverwood Land.

[24] Curtis Scoville was proposed as Mr. Grieve's alternate and Mr. Atwall consented. The CVRD sent a copy of the internal safeguards to Mr. Atwall's lawyer.

August to September 2014: Mr. Grieve Breaches the Settlement Agreement

[25] The petitioner alleges that Mr. Grieve and the CVRD did not abide by the terms of the settlement agreement because on August 11 and September 29, 2014 Mr. Grieve attended meetings and was involved in discussions concerning Bylaw 337, 2014, a draft bylaw to amend the Rural Comox Official Community Plan. The bylaw called for a change to permitted density and community amenity contribution frameworks for subdivision in the Rural Settlement Areas, including the Riverwood Land.

[26] Mr. Grieve concedes he was involved in this bylaw process, but deposes that he did not understand the settlement agreement precluded him from becoming involved in the process related to Bylaw 337. The CVRD addressed the issue by exempting the Riverwood Land from the scope of the bylaw.

[27] Mr. Grieve's involvement in the CVRD ended in 2015 and he was not involved in 3L's second effort at securing an amendment to the RGS after the Court of Appeal judgment.

June 2014 to April 2016: The First RGS Refusal and Judicial Review

[28] The next development of note was on June 24, 2014, when the CVRD rejected 3L's first minor amendment application. 3L applied for judicial review of the process implemented by the CVRD and sought two orders: 1) that the CVRD conduct the steps referred to in s. 5.2.4 of the RGS to determine whether its proposed amendment was a minor amendment and 2) that the CVRD must submit 3L's application to the Technical Advisory Committee and Steering Committee before considering a resolution to initiate the amending process.

[29] The CVRD took the position that an initiating resolution was a precondition to proceeding with a review of an application under s. 5.2.4.

[30] 3L was successful on judicial review. Burke J. determined that the CVRD could not refuse to commence the process in s. 5.2.4 and that a resolution of the CVRD Board was not required in order to initiate the process of considering a minor amendment to the RGS.

[31] The CVRD appealed. Willcock J.A., for the Court, held that an amendment to a regional growth strategy must be initiated by a Board resolution, disagreeing with Burke J. on that point. He explained:

> [37] As the Regional District argues, if an application alone is sufficient to compel the Regional District to address the proposed amendment, as if the amendment process had been initiated by resolution, then significant resources will be expended assessing the merits of applications without the support of any municipality or district. Such an assessment would presumably include the comprehensive consultation steps described in s. 855(2). It is not necessary to read the *Act* in such a manner as to impose that burdensome obligation upon local government; that is not the framework that the RGS sets out. While the Regional District, in approving the RGS, has resolved to take some steps on receiving an application for a minor amendment, it has not resolved to undertake an examination of proposed amendments on their merits. It has resolved to assess such applications in light of the criteria for

minor amendments with a view toward considering a resolution to proceed with an amendment application as a minor amendment.

[38] In my view, the RGS may be read in a manner that is consistent with the conclusion that amendments must be initiated by resolution. That is, as suggested by 3L Developments, by reading the process set out in s. 5.2.4 of the RGS to be a preliminary examination of the application. The section itself speaks of a resolution to proceed with an amendment as a step that follows reference to the Technical Advisory Committee, the Regional District Staff and the RGS Steering Committee. Those committees are not, ultimately, charged with the task of investigating the merits of the proposed amendment, but simply with determining whether an amendment is a minor amendment or not, having regard to the criteria the Regional District has adopted. There is no reason to read into the enactments setting out the process, as the Regional District suggests we do, a requirement to pass three resolutions: one to initiate the amendment; a second to proceed after the procedure described in s. 5.2.4; and a third after consideration of the proposal on its merits. The Act identifies only two resolutions: one to initiate the amendment and a second to accept a proposal after consultation. In my view, it is correct to consider the initiating resolution to be that which follows the preliminary assessment described in s. 5.2.4.

[39] Reading s. 5.2.4 of the RGS as a description of a preliminary assessment, to be conducted before a resolution, is more consistent with a plain reading of the words of the section, which require the Regional District to take steps "once a minor amendment application has been received for consideration". Doing so makes it unnecessary to read into the RGS the words suggested by the Regional District: "once a minor amendment has been initiated by resolution and received for consideration". There is nothing in Part 25 of the *Act*, having regard to its scheme and purpose, which would seem to import special meaning to the word "received". An amendment application is received when an applicant submits it, and not when a Board resolution sets any process in motion.

[40] Nor is reading s. 5.2.4 in this manner inconsistent with the *Local Government Act*. The Regional District submits that s. 857.1 of the *Local Government Act*, as it stood at the time of 3L Developments' application, did not authorize exceptions to the requirement of a board resolution initiating the preparation of an amendment (under s. 854), or to the consultation requirement of consultation (under s. 855). The Regional District submits the sections permitting the adoption of an abridged process for minor amendments address only the processes of acceptance and adoption of such minor amendments. It argues that by explicitly permitting regional districts to vary the approval process in relation to minor amendments, the *Act* implicitly precludes them from altering the *initiation* process. I would not accede to that argument. By adopting provisions for a preliminary review that do not entail an examination of the merits, the Regional Government has not abridged or detracted from the amendment process prescribed by the *Act*. Neither a plain reading of the *Act* nor public policy precludes regional districts from establishing procedures for preliminary consideration of amendment requests, so as to determine whether an abridged approval process will be available, if a resolution to initiate a proposed amendment is passed.

> [41] I would not accede to the Regional District's argument that to require it to take the preliminary steps set out in s. 5.2.4 before rejecting an application for a minor amendment improperly fetters the discretion of a local government. Nor would I accede to the argument that the Regional District cannot be compelled by order to follow the process described in the RGS. Both arguments are founded upon the proposition that it is in the hands of the Regional District to determine, on a discretionary basis, how and when it will consider applications for amendments to the RGS. In my view, 3L Developments is correct to say the Regional District cannot adopt a means of dealing with applications made under s. 5.2.4 other than that set out in the RGS. The *Act* clearly calls for a process to be agreed to by the municipal members of the Regional District and precludes amendments to that process (other than in circumstances that are not applicable here) except with the agreement of all of the members of the Regional District. Here, the Regional District's members have agreed to implement the amendment application process described in s. 5.2.4. Unless and until its members amend the terms of that process, in accordance with the terms of the *Act*, the Regional District is bound to follow the processes it has adopted for itself.

April to May 2016: Post-BCCA Judgment Developments

[32] On April 20, 2016, two weeks after the release of the Court of Appeal's judgment, Ann MacDonald, the General Manager of Planning and Development Services Branch, wrote to 3L to advise that in accordance with the BCCA decision the CVRD would keep 3L apprised of the next steps to move forward. Ms. MacDonald sought confirmation that 3L wanted the CVRD Board to consider its RGS amendment application. Upon receipt of confirmation, Ms. MacDonald would prepare an estimated fee structure in accordance with the relevant CVRD bylaw as well as a detailed assessment of next steps and some outline of expected timing.

[33] On May 17, 2016, CVRD staff met with 3L to discuss the amendment application and advised 3L that once it confirmed it wanted to go ahead, staff would provide a detailed overview of the process and likely timing for consideration. Ms. MacDonald and Alana Mulally, the Assistant Manager of Planning at that time, attended the meeting on behalf of the CVRD.

The "Frosty Friday in Hell" Allegation

[34] The petitioner alleges that at a meeting in June or July 2016, Ms. MacDonald told 3L representatives that it would be "a frosty Friday in hell" before the CVRD would approve the proposed development of the Riverwood Land. The CVRD's

Chief Administrative Officer, Russell Dyson, read about the allegation in an advertisement in the local newspaper in December 2017. I will return to the "frosty Friday" issue later in these reasons.

May 2016 to May 2017: Meetings and Correspondence

[35] Between the May 17, 2016 meeting and April 3, 2017, CVRD staff periodically followed up with 3L to seek confirmation that it wished to have the CVRD proceed with consideration of the RGS amendment application.

[36] On April 3, 2017, 3L wrote to the CVRD to inquire about having its proposed development considered as part of the five-year review of the RGS. 3L complained about not having been notified of an open house that had taken place in March concerning the five-year review and emphasized how important the Riverwood Land was and, in particular, how beneficial the park portion of its proposal would be.

[37] On April 11, 2017, the CVRD Chair Bruce Jolliffe responded in writing, advising 3L that the CVRD had advertised the open house and sent letters to agencies and local governments. Mr. Jolliffe asked if 3L's statements in its April 3 letter were an indication that it wanted to proceed in its application for a minor amendment to the RGS and asked that 3L contact Ms. MacDonald.

[38] On May 8, 2017, 3L met with Ms. MacDonald. It appears from the email confirming the outcome of the meeting that Ms. Mullaly was likely present as well. The email confirms the discussion with 3L that it had two options:

> 1. Apply to rezone the property to allow for lots between 4-20 hectares, and possibly include a negotiated combination of park land dedication and sale of land for park purposes, or full dedication, depending on size of the park,
>
> 2. Proceed with your application to amend the RGS, in accordance with the process outlined in our discussion.

[39] Ms. MacDonald noted that the timeline for the five-year review was tight if 3L aimed to have its application reviewed as part of this process. The email was courteous and professional in tone.

July 2017: 3L Puts its Redevelopment Efforts on Hold

[40] There was further correspondence between CVRD staff and 3L concerning the five-year review process, but on July 7, 2017, 3L formally requested that consideration of its amendment application be put on hold so it could understand the process and provide additional information. 3L referred to the timeline set out in Ms. MacDonald's May 8 email and queried several elements of it, specifically the role of the Technical Advisory Committee ("TAC")and Steering Committee and the timing of their respective reports.

[41] In the letter, David Dutcyvich, the President of 3L, expressed hope in the letter that processes were not being amended "on the fly" in order to make a hasty decision on the application. He stated that 3L would contact the CVRD when it was ready to proceed.

July to December 2017: 3L and Mr. Dyson Discuss Options

[42] Mr. Dyson deposes that between July 7 and December 21, 2017, 3L corresponded and held meetings with CVRD staff. The gist of the information conveyed to 3L was that the process of considering an amendment to the RGS would be a lengthy one, given the consultation requirements under the *LGA*. Since Mr. Dyson would be responsible for overseeing the amendment process, he met with 3L in October 2017 to discuss it.

[43] At the October meeting, Mr. Dyson advised 3L that:

> (1) the CVRD wanted to proceed with consideration of 3L's RGS amendment application in accordance with the reasons of the Court of Appeal;
>
> (2) the process for consideration would be lengthy because of the requirements for consultation under the *LGA*; and
>
> (3) the decision on whether to approve the application was the CVRD Board's, not that of CVRD staff.

[44] Mr. Dyson maintains that he did not tell 3L that the CVRD would expedite consideration of the amendment application. He was not authorized to do so because the timing of the consideration of the amendment application was in the hands of the CVRD Board.

December 2017: Mr. Dyson Becomes Aware of the "Frosty Friday" Allegation

[45] Mr. Dyson deposes that, while 3L was somewhat critical of Ms. MacDonald, in his view the criticisms were consistent with those made by other applicants who are unsatisfied with the planning staff's processing of a development application. Then, in December 2017, Mr. Dyson saw an advertisement in the local newspaper where 3L alleged that Ms. MacDonald had made the "frosty Friday" comment.

[46] 3L maintains that it had drawn the "frosty Friday" comment to Mr. Dyson's attention in a letter dated November 16, 2017, in advance of the newspaper advertisement. The following passages from that letter provide some context:

> Thank you for your letter dated November 6, 2017. Unfortunately, this letter does not reflect what you and I had discussed in our meeting. The letter only reiterated the position held by Ms. Ann MacDonald for the past few years. We were hoping this letter would assist us in resolving the issue.
>
> As I indicated in our meeting, I was expecting that the Regional District would honour its commitment to have the property developed in exchange for 50% of the property being dedicated as park. When I left the meeting, I thought that you and I had agreed to move forward on this in a positive manner. To that end, we supplied you with all of our studies and the basis of our rezoning application. We moved forward with the requested information and discussions with the understanding that we were finding an avenue towards resolution.
>
> We are finding it difficult to pursue the development when comments are made such as "Frosty Friday in hell, before our application is approved" and again, we hoping [sic] the letter would move away from prior feelings between Mr. Grieve and Ms. MacDonald towards Mr. Atwall and our wishes to develop the property for the benefit of the community.
>
> …
>
> We hope that the Regional District and Ms. MacDonald are not going through a lot of effort to prevent the creation of the park and the development. It has gone to court twice and the Human Rights Tribunal once and lost in every instance. If it had honoured its commitment, all of this could have been prevented. This can all be prevented by having common sense prevail, without further costs to either party for continuous court actions.
>
> I would suggest that Regional District honour its commitment to avoid us having to pursue other options.

[47] Mr. Dyson, in an affidavit, observed that the letter did not attribute the "frosty Friday" comment to Ms. MacDonald and if it had, he would have addressed it with her at the time. Mr. Dyson spoke with Ms. MacDonald in December 2017, when he

saw the comment in the newspaper advertisement because she reported to him and had been involved in processing 3L's amendment application.

[48] There is no affidavit from Ms. MacDonald in the petition materials, but Mr. Dyson deposes that she was offended by the comment, denied making it and wanted to respond. Ms. MacDonald spoke to the local newspaper that had published the advertisement and provided her denial. She left the employ of the CVRD on April 10, 2018 and was not thereafter involved with the processing of 3L's amendment application.

[49] Ms. Mullaly deposes that she has reviewed her own notes and Ms. MacDonald's notes from April through October 2016, and could only find one meeting in that timeframe between Ms. MacDonald and 3L – the May 17, 2016 meeting. Ms. Mullaly was present and does not recall Ms. MacDonald making the "frosty Friday" comment.

May 2018: 3L Reactivates its Efforts to Obtain an Amendment to the RGS

[50] In early 2018, 3L advised CVRD staff that it did not wish to proceed with the CVRD Board considering the amendment to the RGS because it wanted to submit additional information in support of the amendment.

[51] On May 22, 2018, Mr. Atwall met with CVRD staff Ms. Mullaly (now the acting General Manager of Planning and Development Services) and Sylvia Stephens (Branch Assistant of Planning and Development Services) to discuss the amendment. Mr. Atwall said he would submit an updated copy of the 2013 RGS amendment application by May 25.

[52] The CVRD notes of that meeting state:

> CVRD staff suggested that the new application be a complete application and also advised of the following outline for a minor RGS amendment per the RGS bylaw:
>
> > -Technical Advisory Committee (TAC), comprising planning staff from all participating RGS member municipalities and the CVRD, will prepare a staff report.

> -Steering Committee comprising CAO's from the same member municipalities including the CVRD, will review the staff report and prepare for the CVRD Committee of the Whole (COW) with the option to initiate/or not the RGS amendment and then to decide whether the application is a minor or standard amendment.
>
> -With a Board decision to initiate the RGS amendment, then a notice to affected local governments (e.g. member municipalities and adjacent regional districts) would be sent out and comments received.
>
> -TAC to prepare a draft bylaw for approval.

[53] At this meeting, Mr. Atwall advised that 3L wanted the CVRD Board to consider the amendment application before local government elections which were to be held that October. He was informed that the last Board meeting before the October 20 election was scheduled for October 2, 2018. The earliest COW meeting to start the application process would be July 18, with a possible Board decision regarding initiation and the type of amendment required on July 24, 2018. Staff also noted that if the Board decided on a standard amendment, the process would take much more to complete and would not be complete by October.

[54] The notes also disclose that Mr. Atwall stated that if the decision of the Board was to initiate a minor amendment to the RGS, 3L would be willing to remove the gate and toll on its private road and allow public access to Stotan Falls. This "carrot and stick" overture was rejected. The staff responded that the property is private land and therefore the issue of public access was for the owner to decide and was unrelated to the RGS amendment application.

[55] CVRD staff was to confirm the number of votes required at the upcoming Board meeting to move the matter ahead as a minor amendment and 3L committed to submitting its updated application by May 25, 2018.

[56] 3L sent its application to Ms. Mullaly on May 25, 2018. It comprised of a one-page letter accompanied by a ten-page "Riverwood Vision" document, which explained how the proposed development was in accordance with the RGS. It also included a Sustainability Matrix and a plan of the property, which outlined the park land dedications and the area slated for development. The application did not

include two reports that 3L had obtained in 2009 concerning traffic and wildlife issues. I will return to those reports later in these reasons.

June to July 2018: The TAC and the Steering Committee are Formed

[57] In response to 3L's updated application, the CVRD struck the RGS TAC and Steering Committee to investigate and provide advice to the CVRD concerning whether the amendment application met the criteria in the RGS as a minor amendment.

[58] The TAC was comprised of senior planning staff of the CVRD (Ms. Mullaly), the Village of Cumberland (Judith Walker, then Ken Rogers after early September 2018), the Town of Comox (Marvin Kamenz) and the City of Courtenay (Ian Buck).

[59] The Steering Committee was made up of the chief administrative officers of the CVRD (Mr. Dyson), the Village of Cumberland (Sundance Topham), the Town of Comox (Richard Kanigan) and the City of Courtenay (David Allen).

[60] Both the TAC and the Steering Committee determined that the amendment application did not meet the criteria in the RGS for a minor amendment and that if the CVRD wished to proceed with consideration of the amendment, it should be treated as a standard amendment. Rather than providing comments, as required by the RGS procedure, the TAC made recommendations to the Steering Committee.

[61] On July 5, 2018, CVRD staff prepared a report for the Committee of the Whole (the COW), advising of the Steering Committee's recommendation and the parties who were entitled to notice of initiation of the amendment. 3L was provided with a copy of the July 5 recommendations.

July 2018: The COW Meetings

[62] The COW met on July 10 to consider the July 5 Steering Committee report. The COW also considered whether a minor amendment process could be utilized, notwithstanding the staff recommendations. 3L was present and supported the minor amendment process. A motion to proceed with a minor amendment was defeated.

However, the following day 3L informed CVRD staff that the staff report had erroneously stated that a unanimous vote of the CVRD Board was required to proceed under the minor amendment process and that this may have affected the vote.

[63] On July 13, CVRD staff responded by preparing a report for the COW advising that the Chair of the CVRD required the COW to reconsider the minor amendment motion. This required the TAC and the Steering Committee to reconfirm its earlier recommendations that the standard amendment procedure be followed, which was done by July 17.

[64] The COW met again on July 17 and reconsidered the minor amendment motion. The vote was 5-3 in favour. There was further confusion about whether the minor amendment required a two-thirds majority or a simple majority, but ultimately the minutes reflect that the motion supporting the minor amendment was carried on the basis of a simple majority.

July 2018: The Aftermath of the COW Vote

[65] On July 17, 3L met with CVRD staff, Mr. Dyson and Ms. Mullaly, and expressed concern about the likelihood that the CVRD Board would proceed on the basis of a standard amendment, notwithstanding the COW's vote in favour of a minor amendment. The concern was based in part on the length of time a standard amendment would take. Mr. Dyson deposes:

> At that meeting, we:
>
> (a) Discussed with 3L Developments a number of scenarios for a standard amendment process, fulsome and expedited, as well as a scenario for a minor amendment process;
>
> (b) Provided 3L Developments with a schematic that illustrated both what a regular standard amendment process could look like and its timing and what an expedited standard amendment process could look like and its timing;
>
> (c) Cautioned 3L Developments that, if a minor amendment process was used, the perception that the RGS Amendment Application was being expedited at the expense of public consultation and consultation with the Regional District's member municipalities, might negatively impact the Regional Board's consideration of the RGS Amendment Application.

> (d) Indicated to 3L Developments that, if the Regional Board was agreeable to adopting an expedited standard amendment process, an expedited standard amendment process might not take much more time than a minor amendment process; and,
>
> (e) Advised 3L Developments that whether the Regional Board would consider the Amendment using a minor amendment process (which was the recommendation of the Committee of the Whole, [sic – no closed parentheses], a regular standard amendment process, or an expedited standard amendment process was solely within the discretion of the Regional Board, and was not the decision of Regional District staff.
>
> [Emphasis added]

[66] Mr. Dyson and Ms. Mullaly both depose that they did not commit to the use of an expedited standard amendment process, nor could they, as they were CVRD staff and the decision as to process lay with the CVRD Board.

July 2018: Mr. Scoville's Email Comments

[67] On July 23, 2018, Mr. Scoville, a CVRD Board director who had participated in both of the COW votes, sent an email to a constituent. The email was then posted on Facebook. Mr. Scoville wrote:

> Thanks for your letter Donna.
>
> I will continue to oppose the motion for a minor amendment as I did on July 10th and 17th.
>
> I appreciate your support to add to my case when I speak to the board tomorrow. I will be more outspoken against the motion than I was on the 17th.
>
> I'm receiving numerous other letters of support and I'm glad to see so much engagement during the summer months, which is unfortunate timing for such an important matter.

[68] Mr. Scoville deposes that he had not at that time made a decision on the merits of the amendment. He had voted in favour of recommending that the amendment be initiated, but he felt it was of a significant nature and warranted a full public consultation process. He deposes that he did not believe the minor amendment process would provide sufficient public consultation.

July 24, 2018: The CVRD Board Meeting

[69] On July 24, the CVRD Board met to consider the proposed amendment to the RGS and the minor amendment process supported by the COW. Representatives of

3L were present and spoke in favour of the minor amendment process. According to Mr. Atwall, the CVRD staff also presented on the possibility of an expedited standard amendment process.

[70] Mr. Dyson deposes that while representatives of 3L spoke in favour of a minor amendment, they also favoured the spectrum of public engagement, including an open house and public hearing.

[71] The Board, including Mr. Scoville, voted against the minor amendment process with the result that the amendment to the RGS would have to proceed as a standard amendment.

July to September 2018: Consultation Begins

[72] The initiation of the standard amendment by the Board triggered the requirement for a consultation plan. CVRD staff informed 3L of this requirement on July 25 and by August 8 the staff had prepared a report. 3L received a copy on August 10.

[73] The report recommended that the CVRD Board adopt a consultation plan that was consistent with a regular standard amendment process, rather than an expedited one, given the significance of the change to the RGS. The staff recommended that full public consultation was appropriate. The plan recommended a variety of opportunities for consultation before the amendment went to the Board for first reading on October 2:

> -information and updates on the CVRD website;
>
> -opportunity for 3L to meet with the TAC and Steering Committee to present about the proposed development and discuss the process for consideration of the amendment
>
> -a public open house, with 3L in attendance with an opportunity to present on the project and in support of the amendment;
>
> -a further meeting of the TAC and Steering Committee to provide recommendations to the CVRD Board concerning the amendment.

[74] The CVRD Board largely adopted the staff recommendations concerning the contents of the consultation plan and CVRD staff began to notify interested parties,

such as local First Nations governments, who were provided with letters that included the CVRD's website, which is where further information would be posted. The date of October 2 was publicized as the date the CVRD Board would vote on first reading of the standard amendment to the RGS.

[75] Other steps in the consultation plan were subsequently implemented, including:

> -an August 28 meeting between 3L and the TAC and Steering Committees;
>
> -a September 6 public open house with 200 members of the public in attendance and 3L presenting on the development; and
>
> -two meetings of the TAC, September 12 and 20, to review the amendment application.

September 2018: 3L's 2009 Reports are Provided to the TAC

[76] Mark Holland, the president of Holland Planning Innovations, wrote to Ms. Mullaly on September 13 on behalf of 3L. He outlined a concern that members of the public might believe there was an option to have the Riverwood Land remain pristine if a development was not approved, when in fact the land was privately owned. Mr. Holland wrote that the owner's intention, absent development approval, would be to pursue resource extraction to realize the value in the land, or to sell large estate lots which would continue to preclude public access to the rivers and Stotan Falls.

[77] Mr. Holland also included with his letter two studies from 2009, a transportation assessment and an ecology and wildlife report, both of which reflected positively on the proposed development of the Riverwood Land. The reports were stamped received by Ms. Mullaly on September 19, 2018 and were considered by the TAC in its report to the Steering Committee of September 26, which confirmed the TAC recommendation that the amendment application be denied. As noted earlier in these reasons, those reports had not been included with the materials submitted by Mr. Atwall on May 25, 2018.

September 2018: The Steering Committee Says "No"

[78] The Steering Committee met on September 27 to review the TAC report of September 26. The Steering Committee recommended that the amendment be denied. A copy of the report was made available to 3L on September 28.

[79] Mr. Holland wrote a letter to the CVRD Board of Directors, which was received on September 28. He emphasized the positive aspects of the development and the downside of rejecting it. Mr. Holland reiterated the alternative to the Board approving the proposal was not to leave the lands "as is", but rather to pursue aggressive rural and resource uses and private ownership in perpetuity.

[80] On October 1, 3L wrote to CVRD staff asking that consideration of the amendment be deferred (extended) to allow 3L to provide further information in support of the amendment. The CVRD staff advised that only the Board had the power to grant the extension. As the agenda for the October 2 meeting had been published, staff prepared a report for the Board with three options to deal with the request: (1) defer (extend) consideration of the amendment, (2) give first reading to the amendment or (3) deny the amendment.

October 2, 2018: The CVRD Board Meeting

[81] At the October 2 meeting, the Board approved several delegations and received the report of the Steering Committee as well as the staff report advising the Board of its three options concerning 3L's request to defer or extend consideration of the amendment.

[82] Mr. Holland was given an opportunity to present information about 3L's application to amend the RGS and other members of the public in favour and opposed were heard. 3L also renewed its request for an extension or deferral.

[83] Larry Jangula, a CVRD Board member, deposes that he believes he moved to defer consideration of the amendment application, in light of the fact that local elections were coming up later that same month. He also deposes that deferrals,

extensions or withdrawals were not uncommon, and that parties seeking to withdraw a motion were permitted to do so when he was a Board member.

[84] The minutes of the meeting do not reflect a motion by Mr. Jangula to defer consideration, which would require another member of the Board to second the motion. In the absence of a motion, there was no debate by the Board on 3L's deferral or extension request.

[85] Director Price moved that the amendment be denied. Director Sproule seconded the motion. Director Eriksson raised a point of order regarding the motion to deny, but the Chair ruled the motion was in order. No appeal was taken of the Chair's ruling and debate on first reading of the standard amendment continued.

[86] As the Board was debating the denial motion, 3L submitted a letter dated October 2 to the Board, requesting to withdraw the amendment application. The Board had never before received a request to withdraw an application which was under consideration at a meeting.

[87] CVRD Board Chair Joliffe recessed the Board meeting to discuss the unusual procedural issue with Board Vice Chair Wells and CVRD staff. They determined that the withdrawal request was at their discretion as the denial motion was already under debate. They rejoined the meeting and CVRD staff advised the Board, 3L and the public that 3L's request to withdraw the amendment application was at the discretion of the Board. The Board continued its consideration of the motion to deny the amendment application.

[88] A majority of the Board voted that 3L's application to amend the RGS be denied, with Directors Eriksson, Grant, Theos and Jangula opposed.

The Petition Issues

[89] I will deal with the petitioner's argument concerning a reasonable apprehension of bias before moving on to the complaints about the July 24 and October 2, 2018 meetings.

A. Does the conduct of the CVRD and its Board give rise to a reasonable apprehension of bias against 3L?

[90] The petitioner's argument concerning a reasonable apprehension of bias rests on a number of factors.

1. The "frosty Friday" comment

[91] As referred to earlier in these reasons, the petitioner alleges that Ms. MacDonald told 3L representatives in June or July 2016 that it would be a "frosty Friday in hell" before their development would be approved.

[92] 3L alleges the comment was made in June or July 2016. Ms. Mullaly's records indicate that the only meeting of record between Ms. MacDonald and 3L representatives was on May 16, 2016 and that Ms. Mullaly was present. She recalled no such comment as alleged by 3L.

[93] Ms. MacDonald followed up on that meeting with an email to Mr. Atwall that was courteous and professional in tone and content. 3L did not complain to Mr. Dyson or anyone else at the CVRD about the alleged comment until the letter of November 16, 2017, eighteen months later.

[94] The November 16 letter did not attribute the frosty Friday comment to Ms. MacDonald. It simply stated that 3L was finding it difficult to pursue the development when comments such as "Frosty Friday in hell, before our application is approved" had been made. It made a vague reference to the prior sentiments of Mr. Grieve and Ms. MacDonald towards Mr. Atwall, but nothing more specific than that.

[95] Common sense suggests that if Ms. MacDonald had made the comment, 3L would have raised a hue and cry soon thereafter. Instead, the allegation was raised indirectly in a letter after a further 18 months of interaction between Ms. MacDonald and 3L.

[96] While I accept that this is the type of comment that might well arise in the context of a heated public debate about property development, I cannot find on the evidence that Ms. MacDonald made the alleged comment. In any event, the

approval of the application was not up to Ms. MacDonald; rather, it rested with the CRVD Board. Further, Ms. McDonald was not a staff member when 3L's second application for an amendment to the RGS for the Riverwood Land was processed in 2018. Any suggestion she was throwing cold water on the amendment at that stage is unfounded.

2. Mr. Grieve's Alleged Racist Remarks

[97] Mr. Atwall's allegations about Mr. Grieve's racist remarks in his affidavit for this petition are vague. He says he learned that Mr. Grieve had made the remarks to a number of people at the CVRD. Mr. Atwall does not say from whom he learned this. In the manner presented, they reflect unsourced hearsay.

[98] Another difficulty with this allegation is that Mr. Atwall pursued a Human Rights complaint against Mr. Grieve, Ms. Oakman and the CVRD. The complaint was settled by agreement. The settlement agreement expressly disavowed any responsibility on the part of the CVRD, Mr. Grieve or Ms. Oakman for having made the impugned comment. It also contained a confidentiality clause.

[99] Leaving aside the propriety of raising the allegation again in the face of the confidentiality clause, the fact of the settlement agreement does not prove the allegation was made. I cannot find the alleged comment was made based on the record before me.

3. Mr. Grieve's Continued Participation in CVRD Meetings Relating to 3L and the Riverwood Land

[100] Mr. Grieve admits he participated in the initial CVRD meetings respecting Bylaw No. 337, 2014, and only subsequently learned that this contravened the terms of the Human Rights complaint settlement. While in retrospect, Mr. Grieve should have been more careful about his activities, the CVRD remedied the situation when it was brought to their attention by exempting 3L from the reach of the bylaw into which Mr. Grieve had input.

[101] The petitioner maintains that the CVRD only fixed this when it was caught by 3L, and this is further evidence of bias. In my view, fixing mistakes in retrospect is at worst a neutral factor and at best an indication that the CVRD was trying to ensure its decision-making pathway accorded with the terms of the Human Rights settlement.

4. Mr. Scoville's Email

[102] The petitioner maintains that Mr. Scoville's email to a constituent created an appearance of bias against 3L's amendment application.

[103] In *Green Dragon Medicinal Society v. Victoria (City)*, 2018 BCSC 116, Chief Justice Hinkson summarized the principles respecting bias:

> [77] In *Save Richmond Farmland Society v. Richmond (Township)*, [1989] B.C.J. No. 555 (C.A.), aff'd [1990] 3 S.C.R. 1213, Mr. Justice Lambert framed the issue before the Court of Appeal as "whether an alderman can properly participate in the process leading to the passage of a bylaw if his mind is made up before the real decision making stage of the process is reached."
>
> [78] In dismissing the appeal from a decision participated in by an alderman who had previously expressed opposition to the application, Lambert J.A. held:
>
> > In the course of his argument, counsel for the Respondent said that the correct state of mind of an alderman could be expressed in this way:
> >
> > > My mind is made up; I cannot be influenced by persuasion; but the law requires me to be present and I will be present; and the law requires me to listen attentively and I will do so; but that is all.
>
> In my opinion, that statement does not express the applicable law, nor does it reflect the applicable law. There must be a degree of openmindedness; there must be a capacity to be influenced by persuasion. But provided that the alderman is not acting improperly in the sense of having been procured to vote in a certain way, (of which there is no suggestion whatsoever in this case,) and providing that he retains the capacity to be influenced by a yet unheard and perhaps unexpected argument, he or she will not be disqualified from participation in this particular process of zoning bylaw consideration by attitudinal views of the kind that are inherent in the political nature of our form of municipal government, and which may well have been exposed by the cut and thrust of that political process.
>
> In this case, Alderman Mawby had been elected. He had spoken out in the political arena about his views of the proper use of land throughout the

municipality. He had been chairman of the first public hearing of bylaws 5110 and 5115 over the course of 40 hours. He had thought about the issues extensively. He was, to a large extent, covering the same ground all over again. The same ground on which he had already once been required to make up his mind. I think that what he was trying to say, or saying, in the course of the interview with the Richmond News was that it would take something very surprising to make him change his mind at that stage and that he did not expect to be surprised at that stage, but that he was going to attend the public hearings and he was going to see what happened. I reach that conclusion about what he was trying to say by taking together the report in the Richmond News, the affidavit of the Editor of the Richmond News, Mr. Mawby's two affidavits, and the transcript of the television show.

Alderman Mawby may have fallen short of saying what I think he was trying to say, but the evidence with respect to what he actually said is not sufficient to persuade me that he said something different from what I have set out as being what he was trying to say.

In my opinion, the evidence in this case is not such as to persuade me that Alderman Mawby ought to have disqualified himself, or ought to be disqualified by this Court, from participating in the bylaw process on bylaw 5300, or that the bylaw process on bylaw 5300 was flawed by his participation.

[79] Subsequently, in *Old St. Boniface*, Sopinka J. commented generally on conflict of interest legislation for local government at 1196:

> I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest. See *Re Blustein and Borough of North York*, [1967] 1 O.R. 604 (H.C.); *Re Moll and Fisher* (1979), 23 O.R. (2d) 609 (Div. Ct.); *Committee for Justice and Liberty v. National Energy Board*, [[1978] 1 S.C.R. 369]; and *Valente v. The Queen*, [1985] 2 S.C.R. 673.

[104] Mr. Scoville's email must be viewed in context. He was not opposed to the merits of 3L's development plans. His mind was not made up before the real decision-making stage of the process had been reached, which I view as the CVRD Board vote on October 2. Mr. Scoville voted in favour of a standard amendment twice, once at the COW stage and again at the July 24 CVRD Board meeting. The view he expressed in the email was that the amendment was not a minor one, not that he opposed any amendment by 3L in relation to the Riverwood Land. Mr. Scoville simply favoured a more vigorous, public process than the one 3L was seeking.

[105] There is no evidence that Mr. Scoville was biased against 3L and should have disqualified himself or should be disqualified by this Court from participating in consideration of 3L's efforts to develop the Riverwood Land.

5. Actions by the CVRD staff leading up to the minor amendment refusal demonstrating that they did not have an open mind concerning 3L and the amendment application and

6. CVRD staff unreasonably revoked support for the expedited standard amendment process

[106] 3L maintains that CVRD staff presented an expedited standard amendment process as a sort of halfway house between the minor amendment and a standard amendment and that this might have influenced the Board to reject the minor amendment process.

[107] The Board is an independent body of elected officials, not beholden to CVRD staff or bound to accept the staff's representations. I am not persuaded that the Board was misled into voting against a minor amendment by staff representations, or that the staff held out to 3L any guarantee that an expedited standard amendment process would succeed before the Board. Mr. Dyson's notes from July 17, 2018 reproduced at para. 65 of these reasons demonstrate quite the opposite.

7. The CVRD contravened the Consultation Plan by failing to properly inform and notify stakeholders

[108] The petitioner filed evidence that at least one chief of a local First Nation did not receive notice of the standard amendment, in accordance with the Consultation Plan. The petitioner submits that, as a result, the CVRD failed to comply with the level of consultation required by the International Association for Public Participation Guide, a guideline the CVRD has adopted for its public consultation processes.

[109] The respondents filed evidence that they sent notice of the standard amendment to the local First Nations, if not to the chiefs then to officials of band councils. Further, the CVRD held a public open house and posted information and updates on the CVRD website, which meets the requisite standard of consultation.

[110] Whether or not the CVRD has a voluntary, self-adopted consultation framework, the governing legislation defines the responsibilities of a local government, including the CVRD. The *LGA* provides, in s. 434(4), that a failure to comply with a consultation plan is not fatal, so long as reasonable consultation has occurred. On the evidence, I find the plan developed and carried out by the CVRD provided reasonable consultation and thus met the legislative requirement.

8. The CVRD failed to provide proper notice of the Steering Committee report or the TAC report before October 2, denying 3L any meaningful opportunity to provide a reasoned response

[111] 3L's position on the progress of the amendment through the various stages is rooted in the belief that the process was a collaborative one, where once a decision was made or a report issued by the CVRD, 3L would have the ability to respond. Leaving aside the fact that the legislation and bylaws in question do not prescribe a collaborative process, it is also inconsistent with the workings of government at a municipal level.

[112] As counsel for the CRVD submits, once the Board proposed an amendment to the RGS on July 24, 2018, it became the proposing board under the RGS. This is consistent with the reasons of Willcock J.A. in 2016 BCCA 148 at para. 36.

[113] This is not to say that 3L had no involvement upon submitting its application to amend – it had a role to play in the public open house, a right to attend public meetings and speak via its delegates at CVRD Board meetings, and it met with the TAC and the Steering Committee on August 28, 2018. However, it did not have "ownership" over the progress of the amendment through to the CVRD Board meeting on October 2, 2018 such that it was vested with a right of response to the Steering Committee report before the CVRD Board heard first reading of the standard amendment.

9. The CVRD prepared reports for the sole purpose of meeting the requirements in the Court of Appeal decision, without any legitimate consideration of the amendment application

[114] The petitioner's allegation is that the CVRD staff and committees were simply paying lip service to 3L's application. This is a broad and baseless allegation. CVRD staff, starting with Ms. MacDonald, was in frequent contact with 3L concerning its plans to move forward with the amendment application within weeks of the Court of Appeal's decision. The evidence shows that CVRD staff expended significant time meeting with and writing to 3L about the process. Those actions are not consistent with an attitude of achieving bare compliance with the ruling in the hopes that 3L would give up on its application or be set up for failure.

10. The Board refused to give proper consideration to the extension and withdrawal applications at the October 2 meeting

[115] This issue is best dealt with under the separate heading of the events of October 2.

B. The July 24 and October 2 Meetings

An Overview of the Law

[116] Before embarking on an examination of the petitioner's arguments concerning these two meetings, it is useful to identify the legal principles applicable in the context of municipal governance.

The Reasonableness Standard of Review

[117] In *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, the Court affirmed that the reasonableness standard applies to judicial review of municipal decisions, but that reasonableness is context-specific:

> [19] The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. "Municipal governments are democratic institutions", *per* LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 33. In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.

[118] The Court also examined the requirement of processes for municipal governments:

> [28] Another set of limitations on municipalities passing bylaws flows from the need for reasonable processes. In determining whether a particular bylaw falls within the scope of the legislative scheme, factors such as failure to adhere to required processes and improper motives are relevant. Municipal councils must adhere to appropriate processes and cannot act for improper purposes. As Gonthier J. stated for the Court in *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, "[a] municipal act committed for unreasonable or reprehensible purposes, or purposes not covered by legislation, is void" (p. 349).
>
> [29] It is important to remember that requirements of process, like the range of reasonable outcomes, vary with the context and nature of the decision-making process at issue. Formal reasons may be required for decisions that involve quasi-judicial adjudication by a municipality. But that does not apply to the process of passing municipal bylaws. To demand that councillors who have just emerged from a heated debate on the merits of a bylaw get together to produce a coherent set of reasons is to misconceive the nature of the democratic process that prevails in the council chamber. The reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw.

The Measure of Procedural Fairness

[119] Allegations of procedural unfairness arise in the context of this petition. In the oft-cited decision *Baker v. Canada (Minister of Citizen and Immigration)*, [1999] 2 S.C.R. 817 L'Heureux-Dubé for the Court stated:

> 21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, per Sopinka J.
>
> 22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[120] L'Heureux-Dubé J. articulated a list of five non-exhaustive factors to consider, which I summarize as follows:

1. The nature of the decision being made and the process followed in making it. The closer the process comes to resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness: at para. 23.

2. The nature of the statutory scheme and the terms of the enabling statute. In the absence of an appeal procedure within the statute, or when the decision is determinative of the issue and further requests are foreclosed, the greater the procedural protections will be required: at para. 24.

3. The importance of the decision to the individual or individuals affected. For example, where one's profession or employment is at stake, a higher standard of justice is required: at para 25.

4. The legitimate expectations of the person challenging the decision, bearing in mind that the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain: para. 26.

5. The analysis should also take into account and respect the choices of procedure made by the decision-maker, especially where the choices are left open by statute or where the agency has expertise in determining appropriate procedures: para 27.

[121] With the foregoing principles in mind, I turn to the two meetings in issue.

The July 24, 2018 Board Decision

[122] The petitioner seeks a declaration that the CVRD Board's decision to deny 3L's minor amendment application should be set aside because it is unreasonable. The petitioner advances a number of arguments under this heading.

[123] First, 3L argues that the CVRD Board was improperly influenced by CVRD staff when it was presented with information that a standard expedited review process would not take much longer than the minor amendment process. This submission was not well-developed, but it seems to be based on the contention that CVRD staff were biased against 3L and held sway over the CVRD Board and perhaps misled Board members.

[124] This is not borne out on the evidence in the petition record, nor can I draw the inference sought by 3L that CVRD staff exerted improper influence that tainted the result of the July 24 vote.

[125] Second, 3L argues that when considering 3L's minor amendment application, the CVRD failed to follow the mandatory language of the RGS. Pursuant to 5.2.4 of the RGS, the TAC was supposed to assess 3L's application and provide comments. Staff would then provide a preliminary report to the Steering Committee, which would in turn make recommendations to the Board. 3L maintains that the TAC actually provided the Steering Committee with a recommendation to treat 3L's

application as a standard amendment, which 3L maintains was rubber-stamped by the Steering Committee and passed along to the Board.

[126] The submission of 3L is focussed on the TAC's use of the word "recommendation" instead of "comment", in its report. This is a distinction without a difference. Comments and recommendations can both be negative or positive. While it is certainly preferable to track the language used in the RGS, I see no practical difference between comments and recommendations in this context.

[127] 3L also submits that it provided certain reports to the CVRD that were not considered by the TAC or the Steering Committee before the July 24, 2018 meeting, or indeed at any relevant time in the process of considering 3L's amendment application. The reports in question were prepared in 2009 by 3L and contained information about traffic flow and environmental concerns. Both reports were favourable to 3L.

[128] The difficulty with this submission is that Mr. Atwall did not append these reports to his renewed application for a minor amendment in May 2018. The reports were date-stamped as received on September 19, 2018 when Mr. Holland wrote to Ms. Mullaly about the options – or lack thereof – for the Riverwood Land if a development was not approved.

[129] It was 3L's responsibility to put forward a comprehensive application. Mr. Atwall sent a letter and a ten-page vision document. He did not include the reports from 2009. It was not the responsibility of CVRD staff to dig through the file of its dealings with 3L and ensure everything relevant had been filed.

[130] The measure of the Board's July 24 decision is reasonableness. A decision to require a standard amendment process, rather than a minor amendment as sought by 3L, was within the range of reasonable outcomes.

The October 2, 2018 Meeting

[131] The petitioner seeks a variety of remedies in relation to the October 2 Board meeting and events leading up to it.

(a) A declaration that the CVRD Board breached the rules of procedural fairness and natural justice by failing to provide 3L with sufficient notice of the September 28 Steering Committee report in advance of the October 2 meeting

[132] 3L maintains that it found out about the Steering Committee report at the last minute and could not prepare any kind of response to it before the October 2 CVRD Board meeting. As noted earlier in these reasons, the *Baker* factors apply to the duty of procedural fairness and those factors vary, depending on the context.

[133] The context of the Steering Committee's function was legislative, not adjudicative or judicial. The Steering Committee was fulfilling its role in the broader process prescribed by the RGS.

[134] The second factor is the nature of the statutory scheme and the terms of the enabling statute. The Steering Committee was operating within the RGS context, providing its views to the ultimate decision-making body, the CVRD Board, which was comprised of elected officials. There is no standalone right for 3L to be consulted as its development plans are examined and scrutinized by local government on behalf of the broader public interest.

[135] The third factor is the importance of the decision to the individual affected. In this case, 3L's desire to develop the Riverwood Land was at stake, which is clearly subjectively important to 3L. However, the interests of 3L were in achieving progress, not defending against a decision to take away its livelihood or any previously vested rights. As 3L has made clear to the CVRD during the course of its application for an amendment to the RGS, it has the opportunity to pursue other economically viable uses of the land.

[136] The fourth factor is legitimate expectations. In this case, there is nothing in the RGS giving 3L a right to respond to the Steering Committee before its report

went to the CVRD Board. To find otherwise would grant a substantive right to 3L that is not contained within the legislative scheme. 3L had the opportunity to meet with the TAC and the Steering Committee on August 28, 2018. It was not shut out of the process and had opportunities well in advance of September 28 to hear the CVRD's concerns about its proposed development.

[137] Fifth, the choices of the procedure made by the decision-maker are relevant and must be respected. In this case, the procedure was prescribed by the RGS, a high-level policy and planning document.

[138] In *1139652 B.C. Ltd. v. Whistler (Resort Municipality)*, 2018 BCSC 1806 [*Whistler*], Madam Justice Horsman considered a submission that a landowner was entitled to the opportunity to make submissions to the Council in relation to an application for variance. While the process was prescribed under s. 460 of the *LGA* rather than under a RGS, the reasons of Horsman J. are illustrative of the contextual nature of the duty of fairness.

[139] Like the RGS, the *LGA* did not expressly require the Council to provide affected parties with a right to be heard before deciding on a variance application. Horsman J. stated:

> [55] In the distinct context of the DVP application process the entitlement to notice, and any implied right to make representations, would seem to be for the primary benefit of adjacent landowners. The applicant already has a right to make representations through the application process itself which conveys the applicant's position directly to the municipal council. In the present case, the Petitioner's application was accompanied by a supportive Staff Report. Through the notice process, a municipal council can additionally receive the views of other impacted landowners so that the broader interests of the community are not overlooked.
>
> [56] It is also relevant that the nature of the decision-making process in this instance was closer to the "legislative" than the "judicial" end of the spectrum. In *Baker*, the Supreme Court of Canada stated:
>
> > [23] …In *Knight*, *supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision

> resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness….

[57] In exercising discretion to grant a DVP under s. 498 of the Local Government Act, a municipal council is not adjudicating an inter-party dispute, but rather is considering whether the requested variance is in the interests of the community as a whole. A municipal council is not restricted in the factors it may consider on a DVP application provided that the factors are not extraneous to statutory purposes. As explained by Stromberg-Stein J., as she then was, in *Costello v. Hornby Island Local Trust Committee*, 2009 BCSC 1334 [*Costello*]:

> [73] A DVP is discretionary, and permits consideration of extrinsic factors other than mandated in the Bylaw, such as the visual impact of a building, to determine if a variance of the Bylaw is in the interests of the community as a whole….Although the Bylaw did not provide for regulation of the colour or appearance of the building, except for height, a DVP deals with a variance from a bylaw and visual impact associated with height, to ameliorate appearance, is within the mandate of the local trustees to preserve and protect the amenities of the Island, including rural neighbourhoods. It is fundamental to a municipal law regulatory scheme that on a variance application extrinsic factors such as colour and appearance may be addressed.

[58] It is within the role of a municipal council, as the elected representatives of their community, to identify and assess factors relevant to the interests of a community on a variance application. This fact is underscored by the broad nature of the discretion granted to local governments by s. 498, and its non-delegable nature (see *Local Government Act*, s. 498(4)).

[59] I conclude that there was no obligation on the Council in exercising its wide discretion under s. 498 of the *Local Government Act* to adopt a court-like hearing procedure requiring oral representations and a right of reply. The procedure adopted by the Council allowed the parties (including the Petitioner and neighbouring landowners) to communicate their positions in a fair manner, and allowed the Council the opportunity to gather information it required to make a decision on the Petitioner's DVP application. This is all that the duty of procedural fairness, and the *Local Government Act*, required in these circumstances.

[60] Finally, it may be noted that the existence and content of the opposition from adjacent landowners to the issuance of a DVP was known to the Petitioner at least since the Board of Variance hearing. The opposition voiced to the Council could not have come as a surprise. It was open to the Petitioner to consult with neighbours in advance of the Council's consideration of the DVP application with a view to addressing their concerns. Indeed, it remains open to the Petitioner to consult and then reapply for a DVP, in accordance with s. 6 of the Resort Municipality of Whistler, *Land Use Procedures and Fees Bylaw No. 2019, 2012*.

[emphasis added]

[140] The RGS amendment application in this case engaged a broad spectrum of community interests, not just those of 3L. The CVRD provided 3L with opportunities to present its position, both in writing and through delegates, at various stages from application to the vote on October 2. In this context, the duty of procedural fairness did not require the CVRD to give 3L the opportunity to respond to the Steering Committee report.

(b) A declaration that the CVRD's decision to deny 3L's extension application, withdrawal application and/or amendment application is unreasonable and/or made in bad faith

[141] 3L made the decision to pursue redevelopment of the Riverwood Land by applying in late May 2018 and wanted the amendment considered before the upcoming local government elections that October. CVRD staff conveyed to Mr. Atwall that the timing was tight to bring the amendment to the October 2 meeting. Nevertheless, once 3L's application was filed on May 25, the CVRD staff set in motion the necessary processes, including the TAC and the Steering Committee phases. The application proceeded through other aspects of the process prescribed by the RGS.

[142] The role of the Steering Committee was not a mystery to 3L, nor was the timing of its participation in the process as things progressed to the October 2 CVRD Board vote. Having expended time and likely considerable resources in responding to 3L's amendment application, the Board was ready to deal with the matter on October 2, consistent with 3L's goal of having first reading go before the Board before local elections later that month.

[143] 3L submits that the Board's decisions at the October 2 meeting "show a calculated effort to set up the Board's denial" of 3L's application, but it was within the Board's discretion to grant or refuse 3L's various efforts to stop the vote on the standard amendment. The decision of the Board to proceed to vote on the standard amendment was within the range of reasonable outcomes.

[144] As for the allegation that the Board acted in bad faith in dealing with 3L's efforts to adjourn or withdraw, the Chair simply sought advice from CVRD staff about the options open to the Board due to an unusual procedural circumstance. There is no evidence the Board acted in bad faith by not acceding to 3L's requests.

(c) A declaration that the CVRD Board breached the rules of procedural fairness and natural justice by failing to properly consider 3L's request for an extension to its amendment application and a declaration that the CVRD Board breached the rules of procedural fairness and natural justice by failing to properly consider 3L's request to withdraw its application

[145] 3L maintains that the decision of the Board to essentially ignore 3L's requests to defer or withdraw its application was quasi-judicial, and demanded a more fair and transparent process. As noted earlier in these reasons, procedural fairness is contextual.

[146] 3L relies in part on the affidavit of Larry Jangula, a CVRD Board member who was at the meeting, to demonstrate a lack of procedural fairness and natural justice in relation to 3L's attempts to withdraw the amendment from the Board.

[147] Mr. Jangula deposes that he thought he proposed a motion to defer consideration of the amendment application, in light of pending local elections. The proposal was not recorded in the minutes of the meeting as a motion, which indicates that it was not supported by another member of the Board. In the absence of a motion to defer consideration of the amendment application, the Board's decision to forge ahead in spite of the desire of 3L to defer is not procedurally unfair.

[148] Section 225(1) of the *LGA* requires that a regional board must establish the general procedures to be followed by the board and board committees, including the manner by which resolutions may be passed and bylaws adopted. The CVRD has established procedural bylaws in the Comox Valley Regional District Procedure Bylaw No. 1, 2008 [Procedure Bylaw]. None of them contemplates the situation that arose on October 2 when 3L attempted to withdraw or adjourn the application to amend the RGS while the Board was debating the motion to refuse it.

[149] The petitioner points out that Rule 22 of the Procedure Bylaw provides that where a procedural matter is not covered by the bylaw, it should be placed before the Board as a resolution drafted by the corporate legislative officer, with the prior approval of the chair and vice-chair to present the resolution to the Board to resolve the procedural matter. This would have required the adjournment of the October 2 meeting to consider a resolution concerning how to deal with 3L's application to withdraw or defer its development request.

[150] The other alternative was for the Board to determine the regulation of its own procedures when the unusual circumstances arose.

[151] In *Houde v. Quebec*, [1978] 1 S.C.R. 937, the issue was whether secret ballots were permissible in school board executive elections. Dickson J., as he then was, for the majority, stated, at p. 940:

> First, public bodies, such as municipal councils and school commissions have broad discretion in the regulation of their procedures. It is not for the courts to dictate the manner in which such bodies shall manage their internal affairs. If a council or a commission fails to observe the formalities which the Legislature has prescribed in plain language for the calling and conduct of meetings, then the Court may, in a proper case, intervene; if questions of natural justice, or fraudulent, inequitable, or oppressive use of power arise, the courts may act; but in the absence of statutory obligation, or misconduct, the internal regulation of their affairs by municipal bodies is a matter for such bodies and for them alone: see *Re Howard and the City of Toronto*, at p. 965.

[152] I am satisfied the CVRD Board was able to determine its own procedure, in the absence of a requirement that one be enacted. In proceeding in the manner it did, the Board was acting within its discretion and did not offend the principles of natural justice. The decision to proceed with the motion on the table was not fraudulent, inequitable or oppressive but rather a practical and permissible response to the particular situation.

[153] To find that a Board which has not provided for every eventuality in its procedural bylaws must adjourn meetings in order to have solutions drafted and debated would unnecessarily hamper the workings of democratic institutions.

(d) A declaration that the CVRD Board contravened ss. 89 and 90 of the Community Charter by conducting a portion of the meeting in camera

[154] The petitioner submits that when CVRD Board Chair Joliffe and CVRD Board Vice-Chair Wells took a break to confer with staff about 3L's request to withdraw its application, they held an *in camera* meeting of the Board, contrary to s. 89 of the *Community Charter.* That provision requires that a meeting of the council must be held in public, except in certain circumstances described in s. 90, none of which applies in this case.

[155] The petitioner maintains that the public and 3L had a right to a fair, transparent and open process, per *London (City) v. RSJ Holdings Inc.*, 2007 SCC 29 at para. 38. In that case, the City passed interim land use bylaws in closed meetings. The Court held:

> 41 …The City's conduct in closing the two meetings in question was neither inadvertent nor trivial. In fact its council meeting of January 19, 2004 was conducted in a manner that is rather reminiscent of the problems reported more than 20 years ago that led to the passing of the statutory open meeting requirement. It is worth repeating the words of the Working Committee quoted earlier: "some municipal councils employ lengthy, in-camera special and committee meetings to discuss matters under debate and then ratify their decision in full council in a few minutes, with minimal discussion". In my view, the eight-minute public session during the course of which the interim by-law was passed without debate or discussion along with 31 other by-laws did nothing to cure the defect.
>
> 42 Further, while RSJ did not have the right to notice of the City's intention to pass the by-law nor any right to make representations at a public hearing, it did have the right, along with other citizens, to a transparent and open process. The Court of Appeal was correct to conclude that the potentially draconian effects of interim control by-laws accentuate the need for the courts to jealously require that "the meeting in which an interim control by-law is discussed be open to the public as required by s. 239(1) of the Act" (para. 27). In these circumstances, I do not accept the contention that RSJ suffered no prejudice.

[156] Counsel for the CVRD does not disagree that meetings of the Regional Board must be open to the public unless the meeting is properly closed, but takes the position that the definition of "board" in the Schedule of the *LGA* means the "board of directors for the regional district". The sidebar between the Chair, the Vice-Chair and staff was not a meeting of the board of directors. There was no quorum, which is

prescribed in s. 10(1) of the *Procedure Bylaw* as at least half of the number of members of the board or committee. There was no motion to vote on and nothing passed.

[157] I agree with counsel for the CVRD that the recess taken by the Chair and Vice-Chair to get procedural advice from CVRD staff was not, by definition, a meeting of the Board. It did not offend s. 89 of the *Community Charter*. It was a step taken by the two Board officials within their mandate of being in charge of procedure.

Summary

[158] 3L did not achieve what it wanted in respect of the Riverwood Land, but I am not persuaded that the results of the July 24 or October 2, 2018 meetings were unreasonable. Nor am I satisfied that 3L was deprived of procedural fairness or natural justice in the particular context of its dealings with the CVRD Board and staff. Finally, I am not satisfied that the conduct of the CVRD Board or staff gives rise to a reasonable apprehension of bias against 3L. Accordingly, the application for judicial review is dismissed. The CVRD is entitled to its costs at Scale B.

"Duncan J."

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The Honourable Madam Justice Duncan