IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kalantzis v. East Kootenay (Regional District),* 2019 BCSC 1001

Date: 20190620
Docket: S120976
Registry: Kelowna

Between:

Fotis Kalantzis, Sandra Hogan and Amber Stephen

Petitioners

And

Regional District of East Kootenay, Pedley Heights Community Association, Her Majesty the Queen in Right of British Columbia, and The Baltac Community Association

Respondents

Before: The Honourable Mr. Justice Gomery

On judicial review from: Bylaws 2847 and 2848 of the Regional District of East Kootenay adopted on September 7, 2018

Reasons for Judgment

In Chambers

Counsel for the Petitioners:	J.W. Robinson
Counsel for the Respondent, Regional District of East Kootenay:	M. Voell
Counsel for the Respondent, Pedley Heights Community Association	J. Van Wyk
Counsel for the Respondent, The Baltac Community Association	C. Wiebe
No one appearing for Her Majesty the Queen in Right of British Columbia	
Place and Dates of Hearing:	Kelowna, B.C. June 5-7, 2019

Place and Date of Judgment:	Kelowna, B.C. June 20, 2019

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Introduction

[1] Lake Windermere is a long, narrow lake located in southeastern British Columbia, near the Alberta border. It is shallow and its waters are comfortably warm for swimming in the summer. Baltac Bay is located on the east side of the lake. It features a beach and two housing subdivisions: Baltac, and Pedley Heights. Many of the owners are seasonal residents, mostly from Alberta. Many have or would like to have boats.

[2] Until now, those boaters who were not content to launch and haul out their boats at the beginning and end of the day have moored their boats at mooring buoys in Baltac Bay. There are between 42 and 50 mooring buoys in the bay and they have been the subject of some controversy. The respondent, Regional District of East Kootenay (the "District") is the local municipal authority. It has enacted a zoning bylaw that limits the placement of new mooring buoys in Baltac Bay.

[3] Many of the owners in the Baltac subdivision are members of the respondent, The Baltac Community Association (the "BCA"). Many of the owners in the Pedley Heights subdivision are members of the respondent, Pedley Heights Community Association (the "PHCA"). BCA and PHCA collaborated on a proposal for a marina, more technically described in the evidence as a group or joint moorage facility (the "Marina"). It would provide to boaters an alternative to the use of mooring buoys. The proposal was for a Marina of 90 slips that would accommodate 90 boats. It required amendments to the relevant zoning bylaw and the District's Official Community Plan for Lake Windermere (the "OCP").

[4] The petitioners and others opposed the proposal. They stated their opposition at a public hearing convened by the District to consider the proposed amendments. Following the public hearing, the proposal was amended. It became a proposal for a Marina of only 60 slips, not 90. On this basis, the District approved the amendments (the "Impugned Amendments").

[5] The petitioners seek to quash the Impugned Amendments. They make three arguments:

1. The District's decision to adopt the Impugned Amendments was unreasonable because the decision overlooked a requirement in the OCP for "bylaws or policies … in place to manage the allocation of moorage spaces amongst the members" of the community associations, and this requirement was not satisfied;

2. The District breached its duty of procedural fairness and statutory prerequisites to the exercise of its power to amend by failing to obtain and disclose to the public draft agreements between BCA and PHCA concerning the allocation of moorage in the proposed Marina; and

3. The District had no jurisdiction to amend the proposal after the public hearing to decrease the density of the area affected by the change without the consent of the owner of the area, and no such consent was obtained.

[6] The District, BCA and PHCA oppose the application.

[7] In adopting the Impugned Amendments, the District exercised statutory powers under the *Local Government Act*, R.S.B.C. 2015, c. 1 [*LGA*]. The *LGA* and the *Community Charter,* S.B.C. 2003, c. 26, establish a framework for municipal governance grounded in the following principles of municipal governance stated in s. 1(1) of the *Community Charter*:

> (1) Municipalities and their councils are recognized as an order of government within their jurisdiction that
>
> (a) is democratically elected, autonomous, responsible and accountable,
>
> (b) is established and continued by the will of the residents of their communities, and
>
> (c) provides for the municipal purposes of their communities.

[8] It is common ground that the petitioners have standing to challenge the District's decision by this application for judicial review. The Court's task is to determine whether the District exercised its statutory powers reasonably and within legal bounds. Speaking for the Court of Appeal in *Community Association of New*

Yaletown v. Vancouver (City), 2015 BCCA 227 at para. 153, Chief Justice Bauman observed that:

> … judicial review has well defined limits. Citizens who disagree with the City's view of the public interest must seek change through the political process rather than the courts.

Legal basis of the challenge

[9] The petitioners apply pursuant to both the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 and s. 623 of the *LGA.* The Court's power to quash the bylaw amendments is the same under both statutes. The only procedural difference of note is that an application pursuant to s. 623 must be heard within two months after the adoption of the bylaw in issue. The petitioners addressed this requirement by setting the petition for hearing on October 29, 2018 and adjourning it immediately. In argument before me, no one suggested that this was not procedurally appropriate.

The parties

[10] The petitioners own properties in the Baltac subdivision and are members of the BCA. Two of them, Mr. Kalantzis and Ms. Hogan, own separate properties on the water's edge. The third, Ms. Stephen, owns an upland property. Ms. Hogan and Ms. Stephen own mooring buoys within an area of the lake that is the subject of the zoning bylaw in issue (the "Lake Area").

[11] The Baltac subdivision is older and more established than Pedley Heights. It contains 144 properties. The subdivision dates back to the early 1960s. "Baltac" is a play on words derived from "a little Alberta in the middle of BC". From this, one may infer that, from the beginning, it has been a recreational community mostly occupied by people from Alberta.

[12] The BCA was incorporated in 1999 pursuant to the predecessor to the *Societies Act*, S.B.C. 2015, c. 18 to represent the interests of the Baltac subdivision owners. In late 2018, it had 91 members in good standing.

[13] The Pedley Heights subdivision contains approximately 285 properties. For the most part, these properties are located further from the lake. Pedley Heights is only partly developed and approximately 62% of the lots are owned by Pedley Heights Development Corporation ("PHDC"). The principal of PHDC is Mark Voszler. PHDC was the developer of the Baltac subdivision as well.

[14] Like BCA, PHCA is a British Columbia society. It was incorporated in 2004 to represent the interests of the Pedley Heights owners. PDHC effectively controls PHCA and Mr. Voszler spoke for PHCA in its dealings with the District and BCA.

[15] The property immediately adjoining the beach on Baltac Bay (the "Beach Property") is owned by PHCA. PHCA has granted many Baltac owners, including Ms. Stephen, easements over the Beach Property to access the foreshore and the lake. For many years, PHCA and BCA have shared the operating expenses of the Beach Property on a 60:40 basis. I was advised that the 60:40 ratio was chosen to reflect the relative size of the Pedley Heights and Baltac subdivisions.

Background

[16] The District enacted the OCP in 2008 following extensive community consultation contemplated by what is now s. 475 of the *LGA*. The OCP was intended to provide guidance on land use and development issues within the plan area for a five to fifteen year period. The plan area includes the Baltac and Pedley Heights subdivisions and Baltac Bay itself.

[17] The OCP contemplated the development of a comprehensive lake management plan for Lake Windermere. Further consultations took place and the Lake Windermere Management Plan (the "LWMP") was completed in January 2011. The OCP was amended to incorporate the LWMP by reference. The LWMP listed specific lake management concerns including:

- Widespread public concern about the sustainability of the lake as an important water source,
- The need to protect environmental resources and values, particularly water quantity and quality, wildlife habitat, and vegetation,

- Boat traffic congestion and shoreline and upland development, and their effects on the rural character and the lake's attraction and value to residents and tourists, …

[18] The LWMP included the following recommendations:

a) The District would implement zoning over the lake surface to control the location of water structures (5.4.1);

b) New marinas were "not generally supported" but might be considered if they would also help to achieve public objectives identified in LWMP (5.4.3);

c) The zoning of the lake would include regulations on the placement and number of mooring buoys (5.4.9); and

d) Docks were preferred over mooring buoys for the mooring of watercraft (5.4.12).

[19] In August 2012, the District undertook an inventory of mooring buoys in Baltac Bay in conjunction with the implementation of a zoning bylaw restricting the placement of mooring buoys. The evidence is unclear as to exactly how many mooring buoys were counted – various numbers between 40 and 50 are mentioned and I suspect that this reflects different counts undertaken at various times – though it is undisputed that owners were invited to register their ownership with the District and most of those who did were Baltac owners. In subsequent discussions, these owners were termed "Existing Buoy Owners" or "EBOs".

[20] At about this time, BCA and PHCA began to formulate their proposal for the establishment of a Marina that they would jointly own and operate. The main elements of the proposal were that BCA would become a co-owner of the Beach Property and the two associations would own and manage the Marina on the basis of the established 60:40 division of expenses. The Marina would be for the use of Baltac and Pedley Heights owners. EBOs mooring their boats at the Marina would give up their buoys.

[21] The Marina proposal required a rezoning and amendment of the OCP by the District, and approval by the Province of British Columbia. The administrative arm of the provincial government that handles such applications is called Front Counter.

[22] In July 2015, PHCA applied to the District and Front Counter for approval of a Marina with 140 slips. The application had to be made by PHCA because, at this stage, it was the sole owner of the Beach Property. The application was supported by BCA on the understanding that, if it were approved, it would become a co-owner of the Marina on the 40:60 basis the associations had discussed.

[23] The District advised PHCA that it would have to reduce the number of slips and PHCA revised the application to seek approval of a Marina with 115 slips.

[24] By letter dated March 23, 2016, Front Counter disallowed the application for a Marina containing 140 slips. The letter gave various reasons for the disallowance, noting environmental and access management concerns and public opposition. It added:

> Should you choose to submit a new application for a group moorage facility at this location, I would suggest a substantial reduction in the number of berths for your proposal and the elimination of a dedicated swim area. A comprehensive Management Plan should be attached to your application addressing the issues noted above in the reasons for disallowance and should include the detailed information requested by the RDEK in their July 27, 2015 email. …
>
> Prior to submitting an application, I would recommend that you hold a public meeting on your proposal to garner public support.

[25] PHCA and BCA engaged in informal consultations with stakeholders and decided to proceed with a fresh application for a Marina of 90 slips. BCA's decision to proceed with the application was preceded by considerable internal discussion and debate. Its membership authorized its Board to proceed with the application by special resolution passed on November 29, 2017 on the basis that the Board would return to the membership for further authority if the application was only approved by the District on the basis of a smaller number of slips.

[26] On April 9, 2018, PHCA submitted to the District its application for rezoning and amendment of the OCP.

[27] PHCA submitted to Front Counter a parallel application for a licence to construct the Marina on aquatic Crown land. The legislative framework governing such an application is described in *Trainor-Degirolamo v. British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development),* 2019 BCSC 430 at paras. 1-10. Front Counter disallowed this application and a further application is pending.

[28] PHCA's proposed bylaw amendments were given first and second reading by the District's Board of Directors (equivalent to a municipal council) on July 6, 2018, and two members of the Board were delegated to conduct a public hearing. Notice of the public hearing was given. The District received 128 letters stating positions for and against the application. These included letters from the petitioners opposing the application. There were also letters expressing qualified support, on the basis that only 60 slips should be permitted. The public hearing was held on July 24, 2018 with 80 people in attendance. It lasted about an hour.

[29] On August 2, 2018, following discussions with District staff and negotiations with BCA's Board, PHCA amended its application to reduce the maximum number of slips to 60.

[30] On August 3, 2018, the District's Board received and accepted a report on the public hearing and gave the revised bylaw amendments third reading. On September 7, 2018, the District's Board adopted the Impugned Amendments.

[31] On October 2, 2018, BCA and PHCA signed a joint operating agreement providing for the management of the proposed Marina on the basis that it would contain 60 slips. The agreement required ratification by BCA's membership. It is significant to the petitioners' argument in this proceeding that there was no prior written agreement between BCA and PHCA.

[32] On October 4, 2018, the petitioners filed the petition that commenced this proceeding.

[33] At a meeting on October 18, 2018, BCA's membership ratified the joint operating agreement by special resolution. Of 91 members, 63 were represented in person or by proxy at the meeting and 46 or 73% supported the resolution.

First issue: Was the District's decision to adopt the Impugned Amendments unreasonable because the decision overlooked a requirement in the OCP for "bylaws or policies … in place to manage the allocation of moorage spaces amongst the members" of the community associations, and this requirement was not satisfied?

Statutory Framework

[34] Section 474(1) of the *LGA* states that an official community plan is a statement of objectives and policies to guide decisions on planning and land use management, within the area covered by the plan, respecting the purposes of local government. It must include statements respecting restrictions on the use of land that is environmentally sensitive to development; s. 473(1)(d). It may include policies of the local government relating to the preservation, protection, restoration and enhancement of the natural environment, its ecosystems and biological diversity; s. 474(1)(d).

[35] The effect of an official community plan is that all bylaws or works undertaken by the council or board after the adoption of an official community plan must be consistent with the plan; s. 478(2)(a).

The Official Community Plan (the "OCP")

[36] The OCP acknowledges the statutory requirements outlined above. In form, it resembles the official community plans described in cases such as *Rogers v. Saanich (District)* (1983), 146 D.L.R. (3d) 475 (B.C.S.C.) at p. 486 and *Residents & Ratepayers of Central Saanich Society v. Saanich (District),* 2011 BCCA 484 [*Saanich Ratepayers*] at paras. 8-13 and 28. It consists of 72 pages of "Policies" followed by maps and detailed schedules addressing such matters as "Badger

Habitat and Connectivity" and a "Road Network Plan". The "Policies" section begins with an introduction that includes the following:

> **1.5 Relationship to the Zoning Bylaw**
>
> The land use designations contained within the OCP were assigned based on the goals and policies outlined within the OCP and in consideration of the current land use. However, the land use designations may not match a parcel's zoning within the Upper Columbia Valley Zoning Bylaw No. 900, 1992. This is because the OCP is a long range strategic planning document that identifies the preferred future land use, while the zoning bylaw usually recognizes the current land use. Development of the parcel may continue in accordance with the zoning of the property, however, any amendment of the zoning must be in conformity with the land use designation in the OCP.

[37] There follow general statements concerning the area history and background, policy development, and the goals of the OCP. One of 17 major goals is:

> 11. Develop land use policies that will assist in preserving the ecological integrity of Lake Windermere, the foreshore of Lake Windermere, the Columbia River and Columbia Wetlands and the other water resources located within the plan area.

[38] Different categories of land use, such as residential, commercial and light industrial, are identified and discussed in turn. For each category, the OCP lists "Background", "Objectives" and "Policies". These "Policies" range from very general aspirational statements to specific requirements.

[39] It is unfortunate that the OCP uses the word "policies" in two different ways, as a label for the whole of the substantive text of the plan, and also to describe more specific and operational statements in respect of individual land use categories.

[40] Part 10 of the OCP treats "Lake Windermere" as though it were a category of land use. The "Background" section references the LWMP and also states:

> Lake Windermere is an integral asset within the plan area that has cultural value for First Nations; is a source of potable water; provides fish and wildlife habitat and recreational opportunities. The recent demands being placed on the lake and the upland areas from development have increased at an unprecedented rate. There are increasing concerns that the anthropogenic impact on the lake has the potential to exceed its ecological carrying capacity and degrade drinking water quality.

[41] "Policies" in respect of Lake Windermere are set out in section 10.3. Group moorage facilities are contemplated in subsections (17), (18), (21), (24) and (25). For present purposes, subsection (25) is unimportant. The other subsections provide in part as follows, except that subsection (21)(c) has been repealed by one of the Impugned Amendments:

> (17) Rezoning applications for the following shall be considered in relation to the LWMP:
>
> (a) new group moorage facilities, including commercial marinas;
>
> (b) new day use facilities managed by a community association or strata council;
>
> (c) additional moorage; …
>
> Demonstration of how the proposed development assists in meeting the goals, objectives and recommendations of the LWMP must be integrated into all surface water rezoning applications.
>
> (18) A rezoning application to accommodate a group moorage facility accessed from Highway Drive along Stoddard Boulevard may be supported subject to the following:
>
> (a) application is made by a community association;
>
> (b) written confirmation of support from the Ministry of Transportation and Infrastructure;
>
> (c) removal of the existing individual docks along Stoddart Boulevard; and
>
> (d) issuance of a Licence of Occupation or Lease by the Province.
>
> Access to the group moorage facility for moorage or day use purposes for the entire Calberly Beach community is encouraged.
>
> …
>
> (21) While not generally supported within the LWMP, the consideration of a rezoning application to accommodate a new group moorage facility in the Baltac / Pedley Heights area may be supported subject to the following:
>
> (a) issuance of the applicable Licence of Occupation or Lease by the Province;
>
> (b) compliance of all proposed development with the Shoreline Development Permit guidelines;
>
> (c) the new group moorage facility is restricted to a net increase of no more than 10 additional moorage spaces that identified in the August 2012 inventory in the bay adjacent to the Pedley Heights Community Association property. Upon completion of a management plan for the proposed moorage an amendment to this provision may be considered;

> (d) bylaws or policies are in place to manage the allocation of moorage spaces amongst the members of the applicable community association(s);
>
> (e) management of moorage spaces must provide for the shared use or rotating occupancy of moorage spaces;
>
> (f) identification of mitigation options to reduce impacts on legally non-conforming mooring buoys in the adjacent bay; and
>
> (g) demonstration of pre-application consultation at the expense of the community association(s) making application with legally non-conforming mooring buoy owners. A reduction in the overall number and congestion of mooring buoys in the adjacent bay is supported. Additional consultation related to the legally non-conforming mooring buoys may be required.
>
> …
>
> (24) The LW-2, Lake Windermere (Group Moorage) Zone within the Zoning Bylaw is intended for the purpose of accommodating communal moorage or day use docking under the direction of a community association, strata council or shared interest development. In recognition of the demand for on-water boat storage the responsible organization is expected to manage the community's moorage spaces amongst the applicable membership.

The Impugned Amendments

[42] As noted above, the OCP was amended by deleting 10.3(21)(c).

[43] The zoning bylaw was amended in two ways:

a) The zoning designation of the Lake Area was changed from LW-1, Lake Windermere (Residential) Zone, to LW-2, Lake Windermere (Group Moorage) Zone; and

b) The following was added to the bylaw:

> The group moorage facility for the Pedley Heights and Baltac Community Associations, as permitted under provincial land file number 4404612, shall include not more than 60 boat slips.

The parties' positions

[44] The parties agree that the question to be addressed by the Court on this application is whether the District acted reasonably in adopting the bylaw

amendments; *Saanich Ratepayers* at paras. 44-51; *Catalyst Paper Corp. v. North Cowichan (District),* 2012 SCC 2 at paras. 24-30.

[45] The petitioners focus on subsection 10.3(21)(d) of the OCP and interpret it in the context of the surrounding circumstances and the balance of the text of section 10.3. They submit that subsection (21) imposes specific conditions on the approval of a group moorage facility at Baltac Bay, including the condition in (d). Comparing subsections (21) and (18), they note that both subsections contemplate a marina operated by a community association, but at Baltac Bay there would be co-ownership and collective management by two associations. They propose that the additional requirement in (d) for "bylaws or policies … in place to manage the allocation of moorage spaces amongst the members of the applicable community association(s)" derives from this feature, arguing that "having two community associations responsible for managing moorage is a recipe for conflict and uncertainty". They therefore interpret the reference to "bylaws or policies … in place" as requiring a formally expressed arrangement involving both BCA and PHCA sufficient to assure that management of allocation of moorage spaces amongst the members of the associations would be functionally equivalent to management by a single community association. No such formally expressed arrangement was in existence when the zoning amendment was approved and the petitioners maintain that the District's decision to approve the rezoning was unreasonable in the circumstances.

[46] The District submits that it was up to its Board to interpret section 10.3 of the OCP which should not be understood as imposing conditions or requirements. Rather, considering the diverse objectives and policies identified in the OCP, the components listed in section 10.3 are no more than a "wish list". It was open to the District to prefer some stated objectives to others in the context of the application at hand. The District cites *Saanich Ratepayers* at para. 39 and *Higgins v. Quesnel (City),* 2013 BCSC 1365 at para. 8 and says that approval of the rezoning was well within the ambit of reasonable decision-making in the circumstances.

[47] BCA supports the District's submission and further submits that the reference in subsection 10.3(21)(d) to bylaws or policies in place does not have to be taken to require a binding agreement. It submits that it was reasonably open to the District to conclude, on the materials at hand, that BCA and PHCA had policies in place to manage the allocation of moorage space in the Marina, as contemplated by subsection (21)(d).

[48] PHCA supports the District's and BCA's submissions on this issue.

Analysis

[49] An official community plan is enacted by municipal bylaw. It is legislative in nature and has legal effect in at least two ways. First, by shaping and guiding municipal decision-making, it provides a platform for an evaluation of the rationality and reasonableness of subsequent land use decisions. Second, the requirement in *LGA* s. 478(2)(a) that bylaws or works made after adoption of an official community plan must be consistent with the plan is a hard legal constraint that can only be avoided by amending the plan.

[50] All municipal legislation – not only an official community plan – is construed generously and not restrictively. Paraphrasing Bauman C.J.B.C. in *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014 BCCA 271 at para. 18, municipal legislation is construed in the spirit of searching for the purpose broadly targeted by the enabling legislation and the elected council with a view to giving effect to the council's intention as expressed in the bylaw upon a reasonable basis that will accomplish that purpose.

[51] Official community plans are, by their generality and forward-focus, rarely susceptible to facile application. The cases emphasize that an official community plan is not a statute, and it must not be interpreted as though it were a statute; *Saanich Ratepayers* at para 40; *Lypka v. White Rock (City),* 2015 BCSC 550 at para. 41. In *Saanich Ratepayers* at para. 42, Newbury J.A., speaking for the Court, referred to:

> … the rather unusual nature of an OCP as a 'visionary' set of policies and objectives that are for the most part laid out in broad strokes. Very little is actually "prohibited", and the definitions of various terms of art used in the plan leave municipal councils with some latitude in practical application. That is the case with respect to the terms "Rural", "Rural Residential", and "large lots", for example. They are not defined with the exactitude of a zoning bylaw, and thus encompass a range of alternatives.
>
> [Emphasis added.]

[52] The same may be said of the reference in s. 10.3(21)(d) to "bylaws or policies … in place". What constitutes a "policy … in place" is not defined and encompasses a range of alternatives. Reviewing the District's decision on a standard of reasonableness, the issue is whether the decision entails an interpretation those words cannot reasonably bear.

[53] I do not accept the District's submission that the OCP can be viewed as no more than a wish list of objectives and guidelines. It is a legal document that must be read as a whole; *Higgins v. Quesnel* at para. 8. While it states objectives and guidelines, it also state more precise policies and, to the extent that clear requirements are imposed, it would be no answer to a complaint that the district had taken action inconsistent with those requirements that it did so in pursuit of an objective stated in the OCP. A zoning amendment was quashed on the basis of inconsistency with a clear requirement in *Western ARP Services Ltd. v. Capital (Regional District)* (1986), 10 B.C.L.R. (2d) 63 (C.A.), a decision noted by Newbury J.A. in *Saanich Ratepayers* at para. 40.

[54] For the following reasons, I do not accept the petitioners' submission that subsection 10.3(21)(d) can only reasonably be interpreted as requiring, as a condition of approval of a group moorage facility in Baltac Bay, a formally expressed arrangement between BCA and PHCA addressing the allocation of moorage spaces among the members of the associations.

[55] The petitioners are correct to note that the point of subsection 10.3(21)(d) seems to be that managing the allocation of moorage spaces among the members of the two associations is a matter that should be addressed. Subsections (21)(c),

(d), (e) and (24) all speak to the management of group moorage facilities. At Baltac Bay, management would have to be undertaken by co-owners.

[56] The language of "policies or bylaws … in place" falls short of stipulating that a formal agreement or arrangement is required. In common parlance, a policy may exist without formal recognition or documentation. It may be no more than an established practice. As I have noted, the OCP itself uses the word "policies" quite loosely. The term "policies or bylaws" does not connote a formally documented agreement or understanding.

[57] Subsection (21)(c) calls for a management plan. Subsection (21)(c) is now repealed, but it sheds light on what may be meant by the reference to "policies" in subsection (21)(d). A management plan may be viewed as an expression of policy.

[58] As a practical matter, rezoning is likely to occur before plans for a group moorage facility are completed, the facility is constructed, and final arrangements for the management and operation of the facility are nailed down. It would be natural for an applicant for a rezoning to postpone fully documenting a preliminary understanding as to how the facility will be managed and moorage will be allocated.

[59] Taking all this into account, in my opinion, it is open to the District, acting reasonably, to conclude that an informal arrangement or understanding could be considered as policies in place to manage the allocation of moorage spaces as contemplated by subsection 10.3(21)(d).

[60] Having concluded that the District is not obliged by subsection 10.3(21)(d) to require a formally expressed arrangement between BCA and PHCA, the remaining question is whether the District had a reasonable basis to conclude that BCA and PHCA had an informal arrangement or understanding to manage the allocation of moorage spaces that provided sufficient assurance in the circumstances.

[61] Consistently with subsection (21)(c), PHCA submitted a Management Plan (the "Plan") with its application for the bylaw amendments. The Plan reviewed the

failed 2015 application and PHCA's discussions with BCA as background to the application. It stated:

> The BCA is not part of the within [F]ront Counter application for land tenure. Should a boat moorage facility be approved for this location, and a joint management agreement be executed between the two communities (whereby the two communities would share the use and expenses for the boat moorage facility on a 60% PHCA / 40% BCA basis), the within applicant PHCA, intends to transfer/assign a 40% undivided interest in the uplands title as well as in the crown land tenure to the BCA. The BCA would thereafter be responsible for capital/operating costs for 40% of the boat moorage facility costs, as well as enjoy the benefits of ownership and use of 40% of the boat moorage facility. For the past number of years the two communities have shared operating costs for the Beach.
>
> [Emphasis in original.]

[62] It was clear from this that a joint management agreement was not yet in existence. The Plan went on to describe the intended joint management agreement:

> The two communities will put in place a formal Joint Management Agreement for the operation of the facility which will contain the following basics:
>
> - the two communities share of the slips will be set at 60/40 (PHCA/BCA) representing proportionality;
> - the PHCA slips will be strictly "communal" for the members of its community, meaning that every year the allocation of slips will be open to all the members and with the slips (weekly, monthly, annually) allocated on a basis to manage yearly supply & demand;
> - the BCA slips will be ultimately fully "communal" for the members of its community, following a transition period within which existing Buoy Owners will have a preferential right of access to an annual slip for a period of time;
> - "public" access to the beach (the crown foreshore area) will be made available to the general public via the boat moorage facility, so as to allow the general public to load and unload using the dock to allow access to the public beach areas;
> - all items addressed in the Environmental Management Plan (attached as part of Front Counter application).

[63] The Plan included a section headed, "Detailed information addressing each of the considerations in 10.3(21) of the Lake Windermere Official Community Plan (OCP) Bylaw". It addressed each of the components of subsection (21) in turn. Addressing subsections (d) and (e) it stated:

> 4.4. Establishment of Bylaws/Policies to manage allocation of slips between the members of each community
>
> The two communities share of the slips will be set at 60/40 (PHCA/BCA) representing proportionality (see paragraph 1.5 above). Over the past 6 years we have worked out the essentials of an agreement between the two community associations to allocate among, and manage the slips for, the members of the two communities. Because the agreement includes transfer of an interest in the beach lands and the facility tenures, its execution and operation is conditional upon the applications (both Front Counter and RDEK) being granted.
>
> 4.5. Management of moorage spaces on a shared use or rotating occupancy basis (see paragraph 1.5 above)
>
> The PHCA slips will be strictly "communal" for the members of its community, meaning that every year the allocation of slips will be open to all the members and with the slips (weekly, monthly, annually) allocated on a basis to manage yearly supply & demand. The BCA slips will be ultimately fully "communal" for the members of its community, following a transition period within which existing Buoy Owners will have a preferential right of access to an annual slip for a period of time.

[64] These passages from the Plan made it clear that BCA and PHCA had a history of cooperation and had addressed the elements of a joint management agreement, including the allocation of slips under such an agreement. In my view, it was reasonably open to the District to view the arrangement described in the Plan to manage the allocation of 90 moorage spaces as sufficient in the circumstances to comply with subsection 10.3(21)(d).

[65] After the public hearing, PHCA and BCA modified their arrangement to accommodate a Marina of 60 rather than 90 slips. The modification was agreed while the bylaw amendments were awaiting third reading and final approval. It was the product of negotiations between Mr. Voszler, speaking for PHCA, and BCA's Board, and was subject to ratification by BCA's membership by special resolution.

[66] On a 60:40 sharing ratio, a reduction from 90 to 60 slips overall would reduce the slips available to BCA members from 36 to 24. BCA's Board perceived a risk that EBOs would not support the change. It pressed for more than 24 slips. It is likely that Mr. Voszler perceived a substantial risk that the rezoning application would fail if BCA were to advise the District that their arrangement had come

unglued prior to third reading of the bylaw amendments. He agreed to modify the 60:40 sharing arrangement in BCA's favour, but only for a limited time.

[67] The result was a compromise. BCA members would obtain 36 slips (60%) for the first ten years of operation of the Marina, and 26 slips (43%) for the next ten years. After that their share would drop to 24 slips or 40%. This provided substantial but time-limited protection for the EBOs.

[68] The District was advised only that, following consultations with BCA's Board, the number of slips in the proposed moorage facility was to be reduced. It was not advised of the time-limited modification of the sharing ratio under the parties' arrangement.

[69] In my view, this undisclosed and limited modification of the sharing ratio does not undermine the District's reliance on the information provided to it or suggest that it was unreasonable for the District to have acted on the information provided in approving the bylaw amendments.

[70] To summarize, I find that the District was in a position to reasonably conclude that the bylaw amendments were consistent with the OCP. Its adoption of the bylaw amendments was not unreasonable. I reject the petitioners' first attack on the bylaw amendments.

Second issue: Did the District breach its duty of procedural fairness and statutory prerequisites to the exercise of its power to amend by failing to obtain and disclose to the public draft agreements between BCA and PHCA concerning the allocation of moorage in the proposed Marina?

The parties' positions

[71] The parties agree that, in addressing a question of procedural fairness, the Court must make its own independent assessment without deferring to the District's own assessment that its procedures were fair; *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.,* 2013 BCCA 55 at para. 52.

[72] The parties agree that, in considering the bylaw amendments, the District owed to members of the public who might be affected by its decision a duty of procedural fairness grounded in s. 465(2) of the *LGA* and the common law. Section 465(2) refers to the public hearing that was required in connection with the proposed amendment of the OCP. A public hearing was not required in respect of the rezoning itself, but the two amendments were considered as a package. Section 465(2) states:

> (2) At the public hearing, all persons who believe that their interest in property is affected by the proposed bylaw must be afforded a reasonable opportunity to be heard or to present written submissions respecting matters contained in the bylaw that is the subject of the hearing.

[73] It is a corollary to the right to be heard or present written submissions that the District owes a duty to interested members of the public to offer them an opportunity to examine in advance of the public hearing "reports and other documents that are material to the approval, amendment or rejection of the bylaws by local government"; *Pitt Polder Preservation Society v. Pitt Meadows (District),* 2000 BCCA 415 [*Pitt Polder*] at para. 54.

[74] The petitioners contend that this duty extends to requiring the District to obtain material reports and other documents not in its possession in order that they may be disclosed in advance of the public hearing. They rely upon *548928 Alberta Ltd. v. Invermere (District)* (1995), 28 M.P.L.R. (2d) 109 (B.C.S.C.), *Pitt Polder* at paras. 58 and 60, and *Community Association of New Yaletown v. Vancouver (City),* 2015 BCCA 227 [*CANY*]. They further contend that draft joint operating agreements between BCA and PHCA were material documents that the District was obliged to obtain and disclose before the public hearing. The District's failure to do so means that the bylaw amendments must be set aside.

[75] The respondents deny that draft operating agreements between BCA and PHCA were material documents that the District was obliged to obtain and disclose before the public hearing.

Analysis

[76] Recognition of a duty of procedural fairness in Canadian law began with the decision in *Nicholson v. Haldimand Norfolk (Regional) Police Commissioners,* [1979] 1 S.C.R. 311. The essential proposition is that a person confronted with a governmental decision that could adversely affect his or her legal or practical interests should be given a fair opportunity to address the decision-maker. A fair opportunity includes access to information or allegations in the decision-maker's possession that could motivate an adverse decision. Procedural fairness has come to be recognized as a central principle of Canadian administrative law; *Dunsmuir v. New Brunswick,* 2008 SCC 9 at para. 90.

[77] The common law duty of procedural fairness informs the interpretation of s. 465 of the *LGA*. It led the Court in *Pitt Polder* to recognize a duty imposed on municipal bodies to permit members of the public to examine reports or other documents that are material to the decision at hand in advance of the public hearing contemplated by s. 465.

[78] *Pitt Polder* concerned documents in the municipality's possession. Imposing an obligation on the municipality to seek out and obtain documents that it does not possess and does not intend to obtain is not an obvious extension of the duty of procedural fairness recognized in *Pitt Polder*. The duty of procedural fairness is founded in a concern with information that may motivate an adverse decision, not with information that will not be considered by the decision-maker. Requiring the decision-maker to seek out information that it does not require for its decision would involve the imposition of a different kind of duty, one more concerned with the substance of the decision than the fairness of the procedure.

[79] In this case, if it were unreasonable for the District to have made the decision without obtaining draft operating agreements, that could found an attack on the substantive reasonableness of the decision, but it would not be a challenge based on procedural fairness. I have already concluded that the District acted reasonably in approving the bylaw amendments on the basis of the information provided to it.

[80] Accordingly, on first principles, I doubt the petitioners' argument that procedural fairness required the District to obtain and produce draft operating agreements between BCA and PHCA. However, it is necessary to address the cases the petitioners rely upon. All three cases involved rezoning applications that required a public hearing.

[81] In *548928 Alberta Ltd.,* the municipality was in possession of development permit variance applications that were material to consideration of the proposed rezoning. The variance applications were not disclosed before the public hearing took place. The municipality argued that the variance applications did not have to be disclosed because they had not yet been considered by Council. Melnick J. rejected that argument, at para. 24, and set aside the rezoning for breach of procedural fairness. This case does not assist the petitioners.

[82] In *Pitt Polder,* highly relevant materials were provided to the District at the public hearing. The District had requested some of them in advance. Speaking for the Court, Rowles J.A. observed at para. 58:

> When the impact reports were thought necessary to Council's decision on the bylaws, and no one suggests they were not in this case, it would have been a simple matter for the Director of Planning Services to request that the reports be delivered to the District in sufficient time to permit them to be made available to the public as part of the Public Hearing Information Package issued in advance of the public hearing.

She held that the failure to make the reports available in advance of the public hearing amounted to a breach of the duty of procedural fairness.

[83] *Pitt Polder* does not stand for the proposition that the District was obliged by its duty of procedural fairness to seek out and obtain documents it did not need or wish to obtain and never in fact obtained.

[84] In *CANY,* a chambers judge had set aside the rezoning for reasons that included a failure to disclose material information. The Court of Appeal allowed an appeal, holding that the disclosure had been adequate in the circumstances. Giving judgment for the Court, Bauman C.J.B.C. did not suggest that the duty of procedural

fairness should require a municipality to seek out and obtain information it does not require. His reasoning tends to favour the contrary proposition. He stated:

> [88] The City submits that, interpreted in light of these authorities, procedural fairness requires it to disclose, before a public hearing triggered by s. 566 of the *Vancouver Charter*, the materials that the City Council will consider when deciding whether to enact the rezoning by-law at issue. It says that such disclosure will ensure citizens can make informed, thoughtful and rational comments on the by-law at the public hearing. I agree.
>
> …
>
> [91] … There is a long line of authority to the effect that a municipality will generally meet its disclosure obligations if, as By-law 9756 requires, it discloses everything that was or will be considered by council (see e.g., *Fisher Road*; *Hubbard*; *Eddington*; *Eadie*; *Pollard v. Surrey (District)* (1993), 76 B.C.L.R. (2d) 292 at para 23 (C.A.); *Eaton v. Vancouver (City)*, 2008 BCSC 1080 at paras. 41-42).
>
> [Emphasis added.]

[85] I reject the petitioners' argument that procedural fairness required the District to obtain and disclose draft joint operating agreements between BCA and PHCA that it did not need or wish to obtain and never in fact obtained.

Third issue: Did the District have jurisdiction to amend the proposal after the public hearing to decrease the density of the area affected by the change?

Parties' positions

[86] Section 470(1) of the *LGA* states:

> **Procedure after public hearing**
>
> 470 (1) After a public hearing, the council or board may, without further notice or hearing,
>
> (a) adopt or defeat the bylaw, or
>
> (b) alter and then adopt the bylaw, provided that the alteration does not
>
> (i) do any of the following:
>
> (A) alter the use;
>
> (B) increase the density;
>
> (C) without the owner's consent, decrease the density
>
> of any area from that originally specified in the bylaw, or

> (ii) alter the bylaw in relation to residential rental tenure in any area.

[87] The petitioners contend that the amendment of the zoning bylaw to reduce the number of slips in the Marina from 90 to 60 decreased the density of the zoning without the owner's consent, contrary to s. 470(1)(b)(i)(C). The argument is technical. They submit that the land in question – that is, the aquatic Crown land of the Lake Area – had no "owner" for the purposes of the *LGA*. They say that the subsection must be understood as imposing an affirmative requirement that an amendment that the owner's consent be obtained or an amendment decreasing density is not permissible after a public hearing. A further public hearing would be required.

[88] The respondents accept that the amendment reducing the number of slips from 90 to 60 was an amendment that reduced the density. They maintain that the Crown was the owner for the purposes of s. 470 of the *LGA*, and the Crown authorized PHCA to make and amend the rezoning application. The amendment was therefore made with the owner's consent and s. 470(1)(b)(i)(C) was satisfied. Alternatively, they dispute that the affirmative consent of an owner is required. If there is no owner within the meaning of s. 470, they submit that an amendment decreasing density is simply permitted.

[89] The parties did not agree on the standard of review in relation to this issue. The petitioners maintain that the issue is one of the District's jurisdiction to proceed with an amendment that reduced the density having regard to the requirements of s. 470 of the *LGA*, and the question is whether the District was correct. The respondents submit that the question is whether the District's decision to proceed is consistent with a reasonable interpretation of s. 470.

Analysis

[90] The petitioners' position that the standard of review is one of correctness where the question is one of "jurisdiction" is supported by *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 at para. 5, following

Nanaimo (City) v. Rascal Trucking Ltd., 2000 SCC 13 at para. 29. Subsequent judgments of the Supreme Court of Canada have called into question whether this analytical framework has survived recent developments in Canadian administrative law*; Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 33-42. In my opinion, for the reasons that follow, it makes no difference in this case whether the standard is one of reasonableness or correctness, and I will not address this question further.

[91] Section 470 distinguishes amendments to zoning applications that would increase the density or change the use of the property, on the one hand, from those that would decrease the density, on the other. The former require a further public hearing. The latter does not, so long as the owner consents.

[92] Section 460(1) of the *LGA* states that a local government must define procedures by which an owner may apply for a rezoning in the first place and the local government must consider the application. This does not preclude a local government permitting others to apply, but an owner is in a privileged position. It is entitled to apply and have its application considered.

[93] Sections 460 and 470 are part of a statutory scheme addressing planning and land use management in Part 14 of the *LGA*. They must be read together. "Owner" must have the same meaning in both sections. That is, a person who is entitled to apply and have the application considered is also entitled to consent to an amendment that decreases density after a public hearing has taken place, and so render a further public hearing unnecessary.

[94] This provides context for the distinction drawn in s. 470. It assumes (as will often if not invariably be the case) that an owner will prefer increased density of use, because the possibility of increased density usually makes property more valuable. Conversely, restrictions on density are imposed in the interests of the broader community. If an owner/applicant for rezoning consents to an amendment to reduce the proposed density, no further hearing is required in the public interest, while an

amendment to increase the density engages the public interest differently and a further hearing is required.

[95] PCHA described itself as the owner of the Lake Area in its application for rezoning. It did so on the strength of a letter dated April 3, 2018 from the Ministry of Forests, Lands, Natural Resource Operations and Rural Development that stated:

> Please accept this letter as the Ministry of Forests, Lands, Natural Resource Operations and Rural Development's consent to authorize you to act as our agent to apply to the Regional District of East Kootenay for rezoning of the Crown land shown on the attached map for moorage purposes.

[96] Lake Windermere is aquatic Crown land because the Crown in Right of British Columbia owns both the water in the lake (*Water Sustainability Act,* S.B.C. 2014, s. 15, ss. 1 (definition of "stream") and 5) and the lakebed, unless the Crown has expressly granted the lakebed to someone (*Land Act,* R.S.B.C. 1996, c. 345, s. 55). There is no evidence that the lakebed of Lake Windermere is the subject of a Crown grant.

[97] The petitioners rely on statutory definitions. The *LGA* does not define "owner" but, by s. 40(1) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, the definitions in the Schedule to the *Community Charter* extend to all enactments relating to municipal and regional district matters, though only "so far as the terms defined can be applied". The Schedule to the *Community Charter* states:

> "owner" means, in respect of real property,
>
> (a) the registered owner of an estate in fee simple,
>
> (b) the tenant for life under a registered life estate,
>
> (c) the registered holder of the last registered agreement for sale,
>
> (d) the holder or occupier of land held in the manner referred to in section 228 [taxation of Crown land used by others] or section 229 [taxation of municipal land used by others], and
>
> (e) an Indian who is an owner under the letters patent of a municipality incorporated under section 9 [incorporation of reserve residents as village] of the Local Government Act;

[98] Crown land is not held by the Crown in fee simple, or in any of the other ways listed in the *Community Charter* definition of "owner". The definition is on its face

exhaustive. The petitioners rely on *Sullivan on the Construction of Statutes* (6th ed.) at s. 4.34. It states:

> Exhaustive definitions declare the complete meaning of the defined term and completely displace whatever meanings the defined term might otherwise bear in ordinary or technical usage. An exhaustive definition is generally introduced by the verb "means". … [T]he statutory definition displaces any understanding of the term based on dictionary definitions or linguistic intuition.

[99] The petitioners therefore contend that the Crown cannot be considered as an "owner" within the meaning of s. 470 of the *LGA*. It would follow that the rezoning application was not made by an "owner" and Crown was not entitled as of right to apply for a rezoning, pursuant to s. 460. While this would undoubtedly have come as a surprise to all involved, the petitioners say that makes no difference.

[100] As I have noted, by s. 40(1) of the *Interpretation Act,* the definition of "owner" in the *Community Charter* only applies to Part 14 of the *LGA* "so far as the terms defined can be applied". The modes of ownership listed in subsections (a), (b), (d) and (e) cannot be applied to the Crown. The first of these, unconditional ownership of a freehold estate in fee simple, is the highest form of private ownership of real property recognized in the law of British Columbia. A freehold estate in fee simple ultimately derives from a Crown grant; DiCastri, *Registration of Title to Land* (looseleaf, 2013 – release 11) (Toronto: Carswell), p. 1-1. The Crown has all the rights of an owner in fee simple without holding a freehold estate in fee simple or any other freehold estate. In my opinion, the definition cannot be applied to Crown land in a meaningful and sensible way. For the purpose of ss. 460 and 470 of the *LGA*, the owner of Crown land is the Crown. I therefore reject the petitioners' third argument. I think that the District was correct to permit the amendment. If the standard is one of reasonableness, its decision was reasonable.

[101] In case I am wrong, I should consider the position if the petitioners are correct and Crown land has no owner for the purpose of ss. 460 and 470 of the *LGA*. What does it mean that the owner's consent to a decrease in density cannot be obtained? There is difficulty arising from the grammatical structure of s. 470, which features a

proviso followed by a double negative. This can be seen by reducing the section to its immediately essential components and underlining certain elements:

> After a public hearing, the council or board may … (b) alter and then adopt the bylaw, provided that the alteration does not … (i) … (C) without the owner's consent, decrease the density …

[102] The word order and a double negative create ambiguity. The section may be understood as giving rise to an affirmative requirement to be satisfied before the proviso is effective. This is the petitioners' interpretation: if the effect is to decrease the density, the board may alter and then adopt only with the owner's consent. Alternatively, the section may be understood as creating a proviso that does not apply when there is no owner: the board may alter and then adopt provided that the alteration does not decrease the density without the owner's consent. In the absence of an owner, the density is not decreased without the owner's consent.

[103] The apparent purpose of the provision is to permit amendments to decrease density without a further public hearing, subject only to consideration of the owner's consent. If there is no owner for purposes of the section, then it makes sense that obtaining the owner's consent would not be a requirement. I therefore prefer the second interpretation to the petitioners' interpretation. Even if the Crown is not the owner of the lands in question for the purpose of s. 470, I would still reject the petitioners' third argument. I view rejection of the petitioners' argument on this point as both reasonable and correct.

Disposition

[104] For these reasons, the petition is dismissed.

"Gomery J."

The Honourable Mr. Justice Gomery