

Court of Appeal File No. CA034437
Supreme Court File No. L052643
Supreme Court Registry: Vancouver

COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA FROM THE
ORDER OF THE HONOURABLE MADAM JUSTICE DORGAN PRONOUNCED THE 16TH
DAY OF AUGUST, 2006 AT VANCOUVER, BRITISH COLUMBIA

BETWEEN:

THE HASTINGS PARK CONSERVANCY

APPELLANT
(PETITIONER)

AND:

THE CITY OF VANCOUVER

RESPONDENT
(RESPONDENT)

FACTUM OF THE APPELLANT

(SEE OVERLEAF)

Solicitors for the Appellant:

Derek C. Creighton
Jason Rohrick

ACCESS Law Group
Barristers & Solicitors
1700 – 1185 West Georgia Street
Vancouver, BC V6E 4E6
Tel. 604-628-6720
Fax. 604-689-8835

Solicitors for Attorney General:

George H. Copley, Q.C.

Ministry of Attorney General
Legal Services Branch
6th Floor, 1001 Douglas Street
PO Box 9280, Stn. Prov. Govt.
Victoria, BC V8W 9J7
Tel. 250-356-8875
Fax. 250-356-9154

Solicitors for
British Columbia Lottery Corporation

Denise McCabe

Fulton & Company
Barristers & Solicitors
248 Second Avenue
Kamloops, BC V2C 2C9
Tel. 250-372-5542
Fax. 250-851-2300

Solicitors for the Respondent:

Ben Parkin

City of Vancouver Law Department
453 West 12th Avenue
Vancouver, BC V5Y 1V4
Tel. 604-873-7512
Fax. 604-873-7445

Solicitors for Hastings Entertainment Inc.

Keith Clark

Lang Michener LLP
Barristers & Solicitors
1500 – 1055 West Georgia Street
Vancouver, BC V6E 4N7
Tel. 604-689-9111
Fax. 604-685-7084

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CHRONOLOGY OF RELEVANT DATES IN LITIGATION

<u>Date</u>	<u>Description</u>
1889	The Province transfers Hastings Park to the City In trust for use as a park
1957	City Council enacts By-law No. 3656 (does not regulate use or structure)
1986	City Council passes a resolution approving existing form of development for Hastings Park as outlined in a one-dimensional line-drawing
1994	City Council resolves to restore Hastings Park
Feb. 1996	Parks Board approves the Hastings Park Program as the basis for a conceptual design plan; City Council approves it in principle
July 2003	Hastings Entertainment and B.C. Lottery submit an application to introduce 900 slots at Hastings Park
October 2003	Province enacts <i>Pacific National Exhibition Enabling and Validating Act</i>
Nov. 17, 2003	Staff submit a policy report to Council recommending approval of a change of use to By-law No. 3656 to permit slot machines
Jan. 1, 2004	Ownership of the PNE is transferred from the Province to the City
July 22, 2004	Council approves resolution approving a by-law amendment to permit the use of slot machines at Hastings Park, subject to approval by Council of an amended form of development and numerous other conditions
July 18, 2005	HEI submits a development application addressing rezoning conditions with a reduced scope due to the absence of a municipal master plan for Hastings Park
Aug 11, 2005	Development Services sends out a notice that the City has approved a rezoning application and the application is proceeding to the permit process
Sept. 7, 2005	Open House at the Development Services Department of the City
Sept. 15, 2005	Staff report to Council with a recommendation that the by-law no longer requires Council's approval of an amended form of development
Sept. 22, 2005	Council meets to consider the amended by-law proposal; The meeting is not advertised and had been recently rescheduled from Sept. 20 th
Oct. 4, 2005	Council enacts Bylaw No. 9119 rezoning Hastings Park to permit the use of slot machines, with approval of FOD requirement deleted and construction of the parking garage deferred for 5 years
Oct. 25, 2005	Public hearing at Development Permit Board; No concept plan or mitigation plan or operating agreement exists as of this date
Feb. 2006	Operating Agreement still not in existence
April 10, 2006	Appellant files Further Amended Petition
August 16, 2006	Reasons for Judgment
Sept. 14, 2006	Notice of Appeal filed

OPENING STATEMENT

The history of Hastings Park is one of broken promises and illegal action by the City of Vancouver. The Park was granted to the City in 1889 for park purposes but Council, disregarding the trust, the Park Board's jurisdiction, the City's zoning scheme, and due process, has been leasing Hastings Park to the PNE, which has intensively developed the grounds to accommodate an annual fair, an amusement facility and sports facilities. During the 1990's, in response to a public groundswell to restore Hastings Park, Council endorsed a restoration plan created by a joint committee of the Park Board and community interests, under which modest steps to re-green the Park have since been taken.

Ironically, at its first public hearing for Hastings Park, the City, in July 2004, approved a resolution to introduce 900 slot machines into a neighborhood already overwhelmed by stadium and fair uses. Not only does this by-law perpetuate the City's longstanding violation of the Park Board's jurisdiction, it was enacted in violation of the principles and constraints of administrative law and procedural fairness enshrined in the *Vancouver Charter*. This two-fold offense, merely the latest installment in a 100-year saga of similar abuses, has provoked the Hastings Park Conservancy, a small volunteer society, to petition to court to quash the by-law approving the use of slots. The grounds for doing so fall into two categories.

First, Hasting Park is a permanent public park, and the Park Board has exclusive jurisdiction over uses and improvements. Recent legislation modifying the permitted uses under the trust do not alter that jurisdiction. The Park Board also has exclusive powers to lease.

Second, the rezoning resolution approved a bare use in conjunction with a vague set of material conditions concerning form of development and material amenities, and the task of framing these conditions was flagrantly delegated without proper authority. Despite clear promises by Council at the public hearing that the final form of development would be brought back before it in a hearing, no such opportunity was granted, with important details for mitigating this unpopular use being left to unelected staff. Even at the final approval by resolution some 16 months later, many of the conditions remained uncertain. Council has sub-delegated vital legislative functions to itself and staff, passed by-laws that are uncertain, delegated without authority, fettered its discretion, and breached the notice and fair hearing requirements of the *Charter*.

This appeal also provides the court with an opportunity to clarify the meaning of the complex statutory provisions that govern the City's comprehensive zoning practices.

PART 1

STATEMENT OF FACTS

I History of Hastings Park, 1889 – 2003

1. In August of 1889, the Province transferred approximately 160 acres of land to the City in trust for the use, recreation and enjoyment of the public.

Steele, Richard, *The First 100 Years: An Illustrated Celebration* (Vancouver: Vancouver Board of Parks and Recreation, 1988) (“Steele”), at pp. 1, 41-2; Crown Grant effected by Letters Patent No. 1404A/42, dated August 2, 1889, (the “Hastings Park Trust”); Aff. Harvey #1, Exh. “B”, [Appellant’s Appeal Book (“AAB”), V3 p. 399-401]; *The Greening of Hastings Park*, (Vancouver: Hastings Park Working Committee and Vancouver Park Board, 1996), at pp. 1, 41-43

2. Despite the clear language of the trust, the City, against the strident protests of a chronically under-funded Park Board (the City had an elected Park Board by 1890), leased the Park to the Vancouver Exhibition Association (the predecessor of the PNE). Over the next 100 years, the Park grounds were intensively developed to include amusement and sporting facilities.

Steele, at pp. 53-61, 75, 80-2, 85

3. Council did not enact a zoning by-law in relation to the Hastings Park site until 1957. By-law No. 3656, enacted without a public hearing, attached a “Zoning District Plan” but contained no regulations governing uses or structure and referenced no development plan. Development continued without formal zoning approval. Council did not address the issue until 1986, when it passed a resolution approving the existing form of development as outlined in a one-dimensional line-drawing. The drawing showed the footprint of the buildings but did not address the use, mass, height, or other details. No public hearing was held by Council and no uses were approved.

Aff Thomsett #1, Exh. “A”, “B” [AAB V4, p. 640-1, 642-8]

4. Following decades of mounting pressure to restore Hastings Park to “park use” as per the trust, Council stated its intention to resume control and operation of the site when the lease with the PNE expired in 1994 and to restore the site to dominant park use with green spaces and trees.

Steele, at p. 184; Aff. Harvey #1, at para. 6, 14 [AAB V3 p. 389, 391]

5. In 1994, the City resolved to restore the site as a park, with the Park Board to coordinate and plan the design, and in 1997, the Restoration Program was “approved as the basis for the

redevelopment of a conceptual design plan” by the Park Board. Council too passed a resolution that the report “be approved in principle as the basis for the development of a conceptual design plan for park development”.

The Greening of Hastings Park, see esp. pp. 1-9, 21-23, 29-33;
Map “Hastings Park: Recommended Restoration Plan”, February 1997

6. The initial phases of the re-greening were completed between 1996 and 2000. In 2000, the Conservancy entered into a Joint Operating Agreement with the Park Board in which the two covenanted to jointly agree to any changes to the restoration principles of the Park Restoration Plan.

Copies of pages from the Vancouver Park Board’s Website
Aff. Harvey #1, at para. 14-17, [AAB V3 p. 391] Exh. “A” [AAB V3 p. 397-398]

7. In 2003, the Provincial Government, at the City’s request, passed the *Pacific National Exhibition Enabling and Validating Act*, SBC 2003, c. 76 (the “PNE Act”) to protect the City from “frivolous lawsuits”, as set out in the Hansard discussions at the time. Ownership of the PNE was transferred by the Province to the City effective January 1, 2004.

PNE Act
Bill 83, An Act regarding the Pacific National Exhibition Enabling and Validating Act,
2003 4th Sess., 37th Parl, 2003 - First Reading, Hansard, Committee of the Whole
Aff. Harvey #1, para. 16 [AAB V3 p. 391]

II The Rezoning of Hastings Park

A The November 17, 2003 Proposal

8. In July of 2003, Hastings Entertainment Inc. (“HEI”) and the British Columbia Lottery Corporation (“BCLC”) submitted an application to introduce up to 900 slot machines to the Racecourse at Hastings Park and asked Council to amend By-Law No. 3656 to allow this use.

9. On November 17, 2003, staff submitted a “Policy Report: Development and Building” to Council recommending a rezoning of Hastings Park to approve 600-900 slot machines. The report advised that introducing slots would be controversial and that both the change of use and the form of development would require approval after a public hearing; with Council approving the change of use and then approving the form of development separately with public input.

Background

...[from 484] Since the appropriate procedure for introducing slot machines is through a rezoning, and since issues relating to this are specific to each site proposed for rezoning, proponents were asked to make rezoning applications that would be taken through the normal review and public process...

[from 485] **Form of Development:** Council is being asked at this time, only to approve the change to the CD-1 By-law to permit 600-900 slot machines in the racetrack... All of the details pertaining to building form, access, parking, mitigation measures, signage and community amenity issues will be dealt with at the development permit stage, after which *Council will be required to approve an amendment to the approved form of development* that currently applies to Hastings Park. *All of the identified issues will then have to be resolved to the satisfaction of Council...* [emphasis added]

[from 488] The process associated with the issuing of a development permit will provide additional opportunities for public input. Staff will *report back to Council to seek formal approval of the form of development, at which point Council can deal with specific mitigation measures and conditions that members of the public would have an opportunity to speak to Council about.* [emphasis added]

Aff. Lee #1, Exh. "A", [AAB V3 p. 481-501, see esp. p. 481-482]

10. The report described alterations to the Building Form.

[from 484] **Project Description:** Proposed is an electronic gaming area accommodating 600 to 900 slot machines on level two of the existing Hastings Racecourse building. The floor area for this use would be 4,722 m² (50,828 sq. ft.). A new entrance lobby would be added to the south side of the building along with a vehicular driveway and other exterior improvements, although staff note that these improvements are outside of the applicant's current lease area. Renovation plans include upgrades to public spaces, kitchen and dining facilities, security, building systems and safety.

[from 485] **Density:** With only a new entrance foyer addition planned, and the slot machines occupying existing building space, building density is not an issue.

11. The report called for a new "Concept Plan" and the resolution of impacts as a precondition to approval of a development permit and rezoning.

[from 487] All traffic and parking matters will be reviewed and resolved at the development permit stage and be reported to Council *as part of the proposed changes to the approved form of development.* [emphasis added]

[from 490] CONCLUSION

The application to install 600-900 slot machines at Hastings Racecourse raises several controversial issues ranging from concerns about potential gambling

additions, the relationship of the facility to the pending planning program for the PNE/Hasting Park and the amount of traffic generated and parking required for the 21 hour per day, seven day a week operation...

Traffic, parking, access and noise mitigation measures, as determined by further studies, would be paid for by the proponents. Prior to the submission of a development application for the initial 600 slot machines, *the new concept plan for the PNE in Hastings Park would have to be first approved by Council...* [emphasis added]

B The “consultation process” between the November 2003 Report and Council’s rejection of Staff’s Proposals in on June 22, 2004

Aff. Harvey #1, at para. 19 [AAB V3 p. 392]

12. As instructed, staff (the directors of the Current Planning and Social Planning) reported back to Council with the results of their “visioning process” on May 31, 2004, in a memorandum entitled “Hastings Racecourse Updated Information”. The memo notes a need for significant measures to mitigate the impact of the change to use on the community, and states:

8. Form of Development and Neighbourhood Impacts

As noted in the November 17, 2003, rezoning report, all details pertaining to building form, access, parking, mitigation measures, signage and community amenity issues will be dealt with at the Development Permit stage. Depending on the extent of proposed on-site changes, Council may be asked to approve an amendment to the approved form of development that applies to Hastings Park. *All of the identified issues would then have been resolved to the satisfaction of Council.* [emphasis added]

Aff. Bornman #1, Exh. “D” [AAB V1 p. 48]

C Four Options for New Concept Plan Proposed – None Accepted by Council

13. Council decided not to accept any of the four options for Hastings Park proposed for acceptance by staff, but rather to explore a modified approach between two of the options as outlined in the staff report. The resolution also asked staff to report back on nine areas, some involving building relocations and facility planning.

Aff. Harvey #1, Exh “E”, [AAB V3 p. 451-452]

D The Notice for the July 15, 2004 Hearing

14. Notice of the July 15, 2004 public hearing was provided in several newspapers, as follows [in part]:

The public hearing will consider zoning by-law amendments for: 2901 East Hastings Street (Hastings Racecourse) to permit up to 900 slot machines in the existing main building at Hastings Racecourse.

Aff. Thomsett #1, Exh. "E" [AAB V4 p. 658]

15. There was also a public hearing agenda on file at the City Clerk's office which included a draft text of the by-law amendment. The draft available for inspection read [in part]:

2.2 The only uses permitted within CD-1(3B), subject to such conditions as Council may by resolution prescribe, and to conditions set out in this By-law, and the only uses for which the Director of Planning or Development Permit Board will issue development permits are:

a) lawful uses existing as of the date of enactment of this By-law;

b) in the racetrack facility, slot machine use to no more than 900 slot machines and a maximum floor area of 4,800 m² for slot machines and circulation...

Aff. Thomsett #1, Exh. "F" & "G"[AAB V4 p. 659-664]

E The By-law Text was approved on July 22, 2004 subject to numerous Conditions and Investigations

16. At the conclusion of a four-day public hearing commencing July 15, 2004, Council, on July 22, 2004, approved an amendment to CD-1 By-law No. 3656 for Hastings Park to permit slot machines at Hastings Park, subject to conditions. [The text of this resolution is appended to this factum as **Appendix "A"**]

Aff. Thomsett #1, Exh. "I" [AAB V4 p. 712-714]

F HEI's formal response to the July 22, 2004 Zoning Conditions

17. A year went by.

18. On July 18, 2005, the Development Permit Board ("DPB") received a document entitled "Project Description/Design Rationale", apparently from the applicant's architect. It states in part:

...In terms of the proposed development, this application is addressing *all of the rezoning conditions* except for the public benefits portion which will be submitted under separate cover.

...The initial scope of the project included design explorations for the entire Hastings Park Racecourse. This involved the rebuilding and reconfiguration of the horse barns, construction of a parkade structure under the infield of the race track, substantial additions to the grandstand building in addition to renovating a large majority of the building. All of this physical infrastructure was being

designed with the overall Hastings Park and Hastings-Sunrise community in mind, along with the rezoning conditions of the CD-1 By-law amendment. *Having spent the better part of six months working through the design options, it became abundantly clear to everybody that it was impossible to design the Hastings Park Racecourse infrastructure without a detailed Master Plan for the overall Hastings Park. ... Based on this, the project scope has been reduced considerably. Construction of an underground parkade, reconfiguration and construction of new horse barns, and additions to the existing grandstand building have all been postponed to a future phase once the overall Hastings Park Master Plan has been developed and finalized...* [emphasis added]

The proposed scope of the current project is mostly contained within the envelope of the existing race track grandstand building. Aside from the items outlined in the public benefits package, and those requirements identified in the traffic study, the remainder of the project is contained to the footprint of the existing grandstand building. The extent of work in the grandstand building includes extensive renovations to all four floors of the building along with a small addition at the mezzanine level of the ground floor...

Aff. Bornman #2, Exh. "U" [AAB V6 p. 972]

G Council's Enactment by Resolution on October 4, 2005 of By-law No. 9119 permitting the use of Slots at Hastings Park

19. Soon after receiving HEI's development proposal and public benefit offering, the City's Development Services Department issued a notice dated August 11, 2005 advising:

...in July 2004, City Council approved an application to amend the zoning by-law applicable to the Hastings Park site to permit slot machines in the racecourse grandstand facility...

The application is "conditional" so it may be permitted; however, it requires the decision of the Development Permit Board...

Aff. Bornman #1, p. 21, para. 61-62; Exh. "HH", [AAB V1 p. 187-188]

20. Staff had advised Council on September 15th to amend the text of the by-law to delete the requirement that Council approve the form of HEI's development, on the ground that the proposed development did not alter the form of development.

Aff. Bornman #1, para. 66-68 [AAB V1 p. 22-23]

21. The September 20, 2005 meeting was not advertised as a public hearing. It was adjourned to September 22, 2005 without notice to area residents or the Petitioner, a fact which Mr. Bornman learned only by consulting the City's website. Mr. Bornman was advised by staff that "there was no time to advise anyone".

22. On October 4, 2005, at a regular meeting, Council passed a resolution accepting the Public Benefits Offering of HEI and deleting the requirement in the approved resolution from July 22, 2004 that the form of development first be approved. (More details below.)

Aff. Bornman #1, para. 43-50 [AAB V1 p. 17-18]

23. Council's decision was based in part on an "Administrative Report" dated September 15, 2005. The report outlined the Public Benefits in very general terms, with much of the scope and details to be negotiated with HEI by staff and police. In the case of childcare amenities, a separate development permit application would be required.

Aff. Lee #1, Exh. "C" [AAB V3 p. 510, 513-517]

24. Staff had advised a member of the Petitioner on May 31, 2005, that a large sign would be posted on the McGill and Renfrew corner of the Hastings Park site, but no sign had been posted by October 2005, months after the rezoning by-law permitting the use of slots had been enacted.

Aff. Bornman #1, para. 18 [AAB V1 p. 11]

H Staff's advice to Council on why it should delete the July 22, 2004 requirement that Council approve Form of Development before Rezoning

25. The September 15th Administrative Report contains the following recommendation about the conditions attached to the July 22, 2004 resolution:

...that...Council's *preliminary approval* for the CD-1 Text Amendment...be adjusted to reflect the fact that HEI's proposed development no longer requires Council's approval of an amended form of development...[emphasis added]

Aff. Lee #1, Exh. "C" [AAB V3 p. 511]

26. The Report describes the purpose of this amendment to the July 22nd resolution as a "procedural housekeeping matter", and then goes on say the following:

At the time of the Council Resolution of July 22, 2004 (the "Rezoning Resolution"), HEI proposed substantial changes to the Grandstand Building on the site, including reconfiguring and substantially changing the entrances and changing the footprint of the Grandstand Building. This required that Council approve an amended form of development to accommodate the slot machines. However, the current development application by HEI no longer alters the form of development as it no longer involves substantial physical changes to the outside of the Grandstand Building and the development proposal is contained entirely within the existing building footprint.... These changes to the development have resulted in the need to make some procedural housekeeping adjustments of the Rezoning Resolution to reflect the current development application.

Aff. Lee #1, Exh "C" [AAB V3 p. 511, 513]

I Representations from Mr. Robinson on scope of Building Changes and why condition of approval of Form of Development was Deleted

27. Mr. Robinson described the initial July 22, 2004 application as a "tenant improvement" in his September 22, 2005 reply to Mr. Bornman's email earlier that day (sent just a few hours before the hearing):

Form of Development refers to the overall massing and scale of the development that is being proposed. As I understand it, the applicant proposed *at the Public Hearing a project that was a tenant improvement*. [emphasis added] Later, the applicant proposed a significantly larger project that included a change to the parking provisions (parking structures) and more extensive alterations to the existing building. When the applicant submitted their application for a development permit, the proposal was for tenant improvements only. That is what is presently being reviewed for a decision. In some cases minor alterations or additions to a building are considered not to fundamentally alter the overall Form of Development. The application is considered one of those cases. Basically what is now being proposed amounts to interior alterations with very minor exterior changes that are not considered to be altering the existing Form of Development which speaks to building height and massing. Hence, the report to Council on Sept 22 states that an amended form of development is not required.

Aff. Bornman #1, Exh. "KK" [AAB V1 p. 194]

28. Subsequently, in his affidavit, Mr. Robinson deposed that staff deleted the requirement of a subsequent referral to Council because the increase in square footage of 3,331 sq. ft. proposed to the mezzanine was minimal in comparison with the 162 acres of Hasting Park.

Aff. Robinson #1, para. 22-25 [AAB V4 p. 574-575]

29. Note that none of these representations identify the cause of HEI's architect's decision to scale back its proposal, due to the difficulty of designing parking structures, and racecourse infield, etc. until the Hastings Park Master Plan had been finalized.

J Descriptions in the Development Permit Report of October 12, 2004 on the scope of Building Changes and why the condition of approval of Form of Development was Deleted

30. Similarly, the DPB report dated October 12, 2005 describes the downscaling of the permit application in relation to the earlier concept, listing extensive changes to the physical structure and representing that most of these were no longer in the application before the DPB. The report also states that HEI is in negotiations of an operating agreement with the City as

landowner for a five-year term with an option to renew for a further 15 years, conditional on constructing additional underground parking in the first year of the renewal.

Aff. Bornman #1, Exh. "EEE" [AAB V2 p. 231]

K No Operating Agreement existed as of October 2005 for a number of Council's conditions for its approval of the Rezoning By-law

31. The CD-1 by-law amendment to allow slots was approved by Council on October 4, 2005 and as at that time the operating agreement terms and/or any drafts of the document had not yet been produced by the respondent. Council added the following conditions:

...H. THAT the operating agreement between HEI and the City provide for the development of a 500 car space underground parking structure by HEI with a construction start in the first year of the renewal period, but after the racing season.

I. THAT HEI pay the childcare operating subsidy for the temporary childcare program (first two years) and for all 44 spaces in the permanent facility for the full remaining term of the Operating Agreement (20 years).

J. THAT Council strongly recommend to the Development Permit Board that the primary entrance/exit for the northwestern parking lot for the HEI/racetrack patrons be off McGill Street through a new Gate 8...

Aff. Bornman #1, Exh. "OO" [AAB V2 p. 205]

32. The Council report added other terms relating to negotiation of protocols between PNE security and the police to "outline a cooperative approach to safety and security issues for guests and community". Based on Mr. Bornman's review of the Development Committee Report in late October 2005, as of that date no concept or master plan for Hastings Park had been made, no operating agreement had been legally secured or finalized, no mitigation plan devised, and no public benefits legally secured.

Aff. Bornman #1, para. 85, [AAB V1 p. 27] Exh. "AAA"- "CCC" [AAB V2 p. 225-228]

L Further Particulars of Information Requests related to the Development Permit Process

33. No information on the operating agreement was provided until a fact sheet was released on August 8, 2005 to a group of 8-9 residents, advising that it was under negotiation and would not be finalized for several months. The fact sheet did not address specific terms referenced at the public hearing such as: securing horse racing and the related jobs to the existence of slots on

site, ensuring the racecourse stays within its current footprint, ensuring that there are no alcoholic drinks allowed on the slots floor, or confirming that there are no gaming tables allowed on site.

Aff. Bornman #1, para.32-33 [AAB V1 p. 15], Exh. “U” & “X” [AAB V1 p. 95 & 107]

34. The negotiator, Mr. Gerry Evans, advised that the annual rent value in the draft operating agreement was based on “...what other racetracks are willing to pay in places like Cloverdale” and refused to provide a copy of the negotiation terms given by Council months before.

Aff. Bornman #1, para. 34-39 [AAB V1 p.16], Exh. “Y” [AAB V1 p. 108]

35. The City held an Open House on September 7 and 10, 2005. Although Mr. Bornman had asked staff to display the full development permit application, they only provided some perspective drawings. Mr. Bornman reviewed the Development Committee report in late October 2005 and could locate no master plan, operating agreement, or mitigation plan.

Aff. Bornman #1, para. 22-25, 85 [AAB V1 p. 12, 27], Exh. “AAA”-“CCC” [AAB V2 p. 225-228]

36. Mr. Bornman and Mr. Sharbo made repeated requests, including an FOI request, for a copy of the audio records of the October 25, 2005 public hearing of the DPB, but were told that the audio recordings were too poor in quality to be copied, and once produced were blank. Mr. Sharbo also learned that DPB members revised some of the conditions imposed in the October 24, 2005 meeting. Mr. Sharbo’s efforts to obtain copies of the operating agreement were met with long delays and fees, which the City would not waive, claiming the matter was not one of public importance. A disclosure package was finally received in late February 2006, but the documents produced were severely edited, providing virtually no details in relation to childcare, capital improvements, or parking areas. Even an internal memo dated May 27, 2005 was excised to delete reference to the date on which the operating agreement was to be concluded.

Aff. Sharbo #2 (all) [AAB V6 p. 1036] & esp. Exh. “T” [AAB V6 p. 1067]
Aff. Bornman #2, para. 36 [AAB V5 p. 725], Exh. “M” [AAB V5 p. 804-917]

PART 2

ERRORS IN JUDGMENT

37. [1] The court erred in failing to find that Council has no authority to zone or rezone Hastings Park and that Hastings Park is exempt from Council’s zoning powers.

38. [2] The court erred in failing to find that the Operating Agreement is of no force and effect.

39. [3] The court erred in failing to find that Council acted outside of the authority of the *Vancouver Charter, RSBC 1979, c. 55* in enacting City of Vancouver, By-law No. 9119 by delegating a vital legislative function to unelected representatives, by wrongfully sub-delegating discretion to enact standards and guidelines for development approval to itself or its officers, by passing an by-law that fails the requirement of certainty, or by sub-delegating discretion in zoning matters without prior authorization.

40. [4] The court erred in failing to find that Council breached the notice and fair hearing requirements of the *Charter* or natural justice by resolving to approve an amendment to use on uncertain material conditions and then later enacting By-law No. 9119 by resolution.

41. [5] The court erred in failing to find that Council in passing the July 22, 2004 resolution fettered its discretion.

PART 3A

ARGUMENT – PARK BOARD JURISDICTION

I Preliminary Issues

A Standard of Review Applicable to an Appellate Court reviewing a Judicial Review Proceeding

42. All the errors under appeal are questions of law. The standard of review is correctness, and there is no presumption that the trial judge was correct in her legal conclusions. This principle is not altered by the discretionary nature of judicial review applications.

Delmas v. Vancouver Stock Exchange, 1995 CarswellBC 1011 (BCCA), at para. 21, 34; *Housen v. Nikolaisan*, 2002 CarswellSask 178 (SCC), at para. 8-9; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, at para. 42-43

43. The standard of review on the question of Park Board jurisdiction is correctness, as this is a pure question of statutory interpretation going to jurisdiction.

B The Jurisdiction of the Park Board was adequately pled and the court had adequate materials before it

44. The Conservancy's Amended Petition sought a declaration that the operating agreement was void on the ground the Park Board had exclusive jurisdiction relating to Hastings Park as a

permanent public park. In its submissions, the Petitioner advanced two arguments to support this plea, that (a) the Park Board has exclusive jurisdiction over zoning in parks, and (b) even if the City has concurrent jurisdiction with the Park Board on issues of use, it has exclusive jurisdiction to enter into leases or operating agreements over park buildings.

45. The Court of Appeal should entertain this jurisdictional question. It is a pure issue of law to be decided through statutory and documentary interpretation, requiring no further evidentiary base than can already be found either in the Appeal Record or in the taking of judicial notice, and there is no prejudice to the City in the court's doing so.

Patterson v. British Columbia (Ministry of Human Resources), 1999 BCCA 645, leave to appeal refused [2000] SCCA No. 65 (QL); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 40-41; *Friends of Stanley Park v. Vancouver (City) Board of Parks & Recreation*, 2000 BCSC 372

46. Concerning the lower court's finding that the Petitioner did not provide evidence to support the Parks Board jurisdiction argument, the Petitioner properly based its application on the record of proceedings under challenge, also tendering evidence, as it is permitted to do, to attack the City's jurisdiction to do the impugned act and to raise issues of due process.

Judicial Review Procedure Act, RSBC 1996, c. 241, s. 15(1); *C.A.I.M.A.W. Local 14 v. Paccar of Canada Ltd.*, 1989 CarswellBC 174 (SCC), at para. 48-53

47. The court may take judicial notice of equitable rights arising under the trust and of historical works, on its own initiative or after having been referred to them, and notice may be taken of such works on appeal to identify more accurately the historical context of a case.

Law and Equity Act, RSBC 1996, c. 253, s.7; *Law Society (British Columbia) v. Gravelle* 2001 BCCA 383, para. 18-30, esp. 27-30; *Birk v. Dhaliwal*, 1995 CarswellBC 956, at para. 13; *R. v. N.T.C. Smokehouse Ltd.*, 1993 CarswellBC 149 (BCCA), at para. 120-121

48. In three similar cases, the court was able to determine whether a park was a permanent public park within the meaning of the *Charter* by reading the transferring document and the relevant statutory provision, namely s. 488 of the *Charter*.

Ladner v. Vancouver (City of) 1992 CanLII 1029 (BCSC) (“Jericho Residents’ Association Decision”)
Save Our Waterfront Parks Society v. Vancouver (City), 2004 CarswellBC 659 (BCSC)
(the “Kitsilano Decision”)
Friends of Stanley Park v. Vancouver (City), *supra*

II Hastings Park became a Park upon transfer of the Deed and its Status as a park does not depend on a Designation from the City

A The City was Gifted Hastings Park in Trust under Terms of the 1889 Grant

49. (See the Hastings Park Trust for the terms of the Crown grant)

B The Trustee of a Park may not Sanction uses that Violate use as a Park

50. The language of the Hastings Park Trust is very similar to the grant considered in the decision of *Victoria (City) v. Capital Region Festival Society*, [1998] BCJ No. 2658 which reads as follows:

...AND WHEREAS the hereditaments and premises hereinafter more particularly described being the public park or pleasure ground known as Beacon Hill have been set apart and reserved out of the Crown lands of the Province for the recreation and enjoyment of the public. (at page 3, paragraph 6)

51. In that case, the court, after a lengthy review of trust concepts and various authorities considering same, concludes that the obligation on the trustee to "...maintain and preserve" precluded activities in the park which restricted public access to the park, even mere concerts.

C The Designation of Hastings Park occurred when the Deed was Transferred, and Designation did not Require a Resolution

52. Under s. 488 of the *Charter*, there are numerous ways for land within Vancouver to become a public park. This provision was considered by Dohm J. in the *Jericho Residents' Association Decision*, which distinguished situations where land is transferred to the City for use as a park from situations where land becomes a park merely by the City accepting the transfer for park purposes. The court concluded that a designation by a direct grant does not require a 2/3 majority vote under s. 488(5)(e) of the *Charter*.

Jericho Residents Association Decision supra at para. 6

D Evidence tendered by the City to decide the ultimate issue contains Legal Error

53. In the present case, the lower court did not consider the clear statutory options for property to obtain a designation as a permanent public park under s. 488 and instead relied on the legal opinion of a City employee that Hastings Park is not a permanent public park until the City designates it as such.

Reasons for Judgment, Dorgan J, para. 111 [Appellant's Appeal Record ("AAR") p. 18]
Aff. Harvey #1, para. 2 & 4, [AAB V3 p. 388-389]

54. In the present case, the Park Board did not have separate legal representation from that of counsel for the City in the court below.

III The Statutory Scheme requires Exclusive Jurisdiction for the Park Board over Uses and Improvements

A The object of keeping Park Use inviolable must govern the Interpretation of the Statutory Scheme

55. The appropriate approach to statutory interpretation is that “the words of an Act are to read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”.

Denman Island Local Trust Committee v. 4064 Investments Ltd., 2001 CarswellBC 2826, at para. 76

56. The *Charter’s* legislative scheme must be interpreted in a manner that safeguards the obligation that goes with power over parklands, that they be used, maintained and preserved as such, including powers over improvements (s. 488). It cannot have intended to reserve power to Council to modify or limit the Park Board authority to control the use of parklands. To interpret the legislative scheme otherwise would do violence to the trust under which the use of the property was established.

57. Further, municipal statutes are to be interpreted by a broad, purposive approach giving enactments a large and liberal construction and interpretation as best ensures the attainment of its objects. This principle requires a wide jurisdiction for the Park Board over parks.

Interpretation Act, RSBC 1996, c. 238, s. 8
Nanaimo (City) v. Rascal Trucking Ltd. 2000 CarswellBC 392 (SCC) at p. 11
Save Our Waterfront Parks Society v. Vancouver (City) (*supra*) at p. 10;
Friends of Stanley Park, *supra* at p. 6

58. Section 488 of the *Charter* expressly delegates exclusive jurisdiction and control of all areas designated as permanent public parks to the Park Board. Not only does an ordinary reading of the words of s. 488 indicate that the Park Board is to have exclusive jurisdiction over uses and improvements, such a reading is also required by the object of the *Charter*.

59. The Park Board is given specific enumerated powers to provide for use of property within parks, including, as to buildings, to provide for:

...(a) constructing, acquiring, maintaining, equipping, operating, supervising, and controlling such buildings, structures, and facilities as may be required for the recreation, comfort, and enjoyment of the public while within the parks.

Charter, s. 489(1)(a)

60. These powers are more fully set out in sub-sections (1)(a)-(r) of s. 489 of the *Charter*. It is submitted that these powers necessarily preclude Council from approving other non-park uses and the construction of buildings in parks.

B The *Charter* only requires the Park Board to share Jurisdiction to enact By-laws in specified instances

61. The Park Board may pass, amend and repeal by-laws for the purposes of controlling, regulating, protecting, and governing parks and people who use them (such as exclude animals, control assemblies, regulate signs, and forbid mischief, etc.), but only to the extent that its by-laws are not inconsistent with any by-law passed by Council, as fully set out in sub-sections (a)-(f) of s. 491 of the *Charter*. This is the only provision requiring by-laws made by the Park Board to be concurrent with those enacted by Council.

62. Section 491 deals with the conduct of people and their possessions coming into the park and strives for consistency with the City's by-laws relating to public places.

63. Since the Legislature has limited the inconsistency provision to only this category of by-laws, by virtue of the rules of statutory interpretation, it cannot have intended to limit the scope of the Park Board's jurisdiction or to give Council a concurrent jurisdiction over the real property of the park.

C Concurrent Jurisdiction for Council is Inconsistent with the Legislative Scheme

64. Council's zoning powers in s. 565 of the *Charter* are not geographically limited to exclude parks; however, zoning powers include the power to regulate the use of land and building form and design, and such powers are fundamentally inconsistent with the broad exclusive jurisdiction given to the Park Board.

65. Although lands designated as permanent public parks would be included in the City planning by Council as an area assigned a "park use", these lands are not subject to the standard zoning powers which could potentially limit the use of the land as determined by the Park Board, or be inconsistent with its use as a park.

66. Were Council permitted to enact fixed (as opposed to discretionary) zoning provisions in relation to the construction of buildings in parks, even this would be a significant restriction on the manner in which the Park Board can perform its function.

D This Court should not follow the *Kitsilano Decision* judgment that Permanent Public Parks are subject to Zoning By-laws

67. With respect, the *Kitsilano Decision* was wrongly decided, or is distinguishable, on the finding that permanent public parks are subject to zoning by-laws, for all the reasons argued above. Additionally:

- (a) counsel for the City appeared on behalf of both the City and the Park Board and did not make representations in respect of the jurisdictional issue;
- (b) the critical jurisdictional issue was left to be decided on the arguments of private litigants who did not present all of the arguments to the court;
- (c) the court confuses “uses within a park” with “park use”. The former relates to zoning while the latter relates to specific activities permitted within a use or construction ancillary to that use;
- (d) “park use” is a separate and distinct use from the surrounding zoning, and issues of compatibility are irrelevant; for example, Stanley Park is surrounded by commercial development, but one does not expect that its facilities be designed to blend in with the commercial buildings of the downtown area;
- (e) the notion of concurrent jurisdiction, specifically that the DPB had the authority to approve the construction of buildings in a public park to ensure that they are compatible in design to the surrounding single family homes is problematic. A park is a distinct use and the design of homes or apartment towers surrounding the park is irrelevant. Facilities in parks serve the park’s use and are unique to the activities encouraged by the Park Board as part of its mandate.
- (f) the application of zoning powers is designed to control uses on private property and not to limit an elected Park Board’s exclusive jurisdiction over its park’s use and the development of the park.

Save Our Waterfront Parks Society v. Vancouver (City) (*supra*), at para. 67

IV The PNE Act does not confer Statutory Zoning Powers on Council or otherwise alter the Exclusive Jurisdiction of the Park Board

A PNE Act recognizes the Conditions of the Trust but Expands Them

68. The *PNE Act* (*supra*) acknowledges the trust condition contained in the Crown grant of Hastings Park to the City, broadens the trust to allow activities at Hastings Park that could be alleged to be contrary to park use (s. 2), and deems the actions of the City in the past in permitting these activities to be in accordance with the trust condition (s. 3).

69. Section 1 of the *PNE Act* acknowledges that the grant of the property of Hastings Park to the City contained a “trust condition”, namely:

that “...Hastings Park be maintained and preserved by the Corporation of the City of Vancouver and their successors for the use, recreation and enjoyment of the public”.

70. The *PNE Act* sets out in s. 2(1) that “...the trust condition is deemed to include authorization to the City and its successors to do, or to authorize, instruct or allow others, including without limitation the Exhibition, to do any or all of the following...”

71. Hansard contains the following comment on the purpose for the legislation:

The legislative power to expand the trust to include new extended uses to construct and finance are essential to provide flexibility to both the City and to the Park Board in managing existing uses until they are phased out, without concern over the potential for frivolous lawsuits.

Both the City and the Park Board must jointly approve such an extension of non-traditional park uses. This creates an opportunity for negotiation and compromise, and allows the Park Board meaningful input into whether the introduction of a non park use is necessary, given the potential for increased income, or whether other programs can be cut or fundraising undertaken.

Bill 83, An Act regarding the Pacific National Exhibition Enabling and Validating Act, 2003 4th Sess., 37th Parl, 2003 - First Reading, Hansard, Committee of the Whole, reading at pages 7723, 7739

72. As trust law requires certainty and specific authorization to undertake incidental works, it was necessary to set out these powers in the statutory amendment of the trust agreement. However, these powers are not sufficient to usurp clear statutory language granting the Park Board exclusive jurisdiction over permanent public parks.

B The *PNE Act*'s purpose is to absolve the City from liability for Breach of Trust, not to amend the *Charter* to confer Park Board powers on Council

73. The *PNE Act* did not amend the *Charter* and did not purport to expand the City's zoning powers to regulate park uses. Neither did it reduce the Park Board's exclusive jurisdiction over permanent public parks, nor did it purport to remove the Hastings Park site from its designation as a permanent public park.

74. Although s. 2 of the *PNE Act* expands the "trust condition" to allow a long list of non "park" uses of Hastings Park, it does not thereby derogate from the powers of the Board with respect to a permanent public park, conferred by the *Charter* as existing provincial legislation.

C Only express and unequivocal language would empower Council to usurp the Legislative Function of the elected Park Board

75. Given the breadth and unequivocal nature of the Park Board's powers, it would take a clear legislative act to usurp its function. The *PNE Act* is merely permissive in relation to the City's power under the trust, and not mandatory.

76. The *PNE Act* does not confer new zoning powers on Council. Nor does it dismantle the Park Board's statutory authority to control permanent public parks and clear the way for Council to act. This would require express language, given the importance of the function of the elected Park Board.

77. Rather, this legislation contemplates the cooperation of Council and the Park Board with respect to management of Hastings Park and allows Council to authorize the Park Board to operate in areas outside the narrow trust.

D Prior to seeking the Enactment of the Act, the City formally affirmed plans to transfer care of Hastings Park to the Park Board

78. Following an extensive multi-year consultation process between the Park Board, community residents and other interests, a Restoration Program for the Greening of Hastings Park was adopted by both City Council and the Park Board in 1997.

Aff. Harvey #1, para. 15 [AAB V3 p. 391];
Aff. Lee #1, Exh. "A", (Policy Report dated November 17, 2003) [AAB V3 p. 495]

79. In the Joint Operating Agreement of May 10, 2000 between the Appellant and the Park Board, the preamble sets out an understanding between the parties that the care, custody and

control of Hastings Park currently rests with City Council and that these responsibilities will be transferred to the Park Board over a number of years as the Park develops.

Aff. Harvey #1, Exh. "A" [AAB V3 p. 397]

V The Park Board has Exclusive Jurisdiction to enter into an Operating Agreement with respect to a Permanent Public Park

80. Although legal title to the Park remains with the City as trustee of the Park, the Park Board has exclusive power to enter into lease agreements pursuant to s. 490, which gives it power to enter into a lease, licence, or any other agreement to permit any person to occupy any building or place on property in a permanent park on such terms as the Board deems expedient.

81. In the *Kitsilano Decision*, the court held that the Park Board had the jurisdiction to enter into a lease for a restaurant.

82. A property negotiator with the City has been negotiating an operating agreement with HEI which is characterized as a "license to occupy a portion of the lands known as Hastings Park", and it deals with "the use and operation of the racetrack site including the grandstand building (the site) within Hastings Park".

Aff. Evans #1, [AAB V3 p. 384-387]

83. The operating agreement has not been finalized. The parties would not yet be legally bound by any terms, allowing an opportunity for the negotiations to be handed over to the proper party, being the Park Board, and rendering premature assertions that the agreement has already achieved the objectives sought by Council.

Aff. Evans #1, [AAB V3 p. 384-387]

84. Council was acting outside its jurisdiction and usurping the role of the Park Board in entering into negotiations with HEI, rendering the operating agreement void and unenforceable *ab initio*.

85. In the alternative, the City as the legal owner of the land, is the party to enter into the operating agreement but its authority to do so is subject to the concurrence of the Park Board.

PART 3B

ARGUMENT – ADMINISTRATIVE LAW ISSUES

I The Enabling Legislation for the Zoning Enactment Under Review

A Scheme of Analysis for Administrative Law Issues

86. The Appellant’s argument on the administrative law issue will follow a scheme of analysis recently used by Binnie S.C.J. in reviewing the exercise of a statutory power:

- (a) examine the legislative scheme in general and the provision relied on by the authority in particular, presuming the Legislature intended the statutory decision-maker to function within the principles and constraints of administrative law;
- (b) isolate the acts or omissions relevant to procedural fairness;
- (c) determine the degree of judicial deference to which the authority is entitled;
- (d) determine whether the decision-maker violated the applicable standard of review;
- (e) determine the appropriate remedy.

C.U.P.E. v. Ontario (Minister of Labour) 2003 CarswellOnt 1770 (SCC), para. 96-104

B Overview of the Charter’s Scheme for Comprehensive Zoning

87. The statutory and by-law provisions relied on by Council to enact By-law CD-1 #9119 must be read in their entire context and in their grammatical and ordinary sense harmoniously with the *Charter’s* scheme for comprehensive zoning, its objects and the Legislature’s intention. The following chart (the “Chart”) outlines that scheme, comparing and contrasting it for the sake of greater clarity with the *Charter’s* scheme for discretionary zoning. (Since the powers evolved over time, the enactment dates of these provisions are also important to their interpretation - see below.)

Denman Island, (supra), at para. 76

88. These provisions show a legislative intent to constrain the discretion of City planners within prior legislated regulations and guidelines.

City of Vancouver, Bylaw No. 5869, *Development Permit Board By-law*

C Charter Provisions relied on to enact By-law CD-1 #9119 Approving Slots

89. As the Chart indicates, the following provisions authorize *comprehensive zoning*:

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

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

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

90. As the Chart indicates, Council has, under the authority of s. 565(1)(f), enacted the *CD-1 (Comprehensive Development) District Schedule*, which contains the following provision:

1 Uses Permitted

1.1 Where an area is zoned CD-1 (Comprehensive Development) District and Council has approved the form of development, the Development Permit Board may approve the issuance of permits for the uses listed in the by-law designating the district, subject to such conditions as it may decide, provided however:

(a) the development is consistent with the intent and purpose of this by-law and any applicable official development plan; and

(b) legal instruments are provided, where necessary, to ensure that all features related to each individual development are used, operated, and maintained in accordance with the development as approved.

91. As the Chart indicates, the following provisions authorize the *delegation of discretion* in relation to zoning matters:

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

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

565A. Council may make by-laws...

(d) delegating to any official of the city or to any board composed of such officials such powers of discretion relating to zoning matters which to Council seem appropriate;

92. Note that these provisions do not themselves delegate discretion in relation to “zoning matters,” but rather empower Council to pass by-laws effecting such delegation.

D The Fair Hearing Requirements within the *Charter*

93. Section 151 distinguishes by-laws from resolutions, prohibits by-law amendments by resolution, and requires that powers specified as empowered by by-law must be so exercised.

94. Sections 565, 565.1 and 565A require that zoning be conducted only by by-law.

95. Section 566(1) prohibits Council from making, amending or repealing zoning by-laws, including rezonings, until there has been a public hearing; s. 566(3) contains notice requirements; and s. 566(4) requires all who deem themselves affected have a right to be heard.

96. Section 566(5) limits Council’s authority to alter the text of the by-law proposal debated at the public hearing before passing it. The section reads:

566(5) After the conclusion of the public hearing, the Council may pass the proposed by-law in its original form or as altered to give effect to such representations *made at the hearing* as the Council deems fit. [emphasis added]

E History of the Legislative Provisions Relied On

97. The *Charter* provisions empowering comprehensive zoning (primarily s. 565(1)(f)) date from the early 1950’s, when Council had not yet been empowered to delegate discretion to relax regulations and impose conditions on use. To determine the meaning of the words and the Legislature’s intent, one must strip away subsequent additions and read the words in their original context before returning to the present scheme.

98. Council’s authority for enacting the original zoning by-law in 1957 apparently came from s. 9(1)(g)(iii) of the *Town Planning Act*, which empowered Council to make by-laws “...designating specific lands...for development or redevelopment as a whole area”. The Act did not authorize the delegation of discretion and required regulations within a single district to be

uniform. A map showing the boundaries of Hastings Park was attached to By-law No. 3656, but it gave no guidance regarding uses or regulations.

Town Planning Act. RSBC 1948, c. 339, ss. 9(1), 9(2), 15, 19, as amended by the Town Planning (Amendment) Act, SBC 1954, c. 50, ss. 4-5; City of Vancouver, By-law No. 3656 (Oct. 1, 1957)

99. Section 9(1)(g)(iii) was replaced in 1964 by s. 565(f), the wording of which is close to the modern s. 565(1)(f), except that the only option was to submit plans outlining the form of development and obtain the approval of Council. (This indicates an intention that form of development be approved by by-law - See argument below.) The second option in the modern legislation, submitting an application compliant with an Official Community Plan (“OCP”), was not added until 1990. Section 565(1)(f.1), (empowering the imposition of amenity conditions) was added in 1990 too.

“History of Vancouver Charter, ss. 559-568” at pp. 1-8; ***Vancouver Charter (Amendment) Act, SBC 1964 c.72, s. 17; Vancouver Charter Amendment Act (No.1), 1990, SBC 1990, c.76, s.10***

100. The 1964 amendment also added s. 565A, including s. 565A(d) authorizing delegation by by-law, but restricted delegation to “executive or administrative powers relating to zoning matters”. The current wording of s. 565A(d), delegating “powers of discretion relating to zoning matters” was enacted two years later, in 1966.

Vancouver Charter (Amendment) Act, SBC 1962, c. 72, s. 18; Vancouver Charter (Amendment) Act, SBC 1966, c. 69, s. 23

101. ***Charter*** provisions enabling Council to delegate discretion to planning staff to relax regulations and approve uses on conditions came later and evolved only gradually. The 1964 amendments included s. 565A(e) providing for relaxations by the Director of Planning (“DOP”), but only in case of undue hardship, and it is not clear whether conditional approvals to use were permitted. This wording is still apparent in the 1979 consolidation, and the current broader wording was not added until 1989. “Conditional approval use” was added as a definition at the same time. Section 565(2) was not revised to permit by-laws with conditional approval uses until 1990. (This shows that s. 565(f) was not intended to allow staff to regulate form of development or use – see below.)

Vancouver Charter (Amendment) Act, SBC 1964, c. 72, s. 18; Charter, supra, s. 565A(e);

Vancouver Charter (Amendment) Act, SBC 1988, c. 67, ss. 11-13;
Vancouver Charter (Amendment) Act (No.1), 1990, SBC 1990, c. 76, s. 10

F The Enactment and Contents of By-law No. 9119

102. A resolution permitting slots at Hastings Park was approved on July 22, 2004 subject to the numerous conditions listed in the resolution.

103. Fourteen months later, in September 2005, having been told by staff that approval of form of development was no longer necessary and that the other conditions had been fulfilled, Council enacted By-law No. 9119 by *resolution*. The by-law enumerates permitted uses, but it:

- (a) contains no regulations or guidelines pertaining to the physical aspects of the buildings;
- (b) contains no regulations or guidelines pertaining to the nature and extent of the capital improvements, public amenities, facilities and enhancements of natural physical features HEI would have to satisfy Council's conditions;
- (c) contains no regulations or guidelines pertaining to access, parking, mitigation measures or signage;
- (d) does not attach plans showing the above details;
- (e) fails to provide enough detail of the public amenities required of HEI to render the requirements legally certain or provide a framework in which discretion to impose the requirements is delegated to a named individual: no specification of financial contribution, no details of the daycare facilities or of hiring policies;
- (f) provides no details of the criteria to be included in the operating agreement to regulate serving of liquor or security issues, no details or specifics for the future provision of a 500 space parking facility, no schedule for the payment of \$40 million dollars in capital improvements by HEI, and no indication of how any of the above will be legally enforced;
- (g) contains no provisions delegating authority to (i) grant conditional approvals to use, (ii) make or relax regulations governing physical aspects, (iii) frame requirements under s. 565A(f) for amenities, facilities, or the provision of land or enhancement of features, (iv) frame requirements for the provision of parking or access or mitigation costs, or (v) frame public benefit conditions such as re-greening, and childcare.

104. Staff received instructions about the operating agreement in May and July 2005 “in camera”, and a brief fact sheet was released in August 2005 saying that the agreement would be completed by January 2006; however, no operating agreement was finalized or made public.

II Interpreting the Statute: Applicable Principles and Constraints of Administrative Law

105. Since the *Charter* contains no express overriding language in the statute to the contrary, the following principles and constraints govern the correct interpretation of the zoning provisions of the *Charter* relevant to this appeal.

C.U.P.E. v. Ontario (Minister of Labour), *supra*, at para. 98-99

A The Prohibition against sub-delegation of vital Legislative Functions

106. Municipal by-laws will be *ultra vires* and invalid if they sub-delegate a vital legislative function back to the municipal council or to others:

- (a) A statutory body cannot lawfully exercise its legislative function by passing it to another forum. This precludes a municipality that is empowered to set standards by by-law from redelegating to itself the power to establish those standards by way of resolution.

Air Canada v. Dorval (City) 1985 CarswellQue 84 (SCC) at para 57-58, 61, 87-89

- (b) Neither may a statutory authority enact by-laws or regulations transferring authority to issue permits to a delegate without first legislating standards and criteria for the exercise of this discretion.

Western Canada Wilderness Committee v. British Columbia (Minister of Environment & Parks), 1988 CarswellBC 131 (BCSC), at para. 15-21

B Discretionary Powers to permit development must be exercised in reference to previously enacted Standards or Guidelines

107. Council must set out standards in a by-law, OCP (which must also be enacted by by-law (s.562(1)), or other legislative act representing its policy decisions *before* licenses and permits are granted and on which the exercise of discretionary power to permit development is to be based. Otherwise, the qualifications for a development permit would reside in the likes and dislikes of individual Council members (or their delegates), rather than in by-laws. The requirement of prior legislated standards precludes an administrative body from carrying out its zoning function through its licensing or permit approval processes.

Westfair Foods Ltd. v. Saanich (District), 1997 CarswellBC 2759 (BCCA), at para. 17 & 29, affirming 1997 CarswellBC 252 (BCSC), at para. 34, 52, & 56

108. The prohibition against legislative bodies carrying out their zoning function through the licensing or permit approval process is not confined to the *Local Government Act*. It flows from fundamental principles of universal application:

- (a) When the acts of a legislative body impact the rights of citizens (including property rights) it must afford those impacted the right to express their grievances at a public hearing in front of that body.

Homex Realty v. Wyoming (Village) [1980] 2 SCR 1011, esp. para. 59-62 & 69-74;
Prince George (City) v. Payne 1977 CarswellBC 366 (SCC), para 20-24

- (b) Officers of the Crown may not impinge on rights of property usage (or any other common law rights) except under the authority of a prior legislative enactment.

Case of Proclamations, [1610] EWHC KB J22, 77 ER 1352, (1611) 12 Co. Rep. 74

- (c) Municipal officers do not have authority to create policy on what is and what is not lawful under the pretext of their powers to grant licenses or permits.

Prince George (City) v. Payne, *supra* para. 24;
Vic Restaurant Inc. v. Montreal (City), 1958 CarswellQue 49 (SCC), at para. 63-78

109. The *Charter* maintains this distinction between making and applying standards by requiring all powers specified as empowered by by-law to be exercised only by by-law (s. 151), by requiring zoning to proceed through by-law (ss. 565, 565.1, and 565A), and by prohibiting Council from enacting or amending by-laws until there has been a public hearing (s. 566(1)). (The Zoning and Development By-law, including the CD-1 preamble, recognizes the distinction too, through zone-specific provisions guiding the exercise of delegated discretion – see below.)

110. Every other municipal government in British Columbia is required to legislate standards before permitting development or delegating the power to do so. Section 920(2) of the *Local Government Act* allows for permits that vary by-laws or impose conditions, but s. 920(3) requires this be done under the guidance of an OCP or zoning by-law; the legislation also contains requirements for a validly-enacted OCP and requires that by-laws or OCP guidelines be in place prior to the issuance of development permits or development variance permits. Moreover, s. 922(8) specifically restricts the delegation of powers under s. 176(1)(e), and both

the *Local Government Act* and the *Community Charter* explicitly prohibit municipal councils from delegating the making of by-laws or the powers or duties exercisable by by-law.

Local Government Act, RSBC, 1996, c. 323, s. 176(1)(e), 191-2, 903; 919.1 – 922;
Community Charter, SBC 2003, c. 26, s. 154(2)

111. Other Canadian jurisdictions have maintained this distinction in their zoning legislation. For instance, both Ontario and Saskatchewan have enacted legislation permitting municipal councils to relax the development standards otherwise applicable in a district, but a by-law may not contain such provisions unless there is an official plan in effect in the local municipality that contains provisions relating to the authorization of increases in height and density of development.

Planning Act, RSO, 1983, c. P.13, s. 37; *Planning and Development Act, 1983*, SS
1983-84, c. P-13.1, s. 83.

C Valid By-laws must meet the Requirements of Certainty

112. Municipal by-laws will be *ultra vires* and invalid if they are vague and uncertain in their meaning. The by-law must be couched in such terms that a person who knows the text of it may know what is prohibited and what is not. This test can be looked at by asking whether the provision is so uncertain that it does not provide an adequate basis for legal debate, that is, for reaching a conclusion about its meaning by reasoned analysis applying legal criteria.

Hamilton Independent Variety & Confectionary Stores Inc. v. Hamilton (City) 1982
CarswellOnt 596 (Ont. SC(CA)), at para. 20-22, 28;
Perry v. Vancouver (City) 1994 CarswellBC 123 (BCCA), at para. 11

113. To meet this requirement, Council has enacted detailed District Schedules and other policies and guidelines to guide officers in exercising their discretion to approve conditional uses and grant relaxations. B.C. courts have upheld by-laws delegating discretionary powers by City Council on the basis that these standards provide enough guidance to City planning officials to render the by-laws sufficiently certain and to reserve legislative powers to Council.

Brown v. Vancouver, 69 B.C.L.R. 308; 1986 CarswellBC 223 (S.C.B.C.) para. 31- 45;
sample Schedule and Guideline excerpts (RT-5)

D The Prohibition against Unauthorized Sub-delegation

114. As local governments are themselves recipients of express delegated authority, the law does not permit them to delegate further, unless the power to do so is granted by the enabling

legislation. (*delegatus non potest delegare*) The power to delegate legislative functions, as opposed to administrative functions, is limited by the requirement of certainty and the prohibition against delegation of vital functions. This requires (a) that a legislative body always express the standards which it expects to be observed, and (b) that there be express legislative authority for the delegation.

R. v. Sandler, 1971 CarswellOnt 791 (Ont. CA), para. 12 – 17;
R. v. Joy Oil Co., 1963 CarswellOnt 17 (Ont. CA)

115. In light of these principles and the statutory scheme, it is submitted that s. 565A(d) also must be interpreted in light of the requirements for validity and general principles of statutory interpretation articulated above, as must s. 565(1)(f) and (f.1). (See below.)

E Municipal Councils may not Fetter their Discretion

116. Municipal councils cannot fetter the discretion of successor councils to engage in the legislative process without undue influences. This precludes agreeing to change zoning in return for consideration.

Pacific National Investments Ltd. v. Victoria (City), 2000 SCC 64

F These Administrative Law Constraints apply not only to the Enactment of Uses and Regulations, but also to the Enactment of By-laws that Delegate Discretion

117. For delegated discretion under s. 565A(d) to be valid, the by-law delegating the discretion must adequately define the scope of that delegation, including the criteria by which such discretion is exercised, otherwise it may constitute an abdication of a legislative power of Council or a sub-delegation of discretion onto itself or staff, namely, of the power to decide, within a given zone, which powers of discretion relating to zoning matters Council has kept for itself and which powers it has delegated to staff.

118. (In the instance at hand, Council failed to properly enact the framework necessary for staff to exercise discretionary legislative or even administrative powers. This failure is fatal to By-law No. 9119, but other by-laws in the CD-1 District Schedule may also be affected by this failure to properly delegate discretion – see below.)

G The Procedural and Fair Hearing Requirements of Natural Justice

119. **Purpose for fair hearing requirements:** Failure to abide by the notice requirements for a public hearing on a proposed land use or zoning by-law generally results in it being quashed. A public hearing serves two important functions: (i) it gives those affected a right to make their views known, and (ii) it gives the decision-maker the benefit of a public discussion of the issues surrounding the proposed by-law.

Pitt Polder Preservation Society v. Pitt Meadows (District) CarswellBC 1349 (BCCA),
at para. 44-7

120. **Factors affecting content of duty of fairness:** The content of the duty of fairness in the rezoning context should consider the statutory decision-making scheme, the process to be followed, the function of the participatory process in the ultimate decision, and the importance and consequence of the decision to those affected by it. The courts may impose additional procedural and fair hearing requirements.

Pitt Polder, (*supra*) at para. 41-3; *Wiswell v. Winnipeg* 1965 CarswellMan 24 (SCC), at para. 28-33; *Homex Realty (supra)*, para. 69-74

121. In applying these general principles in this instance, three considerations support a high duty of fairness, governing the approval process not only for use but all material considerations:

- (a) the approval to use was conditional not only on approval of the final form of development, but also on the conditions enumerated. Given the protracted process (28 mo) and the numerous zoning conditions, it is impossible to conclude that Council would have passed the change of use without also modifying the form of development and imposing the conditions (see also further arguments on this point below);
- (b) although the rezoning involves broad questions of policy, the change to use will directly impact property owners, in that there will be changes to parking, access, traffic flow, and noise in a residential community already under significant pressure from PNE and stadium uses; and
- (c) the application to rezone to permit slots is contentious and controversial and will impact the entire community profoundly for many years to come.

122. **Notice / Disclosure – Sufficiency of Notice:** Notice must be sufficient to inform the public of the extent of the by-law's effect on them and to enable them to make an intelligent

response at the meeting. This entails access to all documents that are material to the approval, amendment, or rejection of the by-law.

Pitt Polder, (*supra*), at paras. 48-54, 67; *Peterson v. Whistler (Resort Municipality)* 1982 CarswellBC 231 (BCSC), at 46, 67-69

123. (This requirement raises the issue of how Council could possibly fulfill its notice requirements when the July 22nd resolution contains vague conditions with no fixed standards.)

124. **Fair hearing Requirement – Prohibition against Substantial Changes Post-hearing:** After the public hearing has ended, Council may not hear from a proponent of the by-law or even its planning committee in the absence of other parties before putting the resolution to a vote or otherwise considering it unless another public meeting is held; however, in some instances the courts have upheld a by-law even though a council consulted with staff after the hearing. In these cases, validity has been upheld on the grounds that the changes were not “of substance”, for instance, adjustments to specifications based on a staff report clarifying technical details.

Charter, s. 566(5); *Bay Village Shopping Centre Ltd. v. Victoria (City)* 1972 CarswellBC 265 (BCCA), at para. 16-21, ; *Re Borque*, 1978 CarswellBC 43 (BCCA), at para. 10-11; *Jones v. Delta*, 1992 CarswellBC 205 (BCCA); *Hubbard v. West Vancouver (District)*, 2005 CarswellBC 3043 (BCCA), at para. 16-19

125. It is submitted that s. 566(5) alterations must be confined to information and representations considered at the hearing in reference to the resolution moved. Section 566(5) does not contemplate alterations to particularize generalized conditions requiring lengthy post-hearing investigations and negotiations. (Here staff continued to meet with the applicant for months, and while some public input was provided, it was to staff dealing with developing standards and not to elected officials in relation to a complete and certain by-law – See below.)

H A Fair Hearing is not possible unless the Proposal meets the Requirements of Administrative Law

126. The fair hearing requirements for a by-law enactment cannot be satisfied unless Council clearly articulates in the by-law proposal the precise discretion delegated and the specific policies to guide it. When the proposed by-law contains bare policies that fail the requirement of certainty and that reserve discretion to Council or its delegates to frame criteria for the fulfillment of conditions, it is impossible for the public to adequately know the practical impact of these conditions, and their meaning and practical consequences may change as the conditions are quantified and refined. It is unfair of Council to present the public with a moving target.

Further, notice of something which is so uncertain or which fundamentally changes later is not really notice of a “proposed by-law”.

III Interpreting the Statute: Delegates of Council must always exercise their Discretionary Powers to approve Comprehensive Development under Prior Legislated Standards

A Argument from the Legislative Scheme, Generally

127. The *Charter* provisions detailed above indicate a legislative intent that staff exercise any delegated zoning power only under the constraints of prior enacted regulations and guidelines: it maintains the distinction between zoning enactments and approvals based on them, prohibits zoning amendments through resolution, and requires that all legislating of conditions to use and physical aspects proceed through by-law. (See the Chart & s. 151,565, 565.1,565A & 566)

128. Council’s own by-laws also show intent to constrain the discretion of City planners within the bounds of previously enacted regulations and guidelines:

- (a) the Zoning and Development By-law No. 3575 limits the powers of the DOP and the DPB to those expressly delegated, and the general provisions assume that discretion to relax by-law provisions and grant conditional uses will always be exercised in reference to pre-ordained regulations, guidelines, and plans, and over plans that fully describe proposed developments (see Chart for references to specific provisions);
- (b) the Development Permit Board By-law No. 5869 requires the DPB to exercise its discretionary powers, for the purpose of applying pre-determined standards, not for the purpose of legislating them. This by-law was enacted in 1985 in recognition of the evolving legislative scheme;
- (c) the District Schedules contain detailed regulations to guide the DOP or DPB in granting conditional approvals to use or relaxations to regulations and are supplemented by the *Land Use and Development Policies and Guidelines* and OCP’s (see sample District Schedule and Guideline excerpt);
- (d) the CD-1 preamble recognizes this distinction, and many of the by-laws on the CD-1 Schedule contain regulations guiding discretion and/or refer to OCP’s.

129. Comprehensive zoning by-laws enacted pursuant to s. 565(1)(f) must be interpreted in light of the definition of “Comprehensive Development” in s. 2 of the *Zoning and Development By-law* (No. 3575), contemplating “special regulations” (i.e. zone-specific) of form and use.

130. Section 565F permits Council to include landscaping requirements when zoning pursuant to s. 565(1)(f). It would be odd if landscaping by-laws had to be passed by by-law but all the use, building form, parking and access requirements could be dealt with by resolution and without meeting the notice and hearing requirements!

B Argument from the wording of s. 565(1)(f) & (f.1) specifically

131. Under s. 565(1)(f), an applicant must “submit such plans and specifications as may be required by the DOP” and “obtain the approval of Council to the form of development”. To whom must plans be submitted? – Council, because s. 565(1)(f) gives authority to approve them to Council alone. The phrase “as may be required by the DOP” does not assign authority to the DOP to approve specific building forms within CD districts in the absence of zoning regulations or guidelines, but rather is a requirement that applicants submit plans and specifications compliant with the sorts of technical requirements laid out in s. 4 of the By-law.

132. Further, the words “regulating” and “regulation” refer throughout s. 565(1) both to use [(1)(b)] and physical aspects [(1)(d)-(e.1)]. Even within (1)(f), the second subordinate clause refers to “regulations and guidelines” within a development plan. Since every other sort of zoning by-law in Vancouver, including zoning within CD districts with their own development plans, regulate both uses and physical aspects, harmonious interpretation requires that zoning approvals of “form of development” either specify physical aspects outright or provide, by DOP or by-law, regulations and guidelines for delegates to follow in approving these aspects.

133. Similarly, s. 565(1)(f.1) implicitly requires that it must be a *by-law* that requires amenities, facilities etc. be provided as a condition of “approving a form of development”, and the repetition of this phrase indicates that those conditions are to be set by Council, not its delegates, as part of the approval process.

C Argument from the History of the Statutory Scheme

134. When comprehensive zoning powers came into existence in 1954, only Council could approve a form of development in a comprehensive zone, as the Legislature did not permit

delegation and mandated uniform regulations. This guaranteed a public hearing to approve the form of comprehensive development.

135. After s. 565 came into force in 1964, the power to determine use and legislate regulations for physical aspects was still reserved to Council. Section 565A(d) should be interpreted in light of s. 565A(e), which from 1964 to 1989 confined the powers of the DOP to relax Council's regulations to cases of undue hardship. These restrictions show that when the Legislature enacted s. 565A(d) in 1964, it was not intended to empower the DOP or DPB, rather than Council, to legislate the regulations and standards governing the form of development within comprehensively zoned districts.

136. The original legislative intent that Council approve use and form of development in comprehensive zoning districts should not be discarded because of the 1989 broadening of s. 565A(e) and the 1990 authorization of conditional use approvals. Since the original comprehensive zone by definition has no fixed prior standards, the custom-made by-law and plans must be substantially complete prior to the public hearing and must be certain and complete when enacted as a by-law. (General language permitting delegation of discretion within all comprehensive zoning districts would constitute a complete abdication by Council of its by-law making functions – See below.)

137. Under the discretionary zoning scheme, Council has since set up zones which are called "CD Zones" but have discretionary uses that can be approved by staff who are delegated discretion under specified policies and guidelines. (See By-law No. 5543 (First Shaughnessy) & FSD ODP as an example.) While these are called CD Zones, they are different from the original comprehensive zones under s. 565(1)(f) which contemplates not only the lack of fixed regulations uses but also that approval of the whole of the form of development be by Council.

D Argument from the fact that CD-1, s.1.1 merely mirrors s. 565(1)(f)

138. The CD-1 Schedule, s.1.1 merely parrots the wording of s. 565(1)(f). Taken alone, it would be invalid for improperly sub-delegating the discretion to Council to enact legislation by resolution. To enact a valid zoning by-law under the CD-1 District Schedule, Council must go beyond s. 1.1 and enact a zoning by-law that fixes the use and form of development for that spot, or at least provide sufficient guidelines to prevent administrative officers or boards from usurping Council's function in these respects.

Canadian Institute of Public Real Estate Cos. v. Toronto (City), 1979 CarswellOnt 560 (SCC)

139. Council can avoid an improper sub-delegation by requiring those who apply for a comprehensive rezoning to submit a copy of the existing structures or a sufficiently certain development plan and by passing a by-law which approves the application subject to the condition that the development that is ultimately approved by the DOP or DPB not be materially different from the one submitted for zoning approval.

Jaco v. Vancouver (City) 1981 CarswellBC 668; 123 D.L.R. (3d) 197 (B.C.S.C.), para. 8-12, 44-6
(See also, as examples CD-1(22) (Arbutus Gardens); CD-1 (138) (Glad Tidings Temple))

140. (Here, Council could have avoided improper sub-delegation when approving slots had plans of the existing facility been referenced in the by-law to fix side yards, mass, floor area, etc. However, Council had no intention to approve slots in the existing building unconditionally.)

141. Council's past practice of approving the form of development by attaching a one-dimensional line-drawing is not consistent with criteria of certainty, and under the newer legislation scheme, may in some circumstances improperly delegate discretion.

E Arguments based on absurd Consequences

142. If Council could approve form of development in a CD district without first rendering both use and approved plans certain, it could without notice authorize construction of a 44-storey slaughter house adjacent to a residential zone. Further approval of a use without regard to the balance of the criteria which comprise a form of development could result in an approval that entails dangerous highway access, inadequate parking, noise conflicts, truck access through residential areas, etc.

F Arguments based on the Requirements of Procedural Fairness under both the *Charter* and the Common Law

143. For Council and the public to engage in meaningful debate over a use, the physical manifestation of that use must be reasonably apparent, such as its impact on existing structures, what new structures will be required, and impact on other uses at that spot.

144. Further, where amenities, licensing arrangements, capital improvements, mitigation measures, etc., are *material* to the public's acceptance or rejection of a comprehensive zoning by-law, procedural fairness require that staff report back with completed recommendations prior

to the public hearing at which the by-law is passed. The public's opportunity to examine "all documents material to approval" is metaphysically impossible if most of the documents do not yet exist at the time of the hearing!

Pitt Polder (supra), at para. 49, 54

145. Also a segmented and protracted consulting process can also be equally illusory, as it requires more involvement than most individuals can afford or is contemplated by the *Charter*.

IV Interpreting the Statute: Were Council to have the power to delegate its power to legislate plans, regulations, policies or guidelines within Comprehensive Zoning Districts, such powers would have to be expressly delegated

146. Since delegation of discretion of zoning powers under s. 565A(d) must proceed by by-laws, the issue that arises in exercising its *comprehensive* zoning powers, is Council is required to delegate discretion to approve uses and regulate siting, mass, etc. on a zone-by-zone basis, or can it rely on s. 1.1 of the CD-1 District Schedule as a kind of "omnibus" delegation of discretion? (There was no zone-specific delegation of discretion here.)

147. This question must be answered both in respect of the delegation of the administration power to interpret policy and the legislative power to create it (which we say is prohibited).

148. It is submitted that, on the authority of the *Canadian Institute of Public Real Estate Cos. v. Toronto (City)* case, the CD-1 District Schedule cannot function as a valid omnibus delegation of the zoning powers contained in s. 565(1)(f) and (f.1), be they legislative or administrative.

149. Further, the legislative scheme intends that a proposal to delegate discretion be scrutinized at a public hearing (s. 565(1)(g), 565A(d)). This requirement is mirrored in the "express delegation" clause of s. 3.1.2 of the *Zoning and Development By-law (No. 3575)* and in the District Schedules. The public hearing requirement of s. 566 would be frustrated if Council could delegate legislative powers to staff in a given spot without notice to the public of its intent.

150. The history of the comprehensive zoning scheme also indicates that the legislature did not intend s. 565A(d) to empower Council to make an omnibus delegation of authority to legislate regulations and guidelines for CD districts. The delegation of legislative responsibility was expressly forbidden by the wording of s. 565A(d) as it read at the time s. 565(1)(f) was enacted, and the discretionary zoning scheme implemented years later contemplates the delegation of discretion on a district-by-district basis within confined parameters.

151. The issue of omnibus delegation of legislative power does not appear to have been judicially considered. In *Jaco v Vancouver (City)*, Mr. Justice Hind comments that the CD-1 District Schedule delegates discretion to the DOP to set conditions for the development permit. However, the delegation of administrative power to set conditions on a development permit in reference to the provisions of the *Zoning and Development Bylaw* should not be conflated with the delegation of unfettered (i.e. legislative) power to approve changes to the physical aspects or impose amenity or other conditions at will. Also, *Jaco* may be wrongly decided on this point.

Jaco v. Vancouver (City), (supra), at para. 45

152. In the *Kennedy* case, MacDonald J., in *dicta*, distinguishes comprehensive zoning under s. 565(f) from discretionary zoning, stating that Council may or may not, *on an individual development basis* retain or delegate discretion relating to zoning matters to City officials, pursuant to s. 565A(d). He notes that as a matter of statutory interpretation such delegated discretion will be strictly limited to conditional uses and could not be extended to limit outright uses, even though the by-law provision did not expressly limit the DOP's discretions. This case demonstrates the need for the court to interpret a by-law within the framework of the empowering legislation to achieve the legislative goals.

Kennedy v. Vancouver (City), 1983 CarswellBC 141; 45 B.C.L.R. 175 (B.C.S.C.)

153. If, contrary our submissions above, the *Charter* does permit Council to delegate not only its discretionary powers to permit developments but also bare *legislative* powers to enact standards governing development approval in individual CD districts, any such delegation would have to be explicitly done on the basis of an enactment for that specific zone, so that members of the public have clear notice that in this instance Council is abdicating a legislative responsibility that goes to the core of its function to unelected planning officials. Having done so, Council would thereafter be precluded from guiding delegated power in that zone, as such interference would offend the rules against fettering or reserving discretion.

154. Further, the July 22, 2004 resolution is merely an approval in principle, not a by-law enactment, and thus cannot be the vehicle through which discretion is delegated to the DPB or staff (see *Spot Petroleum (infra)*). Further and alternatively, the July 22, 2004 conditions fail to meet the requirement of certainty required of a delegation of legislative authority.

155. Since to date legislative powers have not been delegated, a by-law passed pursuant to s. 565(1)(f) must determine regulations, guidelines or policies not only in relation to use but also in relation to physical aspects of buildings (height, bulk, location size, FSR, etc. (the sorts of things indicated in s. 565(1)(d)) and to all conditions imposed that are material to the approval, amendment, or rejection of the by-law.

V Interpreting the Statute: Council must Approve Form of Development by By-law, not Resolution

156. It is conceded that when Council is spot-zoning it sometimes needs to seek clarification from staff in relation to technical details after the public hearing has ended. However, the rule of law requires that this practical necessity be constrained by the “no material or substantial change / nothing new” principle articulated in cases such as *Jaco (supra)* and *Hubbard (supra)*. Otherwise Council will be able to do indirectly what it is prohibited from doing directly, namely enact by-laws through resolution or defeat the notice requirements via changes in substance.

Amax Potash Ltd. v. Saskatchewan, 1976 CarswellSask 76 (SCC), at para. 24-25, 29

157. Neither can “approvals in principle” be used to evade the statutory requirement that zoning proceed by by-law in accordance with the requirements of administrative and natural justice. It is submitted that unless an “approval in principle” leads promptly and without substantial change to the enactment of a legally-binding by-law, the public meeting at which the approval in principle is made cannot form the basis for a subsequent enactment by resolution.

Spot Petroleum Ltd. v. Port Hardy (District), 1988 BCJ No. 1383 (BCCA);
Gardner Construction Ltd. v. Parksville (City), 1995 CarswellBC 323 (BCCA), see esp. para. 8-15

158. In 1988, 30 years after zoning Hastings Park, Council approved its form of development by resolution with a single line drawing of the footprint of the PNE buildings. The City contends that this precedent validates approvals to form of development by resolution; however, that contention assumes the principle under attack as a legal falsehood. The development of over 100 acres of parkland without a public process and in violation of a trust demonstrates the absurdity of the City’s policy of approving forms of development without a public hearing. This fact also puts into question the legality of a majority of the PNE development.

159. Alternatively, if Council *can* approve a form of development for the purposes of s. 565(f)(1) by resolution, which the appellant denies, then any such approval would require a full public hearing, subject to the notice provisions of the *Charter* and the common law.

VI Standard of Review for Jurisdictional and Due Process Considerations

160. The learned trial judge rightly held that the standard of judicial review when a question of jurisdictional authority arises is correctness.

United Tax Drivers' Fellowship of Southern Alberta v. Calgary, [2004] 1 SCR 485

161. Procedural fairness issues are also reviewable on a standard of review of correctness. Although it is appropriate in this case to apply the “functional analysis” factors from *Old St. Boniface*, 3 SCR 1170 to determine the *content* of procedural fairness, this is a separate line of enquiry from determining the standard of review. It is for the courts, not Council, to provide the legal answer to procedural fairness questions, and the learned justice erred in holding otherwise.

C.U.P.E. v. Ontario (*supra*), at paras. 100, 103; *Pitt Polder* (*supra*), at para. 41-2

VII Particulars of Council's failure to legislate sufficient Regulations, Guidelines and Policies prior to passing By-law CD-1 #9119

A Council failed to enact adequate provisions to regulate physical aspects of buildings, creating a “use in a vacuum”

162. For 2500 years, the word “form” [*eidos*] when used precisely in reference to artefacts, has referred to the idea or design in the mind of the builder, in accordance with which the material artefact is constructed. The substance [*ousia*] of, for example, a house, that which makes it to be a house and not something else, consists in the purpose [*telos*] for which it is built, together with the form / design [*eidos / morphe*] used to mould matter into a thing able to fulfill that purpose.

Cohen, S. Marc, "Aristotle's Metaphysics", *The Stanford Encyclopedia of Philosophy* (Winter 2003 Edition), Edward N. Zalta (ed.), marked extracts from s. 8, 11 & 15
URL <<http://plato.stanford.edu/archives/win2003/entries/aristotle-metaphysics/>>

163. These concepts illuminate the “grammatical and ordinary sense” of the phrase “form of development”: someone who has decided to build a shed but has no idea of its height, bulk, location, floor space or elective design, cannot be said to have a *design* in mind yet. His “design” has no substance. It has not yet come into being.

164. Since the July 22, 2004 hearing, a long list of indeterminate conditions has been slowly materializing into a concrete development plan, like the reappearance of Lewis Carroll's

Cheshire Cat. Since only the use had been fixed at the time the by-law was approved, the development *had no form* at that time. HEI's own architect said it was impossible for him to design the development without more guidance. Thus, subsequent design details by City staff were an alteration to the "substance" of the by-law, or more correctly, the construction of the by-law requiring a subsequent public hearing. Even at the end of this 27-month process the Operating Agreement is not complete and key agreements are not in place.

Capital (Regional District) v. Saanich (District), 1980 CarswellBC 302 (BCSC), at para. 75-82

165. The courts have held, in interpreting s. 903 of the *Local Government Act*, a similar provision, that the regulation of use must of necessity include the location and nature of the buildings that will be put to that use, since in most cases uses can only be accomplished by the construction or placement of buildings on the land.

Chernoff Developments Ltd. v. Kent (District) 2001 CarswellBC 2904 (BCSC);
Peterson v. Whistler (Resort Municipality), (supra), at para. 66-70

166. It is remarkable that a significant portion of the PNE appears to have been built without Council's approval of the form of development, demonstrating the extent of its abdication and the important role played by a public hearing that considers both use and form of development.

B The existing racecourse and grand stand buildings are not a sufficient prior approval by Council of form of development in this instance

167. At para 90, the trial judge concludes that "there was an existing form of development at the time the by-law was approved". The existing buildings at the park do not satisfy the requirements of the *Charter* or administrative law and natural justice for this rezoning:

- (a) the notice was misleading, as Council had no intention of passing this use in the existing buildings without addressing the impacts created and the need for substantial community benefits. This is clear in the Council report of November 17, 2003, requiring approval of a New Concept Park Plan, mitigation, noise, traffic, safety, security, parking and a public amenity package under the title "Form of Development", and advising Council of the need to seek public comment and approve when these criteria became crystallized;
- (b) further, the applicant's own architect referred to these as "zoning conditions";
- (c) staff referred to the Council resolution at the conclusion of the Public Hearing as "an approval in principal" recognizing the many unfulfilled zoning conditions;

(d) the form of development was approved in 1988 by way of a one-dimensional line drawing showing the footprint of the racecourse without describing the three-dimensional structure, including massing, siting etc. in any detail. This was insufficient.

C City staff themselves recognized that a by-law amendment was necessary to cure the defects of the July 22, 2004 Resolution

168. Staff advised in their November 2003 report that form of development would have to be approved by Council with public input. However, HEI's architect reported that he could not complete his designs without a master plan from the City, and the application was scaled down, with the rest of the infrastructure changes to come later. This development prompted City staff to advise Council to approve by resolution without another public hearing.

169. This shows that the "insubstantial changes to form" are intended to be merely the first instalment in a much larger modification to the entire Hastings Park. Many of those other changes are likely necessarily incidental to the continuing presence of slots at Hastings Park or to Council's decision to allow them.

D In this instance, use cannot be severed from the concerns that were not addressed

170. In determining whether the by-law approving uses alone is valid in this instance, the court should be guided by the consideration, "would Council have approved this use (slot machines) without imposing the other conditions?" This is an application of the test for severability. Where a by-law cannot be severed, an invalid portion invalidates the entire by-law. Here, Council would not have enacted the use without the other conditions.

R. v. Pride Cleaners & Dyers Ltd. (1964) 49 D.L.R. (2d) 752 (BCSC)

E Council failed to enact provisions to regulate or guide the terms of the Operating Agreement which were a fundamental Zoning Condition

171. If the financial terms of the lease with the City do not meet a market test, it could constitute an illegal subsidy without the required 2/3 resolution. Alternatively, it could result in overstating the cash portion of the incentives proposed by the applicant. Here again, legislative powers have been sub-delegated and certainty requirements remain unfulfilled.

172. The July 22, 2004 resolution delegated the negotiation of the operating agreement to staff with nothing more to guide them than the goals set out under condition "c" & "e". Some

direction was given to staff in camera in May/July of the following year, but these directions fall short of the certainty requirement. Moreover, at no time was a by-law ever enacted delegating discretion to the DPB to set policy (i.e. legislate) as to what would and would not constitute sufficient terms to satisfy the conditions.

173. At no time prior to Council's October 4, 2005 enactment of By-law No. 9119 were the operating agreement and benefits packages put before Council in the form of a by-law proposal that could be debated in public and approved as part of the by-law. The details of the operating agreement, including capital improvements conditional to the rezoning approval, had not even been finalized when the by-law was enacted on October 4th, were still not finalized in November 2005 when the development permit issued, and may still not have been finalized.

F Council failed to enact provisions to regulate or guide the DPB in determining what would count to satisfy conditions in relation to traffic management, access, parking, signage, noise, and other such considerations

174. Having approved a rezoning conditional on the provision of amenities and facilities, etc., Council must enact standards for its delegates to follow in imposing those conditions, otherwise it will be carrying zoning functions through its delegates without a prior legislative enactment, leaving them free to decide for themselves what will and will not satisfy the conditions.

175. The resolution does not inform the public on whether the cash payments by the developer would be permitted in lieu of the provision of public benefits; and such "public benefits" might amount to nothing more than a purchase of a rezoning, which may not be legal. Also questionable is the deferral of the traffic and parking requirements to the negotiation process.

176. Conditions "a" and "b" of the July 22, 2004 by-law were passed without any standards being legislated to guide delegates in determining what would satisfy them: no time frame or conditions for the addition of slots; no standards for the resolution of parking, ultimately leading to "non-exclusive on-site parking" with the underground parking requirement delayed for 5 years (staff identified insufficient parking during major events); no standards establishing sufficient improvements to McGill or Renfrew or sufficient parking, loading, pedestrian, and cycling amenities; "compatibility" rather than "compliance" with the sign by-law; no mechanism for what counts as "high architectural finish"; no standards for what will satisfy the "public benefits" requirements.

G Council unlawfully fettered its discretion

177. By approving a use “in principle” on July 22, 2004 without legislating standards in reference to any of these other considerations, council unlawfully fettered its fettered discretion to approve or not approve the entire development once the enumerated had been addressed.

Harrison v. Director of Planning 1983 CarswellBC 634 (BCSC), esp. para 15-20
Pacific National Investments Ltd. v. Victoria (City), 2000 SCC 64

H Council sought to do indirectly what it cannot do directly

178. Council attempted to do indirectly what it is prohibited to do directly, namely enact zoning legislation by resolution, without a public hearing, directing staff to create and impose zoning conditions.

Amax Potash Ltd. v. Saskatchewan, *supra* at para. 24-25, 29

VIII Particulars of Council’s Failure to meet the Fair Hearing Requirements of the Charter and at Common Law

A Failure to provide specific details in the Statutory Notice of the June 22, 2004 meeting to allow for meaningful public debate in relation to a Form of Development which was certain in all Material Aspects

179. It is difficult or impossible to determine the physical consequences of an approval to use in the absence of any notice of the physical consequences of that use. Even a farm or a park would entail the construction of buildings incidental to such uses.

180. The conditions were material to approval of the resolution, but the public was only given a list of vague generalities that would have to be fulfilled “to the satisfaction of” the named official or Council. This was not disclosure “adequate to permit members of the public to prepare an intelligent and meaningful response”. Further, pre-hearing disclosure of the operating agreement was limited to the one-page fact sheet released in August 2005 dealing with the conditions in only the most general way. Numerous requests, including an FOI request, produced no additional details other than a heavily-edited draft agreement months later.

181. The conditions in the July 22nd resolution create an appearance of Council mitigating the serious impacts of the use, but they fail to set measurable standards to achieve this, making them useless as a medium of public notice and debate. If a directive was given that parking was to be provided so as not to exacerbate existing conditions this would be a very general but measurable

standard; by contrast, the term “satisfactory to...” adds nothing measurable by which the conduct of the DPB can be directed or assessed, by Council, by the public, or even by the applicant.

Pitt Polder supra, at para. 168; *Peterson v. Whistler* supra at para. 67-70

182. Neither can the fair notice requirements be satisfied if the proposed amenity conditions are bare statements of policy with no standards. The public cannot determine whether the benefit is truly a public benefit and not simply a benefit to the development applicant’s business: “Daycare requirements” could mean daycare only for employees of the HEI; and “landscaping requirements” could mean enhancements that only increase the attraction of the building housing the slots, not the beauty of Hastings Park for the public.

B Additional Terms Added by Council Post-Public Hearing

183. Council added term requiring a commitment to provide a 500 space underground parking garage at the applicant’s cost, but not until the renewal of the lease term, which was to be five years, as per the fact sheet. The Agreement was scheduled to be released by December 2005 but has not been released to date. This delay shows the public importance of parking and an attempt to address these concerns in a manner not according with the conditions in the initial resolution, which made the approval of the use contingent on resolving these issues presently and not in five years’ time, when a different Council is dealing with the issue!

C Passing a resolution which promised the citizens that the form of development issued be publicly debated at a later date and then breaking that promise

184. The resolution carried on July 22, 2004 promised the public another hearing on the conditions referenced under point “a”. Similarly, the use of passive voice in condition “b” (“the following be secured”) would lead a reasonable person reading the resolution to conclude that these conditions too would be the matter of public debate in a later hearing to approve or not approve the rezoning, since approval or non-approval of such resources and commitments falls within the mandate of Council under the *Charter*, not under the mandate of its delegates. The public was thus lulled into believing that it would have a right to debate the rezoning amendment once these vague conditions had reached some level of certainty, perhaps leading individuals not to speak at that time on issues important to them, such as neighbourhood traffic and circulation.

D Altering the substance of by-law on the basis of representations from staff and HEI made outside of the hearing [s. 566(6) & Natural Justice]

185. The crystallization of these vague “arrangements to the satisfaction of...” into something tangible over a 27-month period of consultations constitutes a “change of substance” to the resolution approved on July 22, 2005, requiring another hearing.

Bay Village v. Victoria supra, at 16-21; *Re Borque supra* at para. 10-11; *Capital (Regional District) v. Saanich (District), supra*, at para. 75-78

186. Staff recognized that all of the conditions under “a” and “b” were material to Council’s approval of use in their November 2003 report. Later, having been informed by HEI’s architect that the big changes to the infrastructure would have to await the finalization of the Master Plan, staff attempted to back peddle, claiming that form of development referred only to footprint etc. Section 566(6) does not empower Council to approve a use in abstraction, and then delegate responsibility for determining what will and will not satisfy the conditions material to an unelected delegate, in consultation with the rezoning applicant, without enacted standards, and without another public debate in front of elected officials to enact a proper zoning by-law.

PART 4

NATURE OF ORDER SOUGHT

187. A declaration that zoning in relation to permanent public parks falls exclusively within the jurisdiction of the Park Board and that By-law No. 9119, enacted on October 4, 2005 is void as having been made *ultra vires* the *Charter*.

188. A declaration that the power to enter into an operating agreement concerning a public park falls exclusively within the jurisdiction of the Park Board, and that the operating agreement is void as being *ultra vires* the powers of City Council.

189. A declaration that By-law No. 9119 of City Council, enacted October 4, 2005 is void as constituting an improper delegation or unlawful fettering, or both, by City Council of its statutory zoning authority under the *Charter*.

190. A declaration that By-law No. 9119 of City Council, enacted October 4, 2005, is void for being enacted by City Council in violation of the requirements of natural justice or the statutory notice provisions under the *Charter*, or both.

191. The judgment of Madam Justice Dorgan be set aside, with costs in those proceedings to the Petitioner.

192. An order that Bylaw No. 9119 of City Council, enacted on October 4, 2005 be quashed.

193. Costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Vancouver, in the Province of British Columbia, this 16th day of March, 2007.

Solicitor for the Appellant
Jason T. Rohrick

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(b)

(c)

APPENDIX "A"

Excerpt from July 14, 2004 Council Hearing Minutes:

THAT the application by Hastings Entertainment Inc. and British Columbia Lottery Corporation to amend CD-1 By-law No. 3656 for 2901 East Hastings Street (Hastings Park) to permit slot machines at Hastings Racecourse, generally as outlined in Appendix A of the Policy Report dated November 17, 2003 entitled "CD-1 Text Amendment – 2901 East Hastings Street (Hastings Park)" be approved, subject to the following conditions:

a. THAT, prior to approval by Council of an amended form of development for Hastings Park to accommodate slot machines at Hastings Racecourse, the applicant shall obtain approval of a development application by the Development Permit Board, which shall have particular regard to the following:

(i) initial approval to be given to no more than 600 slot machines if parking can be satisfactorily accommodated and traffic circulation issues can be resolved.

(ii) arrangements to the satisfaction of the Director of Planning in consultation with the General Manager of Engineering Services having due regard to neighbourhood considerations including:

- the provision of improvements to McGill Street and Renfrew Street adjacent or in proximity to the site and new or modified signalization as required;
- the location and design of access to/from, and circulation routes within, the site;
- the number and arrangements of parking spaces;
- the design of all parking areas, and passenger and goods loading facilities;
- traffic management, curb zone and trip reduction measures;
- improvements to support pedestrians, bicyclists and transit riders, and
- minimize all destination and truck traffic from Renfrew in order to mitigate traffic problems on the street.

(iii) arrangements for the costs of any mitigation of community impacts, which may include traffic, parking, noise, or policing to be paid by the proponents.

(iv) arrangements to the satisfaction of the Director of Planning for signage to be compatible with the Sign By-Law.

(v) special consideration to be given to a high standard of architecture, landscaping and finishes.

(vi) public benefits to the satisfaction of City Council.

(vii) design development to ensure strong mitigation measures for any light or noise pollution created at the Racetrack.

b. THAT in pursuance of rezoning condition a(vi) [public benefits to the satisfaction of City Council], the following be secured:

- resources to be invested in the Hastings Park greening process;
- resources to improve the community outside Hastings Park through consultation

between the Racetrack operator, staff and community representatives;
- commitment to local hiring, childcare, creating a grooming school and expansion of the learning centre.

c. THAT staff report back as part of the report on the Operating Agreement (lease) for the Racetrack, achieving the following:

- securing horse racing and the related jobs to the existence of slots on the site;
- ensuring the Racetrack stays within its current footprint;
- ensuring there are no alcoholic drinks allowed on the slots floor; and
- confirming there are no gaming tables allowed on the site.

d. THAT staff report back to Council on circumstances after one year of slots operation.

e. THAT through the Development Application or Operating Agreement or Condition a(vi), commitments be confirmed for the Racetrack operator to provide \$40 Million in capital improvements at the Racetrack and/or on Hastings Park.

Aff. Thomsett #1,Exh. "I"[AAB V4 p. 712-714]