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)

APPELLANT'S REPLY

(SEE OVERLEAF)

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REPLY SUBMISSIONS ON FACTS

1. Disputable legal propositions are advanced in Respondent's Factum ("RF") as fact: at para. 11, the meaning of "form of development", and at paras. 10 and 13 that the conditions contained in the July 2004 resolution were not part of the zoning bylaw and did not need to be fulfilled prior to the October 2005 enactment. On the contrary, according to the bylaw text in the July 2004 resolution, the permitted uses would be "subject to conditions as Council may by resolution propose". [Factum, para. 15]

2. Contrary to the learned justice's reasons at para. 85, on June 22, 2004 Council merely directed staff to explore a compromise between 2 of 4 "general concept plan" alternatives proposed in a May 2004 administrative report and to report back on several issues related to building locations, mass, siting and parking, etc. No DP or ODP had been formulated, approved or enacted. The applicant's architect wrote a letter over a year later confirming that no DP sufficient for design purposes had yet been provided.

Aff. Lee #1, para. 2-3, [AAB, v3 p. 473], Exh. "A", [AAB, v3, p. 481 ff., at 490]
Aff. Harvey #1, para. 23, 24 [AAB, v3, p. 393], Exh "E" [AAB, v3, p. 408ff. at 409-10], Exh. "F" [AAB, p. 451-2];
Architect's Letter of July 18, 2005 [Factum para. 18]

REPLY ARGUMENT – PARKS BOARD JURISDICTION

3. In reply to RF para. 119, a gift of land for the "use, recreation and enjoyment of the public" must create a public park, as this is the legal definition of a public park.

St. Vital v. Winnipeg, [1945] C.T.C. 19 (Man. C.A.), at para. 47-53

4. In reply to RF at paras. 120-1, the legislators could have reworded the ***PNE E. & V. Act*** (the "***Act***") to revoke the trust and vest beneficial ownership of the lands in the City, but the Act explicitly retains the trust condition while expanding permitted uses. This shows legislative intent to maintain Hastings as a public park for the purposes of s. 488.

5. In reply to paras. 123 & 154, the only cardinal rule of interpretation is the "contextual approach" and "evidence of the statute's history, including excerpts from the legislative record, is admissible as relevant to the background and purposes of the legislation".

C.U.P.E. **v.** ***Ontario*** (*supra* [Factum]), at para. 54, 106

6. In reply to RF paras. 125-8, the ***Act*** neither explicitly nor implicitly repeals the Park Board's s. 488 "exclusive jurisdiction" over Vancouver's 2nd largest park. Section 2(1) delegates powers to the City, not Council. Under ***Vancouver Charter*** s. 145, the City's

powers are exercised by Council "unless otherwise provided", and s. 488 provides otherwise. Section 2(1) of the ***Act*** merely broadens the Park Board's powers under s. 489-91 of the ***Charter*** to approve uses not traditionally associated with a park.

7. Further, the interpretation urged by the Respondent would frustrate the legislative intent, which is for public parks policy and administration in Vancouver to be under the control of an independently elected Park Board that is accountable to electorate and which encourages civic involvement in parks planning and administration.

REPLY ARGUMENT – ADMINISTRATIVE LAW PRINCIPLES

A When a bylaw resolution imposes conditions on an enactment or delegates administrative authority, these terms must be made certain before the public debate and vote. That did not happen.

8. The rule of law, as codified in the ***Vancouver Charter*** and as expressed in the common law, requires that the substance of a legislative resolution must crystallize to meet the requirements of certainty and the non-delegation of legislative function before that resolution is debated and voted on at a public hearing before Council.

The July 2004 resolution explicitly placed amenity and other conditions on the rezoning; once incorporated in the bylaw resolution they become part of its text and must meet certainty and non-delegation requirements

9. In July 2004, Council passed a resolution explicitly legislating conditions, including a subsequent approval by Council of form. These mitigated the impact of a very controversial and intense use. The learned justice erred at paras. 83-7 in finding that such conditions do not form part of the rezoning. Since the conditions enumerated in the July 2004 resolution became part of its substance, they too ought to have crystallized before the public hearing and vote.

(a) Once a condition is fixed within a bylaw, it forms part of the bylaw -- ***Victoria (City) v. Meston*** (1905), 11 BCR 341 (BCSC), esp. paras. 15-20.

(b) In reply to RF paras. 49-50, even if requirements enumerated in the 2004 resolution are not normally "zoning matters", they were imposed pursuant to s. 565(1)(f.1) as conditions to the approval of a bylaw amendment and thus became part of the zoning bylaw.

10. It matters not that the conditions do not appear on the face of the enacted bylaw.

Capital Region v. Saanich, (*supra* [Factum]), at para. 10-12, 72-82

Law makers cannot approve bare uses or conditions without also legislating guidelines for the exercise of discretion to approve form and judge those conditions satisfied

11. In the zoning context, the requirements of certainty and non-delegation of legislative function prohibit the passing of a bylaw resolution approving a bare use without form, or requiring "satisfactory parking and traffic management" or "suitable mitigation of community impacts" or "suitable architectural standards", without first making policy containing indicia for administrative delegates on what will suffice to fulfill such conditions for the purpose of approving a development. A similar spot-zoning case in Ontario in 1979 led to revisions to Ontario's *Planning Act.*

Sun Oil v. Verdun (City) [1952] 1 S.C.R. 222, see para. 3-4, 11-15; ***Outdoor Neon Displays Ltd. v. Toronto (City)***, [1960] S.C.R. 307, see para. 13, 19-20; ***C.I.P.R.E. v. Toronto*** (*supra* [Factum]), see hn, para. 2, 6, 9-11; Zuckner, L. H., "**Site Plan Control–Its History and Relationship with the Zoning Bylaw"**, (1996) 3 D.M.P.L. July 1996, vol.3; ***Barthropp v. West Vancouver (District)*** (1979) 17 B.C.L.R. 202 (BCSC), see hn, para. 5, 9-13

12. This requirement is reflected in the empowering statute: (a) s. 565(1)(f) requires form of development be legislated prior to rezoning approval, either by site-specific development plans approved by Council or by sufficiently certain guidelines in a previously-enacted official development plan for that zoning district; (b) s. 565(1)(f.1) requires that *if* Council imposes amenities, it do so by bylaw.

13. Thus, terms imposing conditions too must meet the requirements of certainty and non-delegation of legislative function; so must terms delegating administrative discretion.

14. Here, in July 2004 the municipality approved a bare use for a spot zone, conditional on the applicant subsequently meeting as-yet undetermined requirements for (a) traffic flow, parking, loading, noise, financial contributions for mitigating all of these; (b) the provision of public benefits, including daycare; (c) an operating agreement impacting the Racetrack footprint; (d) an assessment of the slots; and (d) capital improvements. Thus, the policy decisions that most directly impact the neighbourhood are being determined after the public hearing, with no debate before Council or accountability by elected officials: especially true of parking, road use and noise in a congested district.

15. In Reply to RF paras. 29-47, the Respondent and the learned justice confused *framing* requirements for form, parking, amenities, etc, a legislative act, with *determining*

that they have been satisfied, an administrative act. Conditions need not be fulfilled or judged fulfilled prior to the public debate, but they do need to be framed and passed.

16. In reply to RF para. 46, ***Eddington*** is distinguishable because in that case, long term development policies for the CD zone had been framed in public via hearings to modify the official community plan, pursuant to ss. 709-14 of the *Municipal Act* (as it then was).

17. In reply to RF para. 54, ***East Broadway*** affirms at para. 63 that matters such as parking are "naturally linked to zoning" and should be part of the rezoning hearing.

B Council may approve a bylaw in principle in public and enact it later by resolution (where terms are certain), but only if none of the terms legislated earlier after public debate are altered, including terms imposing conditions or delegating administrative authority. Here legislated terms were materially altered (i.e. amended) by resolution

18. The July 2004 approval in principle did not have the legal effect of rezoning.

Bostov Development Ltd. v. Mount Pearl (Town) (1983) 21 M.P.L.R. 192 (Nfld. S.C.), at para. 24-5;
Donovan v. Belleville, [1931] 4 D.L.R. 268 (Ont. C.A.), at para. 271

19. It is permissible for Council to approve a rezoning bylaw in principle with conditions (which are certain) at the public hearing and then enact it later by mere resolution, but the prohibition against legislating through resolution requires that none of the terms legislated may be altered after the public debate, including terms imposing conditions or delegating administrative authority. Otherwise the procedural requirements of natural justice and the rule against self-delegation of legislative discretion would be violated.

20. Council materially altered the bylaw between the 2004 & 2005 meetings by removing conditions forming part of the resolution debated and passed at the public hearing. Conditions forming part of a bylaw can only be removed by a bylaw amendment.

Victoria (City) v. Meston**,** (*supra*);
Capital Region v. Saanich, (*supra* [Factum]), at para. 10-12, 72-82

21. In reply to RF paras. 54 & 80, this prohibition should not be confused with the administrative act at the time of enacting by resolution of affirming that conditions previously legislated have been fulfilled.

Cf. ***Pitt Polder*** with ***Jones v. Delta*** at para. 74-6 and ***Guimond*** at para. 46-9

C Assorted additional Reply submissions

22. **October 2005 Resolution invalid on its own.** Even if there had been a second public hearing, the 2005 resolution would still be invalid for uncertainty and delegating

legislative discretion back to the City and to the Development Permit Board to set policy in relation to parking, childcare, the operating agreement, and future alterations to the racecourse infield footprint under an as-yet undetermined master plan for the Park.

23. **Fettering.** By approving in principle, prior to the legislative conditions being made certain, and by rezoning in October 2005 when policy-making essential to the zoning decision had been delegated and not approved by itself, Council fettered its discretion.

Harrison v. Director of Planning *(supra* [Factum]);
PNI v. Victoria *(supra* [Factum])

24. **Due process cases distinguishable.** In Reply to RF paras. 57-111, cases finding there had been a fair hearing despite small irregularities in notice, disclosure, or post-hearing consultation are distinguishable because here (i) the 2004 resolution contained uncertain conditions that could not form the basis for reasonable debate; and (ii) the 2005 resolution was passed with conditions altered, a bylaw amendment by resolution.

25. **Jurisdictional error and breach of natural justice both reviewable on correctness.** In Reply to para. 15-22, a municipal enactment inconsistent with the empowering legislation or which seeks to improperly delegate legislative powers is reviewable on correctness, as is a procedural error when fairness is owed. Here a zoning bylaw was passed in relation to a specific property for a use that is controversial and has its greatest impact on those living close by.

26. **The City confused the role of conditions to approval in the development permit process with their use in the legislative process.** It is acceptable for an administrative officer where authorized in legislation to impose conditions that are not legislative in nature (eg. submit plans for checking) and when they are fulfilled to issue a permit that makes no mention of them, but bylaws can only be amended by bylaws. It is easy for this distinction to blur in the spot zoning context, but the courts must be vigilant to preserve the rule of law against the arbitrary exercise of power by administrators through improperly delegated discretion, as we are governed by laws, not the caprice of men.

Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed.
(London: MacMillan & Co. Ltd. 1959), p. 187-9

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Vancouver, this 10th day of December, 2007.

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Solicitor for the Appellant
Jason T. Rohrick

LIST OF AUTHORITIES