

CANADA / JUDGMENT

Coltman v. Vancouver (City)

2016 BCSC 241

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Supreme Court of British Columbia

DECIDED

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2016 BCSC 241 Coltman v. Vancouver (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Coltman v. Vancouver (City),

2016 BCSC 241

Date: 20160216

Docket: S158531

Registry: Vancouver

Between:

Theresa Coltman, Veronika Gruber, Jane-Anne Manson, June Quiroga,

Zdena Safarik and Katrine Valut

Petitioners

And

City of Vancouver and 1700 Pendrell Property Inc.

Respondent

Before: The Honourable Mr. Justice Affleck

On judicial review from: A Resolution of the Vancouver City Council dated September 15, 2015.

Reasons for Judgment

In Chambers

Counsel for the Petitioners:

N. Baker

Counsel for the Respondent, City of Vancouver:

I. Dixon

Counsel for the Respondent, 1700 Pendrell Property Inc.

D. Parlow

N. Kornfeld

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 15 and 18, 2016

Place and Date of Judgment:

Vancouver, B.C.

February 16, 2016

[1] Relying on s. 524 of the Vancouver Charter, S.B.C. 1953, c. 55, the petitioners apply for judicial review of a resolution of the Vancouver City Council (the "City Council") adopted on September 15, 2015 (the "Resolution"). The petitioners submit the Resolution, which granted approval in principle for a proposed rezoning bylaw, ought to be quashed and sent back for a new public hearing and reconsideration by the City Council.

[2] The Resolution reads:

THAT the application by Henriquez Partners Architects, on behalf of 1700 Pendrell Property Inc., to rezone 1754-1772 Pendrell Street [legal description omitted] to increase the floor space ratio from 2.20 to 6.96 to permit the development of a 21-storey multiple dwelling building containing 178 secured market rental housing units, 26 of which are secured for 30 years with rents at 20 per cent below the average West End area market rents, generally as presented in Appendix A of the Policy Report dated June 16, 2015, entitled "CD-1 Rezoning: 1754-1772 Pendrell Street", be approved subject to [various] conditions.

[3] The petitioners object to the new zoning because it would authorize construction of a much larger building than permitted by the existing zoning and "would result in a massive increase in density for market housing in an area of the West End where City policy does not support increases in density for market housing".

[4] The petitioners live at 1725 Pendrell Street close to the property affected by the Resolution (the "Property"). There is no dispute the petitioners have standing to make the present application.

[5] The respondent, 1700 Pendrell Property Inc. is the registered owner of the Property.

The Standard of Review

- [6] Before addressing the particulars of the complaints of the petitioners it is necessary to determine the standard to which the Court will hold the City Council when it decided to adopt the Resolution. There are two possible standards: "correctness" and "reasonableness".
- [7] The correctness standard permits the Court no latitude to defer to the City Council's decision if in the Court's opinion, after considering the facts and the governing law, the decision was wrong. If that is the Court's conclusion, the decision will be quashed and sent back to the Council for reconsideration bearing in mind the reasons the Court gave for finding the decision to have been incorrect. This standard usually applies to questions of law including questions of true jurisdiction.
- [8] When the standard of review is reasonableness, the Court considers the challenged decision keeping in mind that there is no single necessarily correct decision. Reasonableness connotes a range of possible reasonable decisions, and if the decision falls within that range, the court will not interfere.
- [9] The petitioners submit the City Council acted in a quasi-judicial capacity when it adopted the Resolution. This implies the City Council was engaged in a process of decision making resembling the process of a court of law and therefore the decision is open to review on a correctness standard. I do not agree. The City Council was engaged in enacting delegated legislation and its conduct is subject to review on a reasonableness standard.
- [10] In *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, Chief Justice McLachlan wrote the following which has application to the present request for judicial review of the decision of the City Council:
- [19] The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. "Municipal governments are democratic institutions", per LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 33. In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.
- [20] The decided cases support the view of the trial judge that, historically, courts have refused to overturn municipal bylaws unless they were found to be "aberrant", "overwhelming", or if "no reasonable body" could have adopted them (para. 80, per Voith J.). [Citations omitted.]

[24] It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside.

[Emphasis added.]

The Typical Process for a CD-1 Rezoning

[11] In the affidavit of Yan Zeng, a Planner with the City, "the rezoning process generally for comprehensive development (CD-1) rezoning" is described in the following paragraphs:

3. Most privately initiated rezonings commence when the prospective applicant approaches the City of Vancouver (the "City") regarding the general nature of a proposed development. Normally the applicant will make a rezoning inquiry to the Planning Department to determine whether, considering the zoning and applicable Council of the City of Vancouver ("Council") policies, the Planning Department will be supportive of an application to rezone the particular site.
4. Upon receipt of a rezoning inquiry the Planning Department usually issues a letter of response, acknowledging receipt of the inquiry and providing preliminary feedback on the inquiry. The letter of response may be by letter or by email.
5. Then, depending on the advice given by the Planning Department, the applicant may decide to prepare a formal rezoning application and submit it to the City. The formal rezoning application is then assessed by Staff.
6. In considering applications to rezone a site to CD-1 Staff are often not supportive of the form of development proposed in the application. In these circumstances Staff provide advice and feedback to assist the applicant in amending its application so that the form of development is supportable by Staff. It is very common that the eventual development presented by Staff to Council bears little or no resemblance to the initial proposal, other than relating to the same site.
7. A significant change in the form of the proposed development does not trigger the need for a new rezoning application. There is no trigger under either the Zoning and Development By-law (the By-law) or City policies which would result in the City requiring a new rezoning application for a site where an existing rezoning application remains extant, although particulars of the proposed rezoning may change.

8. It is not unusual for a rezoning application to become dormant for a period of time and then become active again. The application may become active again because the economics of the proposed project have changed or because the applicant has determined that a significantly different form of development is now better suited to the site. The applicant may also revise the application in response to feedback received from Staff, the public, or advisory boards.
9. The City considers that rezoning applications remain open and continuing unless they are formally withdrawn by the proponent. Applications do not lapse due to the passage of time.
10. It is also not unusual for a development site to be sold to another owner while there is an outstanding application. The new owner may choose to continue with the application, change it significantly or abandon it. The City considers the application to be related to the site in question, not to a particular owner or developer.
11. Once a form of development has been arrived at that is generally supportable by Staff, Staff prepares and presents to Council a report which assesses the application and makes a recommendation as to whether the application should be refused or referred to public hearing. A public hearing is a necessary step prior to any rezoning approval by Council.
12. All rezoning applications which involve proposed construction of new buildings are reviewed and evaluated by the City's Urban Design Panel (the "UD Panel"). The UD Panel is composed of non-City staff urban design professionals, including architects, landscape architects, engineers and industry representation. Its role is to objectively evaluate new projects and provide recommendations to the developers and the City on possible ways of improving the project from the urban design perspective. The findings of the UD Panel are presented to Council, but are not binding on Council.
13. When the public hearing occurs, a draft of the proposed amending by-law is, as a matter of practice, posted on the wall at the location of the hearing. In advance of the hearing it is also, as a matter of practice, available for viewing in two locations at City Hall and on the City's website. The public is advised in the notice of public hearing of the two locations and the times when the draft by-law is available for viewing.
14. At the public hearing, Council will hear from the applicant and their representatives who are proposing the rezoning, and from other interested parties including the public. Council will also hear from planning staff regarding the details of the proposed rezoning and the proposed development. Council may ask questions of staff and any interested parties and may defer any decision regarding the rezoning until such questions have been answered to its satisfaction.
15. After the public hearing has been conducted, Council may decide to approve in principle the proposed by-law in the form presented at the public hearing, or in an altered form to give effect to matters raised at the public hearing. Council may also decline to approve or amend the by-law.

16. If Council approves the rezoning application, this is normally done by passing a resolution approving it "in principle" i.e. that Council will enact the amending by-law at a future Council meeting. The subsequent meeting at which the by-law is enacted may take place very soon afterwards, or may take place many months later depending upon the circumstances.
17. Council may approve a rezoning application subject to certain conditions that must be fulfilled to Council's satisfaction. Such conditions must either be fulfilled or secured by a legal agreement prior to Council enacting the amending by-law.
18. The normal enactment process is that Rezoning Centre staff will obtain the minutes of the public hearing and review the resolution approving the application "in principle" and see whether any "prior to enactment" conditions exist and, if so, whether they have been met. If there are "prior to enactment" conditions, the Rezoning Centre staff refers the application to the Legal Services Department to secure such conditions by way of legal agreements. Once all "prior to enactment" conditions have been met or secured, the Legal Services Department advises the Rezoning Centre staff and they then ask the Legal Services Department to bring the rezoning by-law forward to Council for enactment.
19. Council will then enact the rezoning by-law if it is satisfied that all "prior to enactment" conditions have been fulfilled. If no such conditions were attached to the resolution approving the amendment in principle, then typically the by-law is enacted as a matter of course.

[Emphasis added.]

- [12] The portions of Ms. Zeng's affidavit that I have underlined, except for paragraph 13, relate to the petitioners' complaint that the City Council was influenced to move forward with the rezoning of the Property by erroneous information provided by City staff that the application for the rezoning had stretched over a 10 year period. The petitioners submit the rezoning application was of much more recent origin. I will return to this question.
- [13] The petitioners make no criticism of this typical process but do complain that the "practice", referred to in paragraph 13 of Ms. Zeng's affidavit, of posting signage was not properly followed in this instance. I mention this complaint at paragraph 26 below.
- [14] The Zeng affidavit goes on to describe the history of the rezoning of the Property in the following paragraphs and it is here that the petitioners submit the process went astray:
20. In or about March 2007 the City received a rezoning inquiry for 1754-1772 Pendrell Street (the "Property"). In June 2007 Staff and the applicant met to discuss the inquiry and on November 13, 2007 an emailed letter of response was sent by Michael Naylor [Exhibit omitted].

21. In December 2007 the City received an application to rezone the Property in order to allow for the development of a 19-storey, 34-unit strata titled project with a proposed floor space ratio ("FSR") of 3.28 (the "Application"). The Application is described in Section 3 at page 6 of the June 16, 2015 Policy Report to Council found at Exhibit "J" of the Affidavit of Jane-Anne Manson (the "Council Report") [which reads:

2007 Proposal

The original rezoning application for this site was submitted in December 2007 and proposed an increase in overall density from the RM-5A maximum of 2.20 FSR to 3.28 FSR, while adhering to the maximum permitted height under the RM-5A. The proposal involved:

- a 19-storey (58.0 m/190 ft.) residential tower with a townhouse podium containing a total of 34 market condo units;
- demolition of the existing three-storey wood-frame, 19-unit apartment building at 1772 Pendrell Street; and
- renovation and expansion of the existing house at 1754 Pendrell Street to provide 10 social housing units.

As outlined in the previous section, the Rental Housing Stock ODP allows for alternative provisions to the one-for-one replacement of existing rental units where the proposed alternative focuses on affordability of replacement units. The original application proposed to address the intent of the ODP through the provision of the social housing units, which would be transferred under the City's ownership.

2010 Proposal

In February 2010, based on feedback from the public and staff to provide one-for-one replacement of the existing rental housing on this site with new social housing units, a revised rezoning application was submitted. The revised scheme was to demolish both the existing apartment building and the house and to provide one-for-one replacement of the 26 rental units in a new building attached to the base of the tower. The City would have taken ownership of this building (as an air-space parcel) and made it available for management by a non-profit housing society as social housing.

With the increase of social housing units from 10 to 26, an increase in density for the market condominium component was also proposed in order to offset the cost of providing social housing. As a result, the proposed total density increased to 6.30 FSR. The condo unit count increased from 34 to 79. The proposed height stayed at 58.0 m (190 ft.) and 19 storeys.

Current Proposal

The current proposal, which is the subject of this report, is for a 21-storey (58.0 m/190 ft.) tower containing 100 per cent secured market rental housing units, with a proposed density of 6.96 FSR. The revision, made after the adoption of the West End Community Plan, was to address

community needs for more market rental housing as identified in the Plan. The change of tenure from market condominium to market rental has financial implication to the application: the value of the land lift created by the rezoning would be reduced. Instead of City-owned social housing units, the 26 units that replace the existing 26 rental units on site would be privately owned and secured for 30 years with 20 per cent below the average West End area market rents.]

22. Rezoning was required for the Application in 2007 because of the increased FSR sought by the applicant. As noted at page 98 of the Council Report, the intended 190 foot height of the form of development has at all material times been permissible under the existing RM-5A zoning for the site.
23. Processing of the Application began with public consultations and a presentation to the UD Panel [reference to the exhibits omitted]. The Application was supported by the UD Panel, but, based on public feedback and City concerns surrounding the provision of affordable housing, Staff advised the applicant that they would not be supportive of the Application in its current form.
24. In 2010 the Application was amended (the "2010 Amendment"). The 2010 Amendment included increased social housing, a floor space ratio of 6.3 and an increased number of strata title units. The proposed height remained at 190 feet which was permissible under the existing RM-5A zoning for the site. The 2010 Amendment is described in Section 3 at pages 6 and 7 of the Council Report.
25. Staff commenced a public consultation process with respect to the 2010 Amendment, and it was presented to the UD Panel. The form of development proposed in the 2010 Amendment was unanimously rejected by the UD Panel, and, due to this rejection and public feedback, Staff advised the applicant that they would not be supportive of the form of development found in the 2010 Amendment.
26. From time to time thereafter, City staff were advised by representatives of the owner of the Property that it was working on revisions to the Application. As is usual with pending applications, the representatives consulted with City staff concerning the potential amendment.
27. In July 2011, Council considered a report entitled "Vancouver's Next Community Plans". [Exhibit omitted].
28. At the July 28, 2011 Council meeting, Council directed Staff to begin work on a Community Plan for the West End and adopted the "Policy Consideration of Rezoning Applications and Heritage Revitalisation Agreements during Community Plan Processes" ("Interim Rezoning Policy"). The Interim Rezoning Policy included the following statement relating to the West End:

Where, at the time of adoption of this rezoning policy, there is an active rezoning application or where an enquiry has been received, and the application has received a written response stating that a rezoning application would be considered, the application will be considered.

The Application was considered by the City to be an active rezoning application. The resolution and its application to this Application are set out in Section 2, at page 5, of the Council Report.

29. In August 2013, a further amendment to the Application was received by City staff (the "2013 Amendment"). The review process for the 2013 Amendment continued for some time and, ultimately, the City began a public consultation process regarding the 2013 Amendment in early 2015.
30. On November 20, 2013 Council considered a report dated November 1, 2013 which detailed the proposed West End Community Plan. [Exhibit omitted].
31. At the November 20, 2013 Council meeting, Council adopted the following resolution:
 - a. THAT Council approve the West End Community Plan as contained in Appendix A of the Policy Report dated November 1, 2013, entitled "West End Community Plan".
 - b. THAT Council direct staff to proceed with the implementation of the West End Community Plan, including:
 - i. a detailed commercial streets public realm plan, to guide improvements in support of the revitalization of West End commercial streets;
 - ii. a Laneways 2.0 infill toolkit, to provide additional design and development guidance to facilitate laneway rental housing.
 - c. THAT Council approve the West End Rezoning Policy, as contained in Appendix C of the Policy Report dated November 1, 2013, entitled "West End Community Plan", to provide guidance for the intensification of the West End to meet the long term demand for job space, new housing opportunities, and the provision of public amenities;

FURTHER THAT Council repeal all references to the West End in the Council- approved policy relating to Rezoning Applications and Heritage Revitalisation Agreements During Community Plan Programs in the West End, Marpole and Grandview-Woodland (adopted July 28, 2011);

AND FURTHER THAT Council direct staff to continue processing two active rezoning proposals at 1155 Thurlow Street and 1754 Pendrell Street, which meet the conditions set out in the Rezoning Applications and Heritage Revitalisation Agreements During Community Plan Programs in the West End, Marpole and Grandview-Woodland (adopted July 28, 2011). [Emphasis in the affidavit.]

Minutes of the November 20, 2013 Council meeting are found at Exhibit "G" to the Affidavit of Jane-Anne Manson.

32. The adoption of the West End Community Plan was referenced in the Council Report in Section 2 at page 5. [Exhibit omitted.]

33. In April 2015 the 2013 Amendment was presented to the UD Panel and was supported unanimously. The proposal before the UD Panel was for a 171 rental unit building with a density of 6.56 FSR. As with all earlier versions of the Application, the proposed height of 190 feet did not exceed the height restriction under the pre-existing RM-5A zoning.
34. In response to the feedback received through the public consultation, as well as to the West End Community Plan's call for more family housing in the community, Staff recommended that more three bedroom units be included in the development. The applicant responded by proposing a small increase in the total floor area of the building as well as the total unit count in order to accommodate more three-bedroom units. The increase in floor area is achieved by adding 34 square metres (366 sq.ft.) at the back of the building on each floor, generally within the proposed building footprint shown on the application drawings. These revisions resulted in an increase [in] the density to 6.96 FSR with a total of 178 units. This change was outlined in the Council Report at page 8.
35. The 2013 Amendment, as amended by the applicant to increase the number of three-bedroom units as recommended by Staff, was the basis for the Council Report.
36. On July 13, 2015 a public hearing was held into the proposed rezoning of the Property. The transcript of the proceedings at the public hearing [formed part of the application record].
37. On September 15, 2015 Council passed a resolution approving the rezoning of the Property in principle with "prior to" conditions. The motion setting out those conditions is found [in the application record]. The transcript of Council's deliberations on the motion is found [in the application record].
38. As of the date this Affidavit is sworn, the conditions set out in the Council's September 15, 2015 motion have not been met and the By-law rezoning the Property has not been enacted.

[Underlined emphasis added.]

[15] It is apparent from the Zeng affidavit, in particular the underlined passages, that the rezoning application has gone through several iterations since 2007.

[16] Portions of the transcripts referred to above are relied on by the petitioners to demonstrate, the petitioners submit, that members of the City Council erroneously believed the rezoning application had been delayed for a decade.

[17] Council De Genova, who supported the Resolution, is recorded as follows:

So I have to say, looking at the merit of this project, the fact that the applicant has come to work with the City of Vancouver and offered a more amenable package to the tenants, I will be supporting this in the interest of making sure that we accommodate family housing in an area that really has a lot of aging housing stock. And although I do have some concerns about how this fits into the West End [community], I do understand that this [rezoning application] did pre-date the [West End Community Plan adopted in 2013], so I will be supporting this. Thank you very much.

[18] Councillor Reimer supported the Resolution and his remarks include the following:

I mean, this one was challenging because it is always -- you know, no matter how much you try and anticipate in life, it's hard to make a rule that anticipates everything. And in -- the first issue on this one, of course, is the timing, and -- and I think everybody who's gotten up has spoken to that. The first application for this project went in in December 2007, which means that the project itself probably started considerably before that, let's say a minimum of 12 months. So we are coming up on a decade now that this project has been rattling through our system here at City Hall in an area of town that has a .3 percent vacancy rate for renters.

So it's very difficult for me. I -- it is always a challenge to balance off the needs of the planning process with the legitimate need of property owners to have some fairness in the application of administrative rules, and I would say that waiting decade to get a proposal before Council -- sorry, nine years, is [un]reasonable -- I -- I feel that we at this point really do need to -- to treat the applicant fairly and give them a fair hearing today, and not say that we felt that it shouldn't be before us.

[19] Councillor Jang also supported the Resolution saying the following:

I don't have too much more to add but I do want to thank Councillor Reimer for reminding us that really this application has been processed for ten years, and so that's why it long predates the most recent plan, and it's not a fast -- no one's pulling a fast one or anything like that. This has been in the process for ten years, and -- and that's a very long time to get it right, and they did get it right. I think, you know, the height and the densities and everything is adequate. You know, and -- and really, at the end of the day it really comes down to where you put personal values. A lot of people oppose it because they might lose a bit of view or something like that, or some shadowing and things like that. And they said that they're, you know it's your -- your words, Councillor Carr, that their "quality of life is unduly harmed". And I always, when I do things, I flip it around the other way around and I say, well, what's the upside to this? And I think of, you know, 106 -- 178 units of rental housing, 26 at, you know, very affordable rates.

Well, thank you very much to our staff for all their hard work and doing -- working on this one for ten years to get it right.

[20] The petitioners submit the application that was before the City Council on September 15, 2015 for rezoning of the Property did not in fact have its origins a decade earlier. The petitioners say that not only was the rezoning applicant of 2007 not the same applicant as that in 2015, the application in 2015 was substantially different from any earlier application or amended application. Any sympathy for a 10 year delay was thus misplaced. As I understand their position the asserted misunderstanding of several councillors is at the heart of the petitioners' complaints.

[21] In my view, the alleged misunderstanding is of no consequence for the present application. I am not aware of any basis on which the City Council was precluded from adopting the Resolution without an accurate history of the rezoning application for the Property. I do not

suggest that the history given by City staff to City Council was erroneous. Erroneous or not I am satisfied the only obligation of the City Council was to consider the merits of the particular resolution before it. The history of efforts to rezone the Property was perhaps interesting for members of the City Council to hear, but they were not obliged in the context of the Resolution before them to consider the history before reaching their decision. Not only do I conclude that an inaccurate history would not have been fatal, I also conclude the understanding of several councillors that 10 years had elapsed since the rezoning application was first made was accurate. Ms. Zeng deposes that once a rezoning application is initiated the City treats it as a single application despite changes or amendments to the application itself or changes in the applicant. The petitioners do not challenge that treatment.

- [22] Those councillors who understood the rezoning of the Property had been long delayed were entitled to take that fact into account when determining whether or not to support the Resolution.
- [23] The petitioners' position that the history of the rezoning application was central to the City Council's deliberations is related to the implications, if any, of the West End Community Plan. The petitioners' argument appears to be predicated in part on their understanding that the West End Community Plan enjoys a legal status which prevented the City Council from adopting the Resolution which the petitioners say is inconsistent with the Plan. I make no finding that the Resolution was inconsistent with the West End Community Plan, but I conclude that even if it was, that was not a bar to the adoption of the Resolution.
- [24] The West End Community Plan is not a bylaw adopted pursuant to s. 566 of the Vancouver Charter. Section 561 of the Vancouver Charter provides that the City may "have development plans prepared or revised from time to time". Such plans do not enjoy the status of bylaws. The West End Community Plan is a statement of policy and no more. Nothing in s. 561 of the Vancouver Charter prevented the City Council from enacting a bylaw inconsistent with a community plan. The West End Community Plan should not be confused with an Official Development Plan enacted pursuant to s. 562 of the Vancouver Charter. An Official Development Plan is a form of bylaw which the West End Community Plan is not.
- [25] It is also important to recognize that when the City Council adopted the West End Community Plan in November 2013 it expressly directed City staff "to continue processing two active rezoning proposals" one of which was for the Property.
- [26] The petitioners have other complaints none of which is, in my view, a basis to quash the Resolution. One is that ownership of the Property changed during the time the application was under consideration. This cannot be a relevant factor even if true, which I doubt. It appears the shareholders of the respondent 1700 Pendrell Property Inc. changed over the relevant time but that company remained the registered owner. Another complaint is that the form of development considered by the City Council at the public hearing was different from the earlier proposals for rezoning. This is of no moment. The City Council considered

the particular proposed rezoning which was before it. It had no other obligation. The petitioners complain of the lack of signage, at one time or another, advising residents of the West End of the rezoning application. If there was any lack of notice, which I doubt, there was a public hearing of which the petitioners were aware. I cannot find any procedural unfairness in the manner in which the City Council conducted itself in regard to the Resolution.

[27] The speeches of various City councillors indicate they were engaged in the "array of social, economic, political and other non-legal considerations", that the Supreme Court of Canada in *Catalyst Paper*, *supra*, found was their appointed task.

[28] The decision of the City Council to adopt the Resolution cannot be characterized as unreasonable within the meaning of the governing authorities. The judicial review application is dismissed with costs.

"Affleck J."

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