
CANADA / JUDGMENT

Sevin v. Prince George (City)

2012 BCSC 1236

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1236 Sevin v. Prince George (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sevin v. Prince George (City),

2012 BCSC 1236

Date: 20120817

Docket: 1140298

Registry: Prince George

Re: In the matter of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, and the Local Government Act, R.S.B.C. 1996, c. 323

Between:

Janice Louise Sevin

Petitioner

And

City of Prince George

Respondent

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for the Petitioner:

R.J. Stewart, Q.C.

Counsel for the Respondent:

R.E. Young, Q.C.

Place and Date of Hearing:

Prince George, B.C.

April 26 and 27, 2012

Place and Date of Judgment:

Prince George, B.C.

August 17, 2012

- [1] The petitioner is a resident of 4997 Leslie Road in the Haldi Road area of the City of Prince George, and brings this petition for a declaration that a bylaw passed by the City Council to rezone a particular property nearby at 5877 Leslie Road from AR2 Rural Residential to Z16: Therapeutic Community is invalid and should be quashed as being inconsistent with the Official Community Plan ("OCP") of the City.
- [2] The City rezoned this particular property by means of an amendment bylaw to City Zoning Bylaw No. 7850, 2007, entitled "City of Prince George Zoning Bylaw No. 7850, 2007 Amendment Bylaw No. 8362, 2011" (the "Amendment Bylaw").
- [3] The preamble to the Amendment Bylaw states that the Council has deemed it desirable that certain lands be rezoned from AR2 Rural Residential to Z16 Therapeutic Community to facilitate the establishment of a recovery centre for women, or other uses, pursuant to the Z16 Therapeutic Community zoning designation.
- [4] The body of the Amendment Bylaw itself amends City Zoning Bylaw No. 7850, 2007 to rezone 5877 Leslie Road as outlined on an attached map to Z16: Therapeutic Community, adds a section to Zoning Bylaw 7850 describing the purpose of the Therapeutic Community zone, and adds to Zoning Bylaw 7850 a definition of Community Care Facility, Therapeutic.
- [5] The petitioner submits that the Amendment Bylaw is invalid and should be quashed because it is inconsistent with the OCP of the City of Prince George, contrary to the provisions of s. 884(2) of the Local Government Act, R.S.B.C. 1996, c. 323, and also because the Amendment Bylaw regulates users and not use of property, which is alleged to be impermissible under general zoning law.
- [6] The petitioner also seeks special or alternatively ordinary costs.
- [7] The petitioner proceeds under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 as well as under s. 262 of the Local Government Act, which authorizes an application to the court to set aside all or part of a bylaw for illegality.
- [8] Section 884(2) of the Local Government Act stipulates that:

884 (2) All bylaws enacted ... by a council ... after the adoption of

(a) an official community plan ...

must be consistent with the relevant plan.

[9] Other relevant sections of the Local Government Act are as follows:

875 (1) An official community plan is a statement of objectives and policies to guide decisions on planning and land use management, within the area covered by the plan, respecting the purposes of local government.

...

877 (1) An official community plan must include statements and map designations for the area covered by the plan respecting the following:

(a) the approximate location, amount, type and density of residential development required to meet anticipated housing needs over a period of at least 5 years;

...

(2) An official community plan must include housing policies of the local government respecting affordable housing, rental housing and special needs housing.

...

878 (1) An official community plan may include the following:

(a) policies of the local government relating to social needs, social well-being and social development;

[10] The OCP for the City of Prince George was established by Bylaw No. 7281 adopted on September 17, 2001. The document is divided into different parts with chapters in each part and begins with Part A - A Vision for the City, consisting of a Vision Statement.

[11] The Vision Statement begins with a section entitled "What is a Community Plan?", which states:

This Official Community Plan (OCP) establishes a framework for directing future growth and land use in the City of Prince George. The city's Community Plan gains its "official" status once Council has adopted it through enactment of a bylaw. The Plan provides for long-term land use, such as residential, commercial and industrial development, greenspace, and comprises background information, policies and maps. The material in this document thus provides a long-term outlook and plan for the future of the city.

[12] The Vision Statement includes a section on "Quality of Life" in which it is stated:

This phrase captures the positive outlook residents have for the future of the city, and the value that is placed on a strong and vibrant community life. The focus on quality of life also reflects the concern residents have regarding the quality of the city's future growth. New developments are expected to contribute to a strong sense of community, not simply provide new homes and jobs.

[13] Another section of the Vision Statement sets out "A Long-term Vision for the City of Prince George" and sets out certain principles which are stated as providing a foundation for the Vision to include the following:

Focus on Quality of Life

Focus on creating a high quality of life for residents, giving consideration to the visual, social, environmental, economic and general community impacts.

...

Downtown as the Centre

Create a strong vibrant downtown that is the centre of business activity, and the focus for cultural and recreational activities, provides housing for a diverse residential community. ...

...

Manage Growth for the Long-term

Consider the long-term impacts of all land use decisions; build a sustainable community that works both for today and the future. Ensure that short-term decisions do not compromise long-term policy direction.

...

Build Strong Neighbourhoods

Recognize that quality of life is most important in the local neighbourhood and create neighbourhoods that provide housing choices, recreation, open space and services close to home.

Social Responsibility

Ensure that all residents are supported in their needs for housing, education, recreation and overall quality of life.

Diversity - Consider the Needs of All Residents

Recognize and support the diverse nature of the community and provide for the needs of all age groups, including social and economic considerations.

[14] Under another section of the Vision Statement which is headed "Implementing the Vision - Future Land Use and Planning Decisions", a checklist is provided in the form of questions to be considered when major policy changes are proposed. Some of those questions are as follows:

Quality of Life

Will this decision enhance the quality of life for the residents of Prince George?

...

Manage Growth for the Long-term

Is this decision compatible with the growth management objectives and in the best long-term interests of the community?

...

Build Strong Neighbourhoods

Does this decision respect the character and nature of the local neighbourhood? Does it make this neighbourhood a better place?

Social Responsibility

Are the needs of all members of the community being met, including those who cannot speak for themselves?

[15] Part B is headed "Planning Strategy" and the first chapter is headed "Background and Trends".

[16] This chapter sets out the organization of the OCP into its separate parts and sets out the legal basis for the OCP with reference to provisions of the Local Government Act that authorize and define an OCP and outline the required contents of an OCP.

[17] The section on the legal basis for the OCP includes the following statement:

Once an Official Community Plan (or simply the Plan or Community Plan) is adopted as a bylaw, all future land use decisions made by Council must be consistent with the objectives and policies outlined in the OCP. An OCP, however, is not intended to be a static document, but should adapt to new trends within society and respond to changing circumstances. As such, following careful consideration by Council, policies and land use designations in an OCP may be revised by an amending bylaw pursuant to provisions outlined within the Local Government Act.

The policies and land use maps in an Official Community Plan are not intended to function as a zoning map. The community Plan emphasizes long-term direction. The zoning Bylaw and maps, in contrast, reflect immediate use, and include significantly greater detail on specific permitted uses, as well as siting and building regulations. As a rule, an OCP is reviewed at least once every 5 years. Once the Official Community Plan is adopted, any future rezoning that Council may consider must be in conformity with this Plan.

[18] Chapter 3 of Part B is headed "Growth Management" and sets out certain guiding principles including the following principles:

Provide for urban and rural land use, and ensure both life styles are accommodated in the city.

...

Recognize that existing established neighbourhoods are a strength of the city. Neighbourhoods should be protected from incompatible uses, although some variation in housing types are supported to meet the changing needs of a neighbourhood...

[19] Part C headed "Land Use Designations" is divided into a number of chapters including Chapter 5 Rural and Agricultural, and Chapter 6 Residential (Urban).

[20] On this petition the parties focused on Chapter 5 Rural and Agricultural and Chapter 6 Residential (Urban).

[21] In Chapter 5 Rural and Agricultural, the following provisions are found:

5.1 Introduction

Rural residential development provides an alternative to living in an urban environment. ... Rural residential areas in the city offer an important lifestyle opportunity. Some rural areas represent large agricultural holdings and hobby farms west of the bowl area. Others include country residential lots in the Ferguson Lake area north of Chief Lake Road, in Blackburn, on Cranbrook Hill, and in pockets along Old Summit Lake Road, and in the southwest section around Haldi Road. ... A number of residents enjoy the larger open spaces offered by rural lots, and are willing to trade off a lesser degree of services against the relative proximity to the city centre and the amenities it can offer.

5.2 Allow a Range of Lifestyle Opportunities

An implication of extensive rural residential land use is the sprawl that can result, as densities are often inadequate to support services such as transit, shopping, entertainment, and comprehensive community water supply and sanitary sewer. Of similar concern is the fact that densities that do occur are frequently too great to allow for a genuine rural experience. Thus, this Plan offers a balance. This balanced approach is reflected in lot size and density standards accommodated by four rural land use classifications. They vary from a large lot resource designation with very low densities mainly intended for resource, agricultural use, and retention of larger natural open spaces, to rural residential classifications that include lands which in some

cases are supplied with city water.

The designations are illustrated on Map 3, and summarized below.

Table 4 - Summary of Rural Designations

Rural Designation

Maximum Density of Minimum Lot Size

Overall Intent

Rural Resource (RR)

20 Hectares

Areas to be maintained in resource use such as forestry and agriculture, as well as natural open spaces

Rural A

1 lot per 4 hectares

Low intensity rural and hobby farm use

Rural B

1 lot per 2 hectares

Moderate intensity rural residential use

Rural C

4000 m²

Rural residential development

More intensive urban type development within the Rural designations is not envisaged in the foreseeable future.

...

5.3 Policies

...

Rural Residential Lifestyles

7. The Rural B designation is intended to provide a rural residential option for those seeking that lifestyle. Utility services will be limited, and will not include city water and sewer. New rural residential subdivisions in this designation shall, wherever practical, be serviced with paved roads. The minimum lot size shall be 2 hectares.

...

Provision for Home Occupations

12. Within the Rural Resource, and A and B designations, the City may apply more flexible zoning regulations with respect to permitted home occupations or home based businesses in recognition of the lower overall densities which occur in this area, and as a means of accommodating lifestyle and employment options. This provision shall be subject to appropriate limitations to protect the quality of life in the residential areas.

[22] The petitioner's property and the property the subject of the Amendment Bylaw are both within Rural B allowing for one lot per two hectares with an overall intent of moderate intensity rural residential use.

[23] Chapter 6 Residential (Urban) includes the following provisions:

6.1 Building Strong Neighbourhoods

It is clear that developing and preserving strong urban residential neighbourhoods is a cornerstone to the quality of life enjoyed by residents. To this end, keeping residential areas intact and free from intrusion from incompatible land uses was a frequently expressed objective during the OCP review process. The Vision Statement for the OCP includes the statement "Build Strong Neighbourhoods". It emphasizes the desire to accommodate diverse life-styles and needs.

...

6.2 Housing Choices

To meet changing community needs for both single family housing and other housing forms, the City will encourage development of a mix of housing forms and densities within the Urban designation shown on Schedule C Long Range Land Use Map.

Principles

Encourage social housing to be located within all city neighbourhoods.

6.3 Policies

...

Community Residential Facilities

20. Community Residential Facilities play a special role in the community, particularly to provide a stable residential home environment to those with special needs or assistance with daily living. To ensure this need is met as the city develops, the City will as a guide request 1 of every 200 new lots to be zoned Community Residential Facilities (CRF), or a similar designation.

21. The City accepts the need for special facilities such as hostels, drop-in centers, group homes and similar uses. Locations must be appropriate to the need, and should consider proximity to associated amenities including commercial and social services, traffic, utility capacity, and locational distribution in relation to similar facilities. Such facilities should not all be concentrated in one area. A Social Plan by the Community Planning Council will provide further direction with respect to such facilities.
- [24] On May 30, 2011 a rezoning and OCP amendment application was submitted by the company L&M Engineering Ltd., to the City, seeking a rezoning of 5877 Leslie Road from AR2 Rural Residential to Z16 Therapeutic Community, within the existing OCP designation Rural B. Even though the application was stated as including an OCP amendment application, it did not in fact include any application to amend the OCP.
- [25] The application was made by the agent of the owner of 5877 Leslie Road and was sent to the Planning and Development division of the City of Prince George along with a written "Proposal".
- [26] The Introduction to the Proposal stated that:
- The purpose of this application is to create a site specific zoning regulation which will allow for the operation of a therapeutic recovery facility at 5877 Leslie Road. The enclosed Z16: Therapeutic Community zoning regulation is proposed to apply to the subject property only.
- [27] The site was described as an old school that had closed in early 2000 and had been converted in 2004 to a residential property, and was currently vacant and recently sold.
- [28] The intention of the owners of the site was stated to be to lease the property to the Northern Supportive Recovery Centre for Women with the expressed intent of the recovery centre to provide recovery services within a safe environment located away from daily life and home demands.
- [29] It was further explained:
- ...The abstinence-based program will assist women suffering from substance abuse, alcoholism, anxiety, co-dependency, avoidance, as well as grief and loss. The facility will also provide vocational skill training and help women attain their grade 12 diploma. The facility will be supervised by 24-hour staffing. The recovery programs are provided within a residential environment where clients live in the therapeutic facility. The centre will provide long term, residential multi-phase addiction recovery program for a maximum of 30 women. The rural lifestyle of the Haldi Lake community makes the site an ideal location, as it is away from the negative influences of the downtown core.
- [30] Under the heading "Community Residential Facilities (OCP)" reference was made to OCP Section 6.3.20 with the statement, "Thus, the OCP supports community residential facilities in every neighbourhood."

- [31] Under the heading, "Social Responsibility (OCP)", reference was made to Section 6.3.21 of the OCP with the statement that:

One of the primary objectives of the Northern Recovery program is to remove women from their daily lives and severely limit contact with people outside of therapy. Thus, the rural location of the property is ideal for the centre. Additionally, the OCP clearly expresses the desire not to have social services clustered in one part of the city, but rather dispersed throughout the community. Currently, there are no social services located in the Haldi Lake neighbourhood.

Improving the quality of life and adhering to social responsibility are essential tenets of the Prince George OCP. Creating a high quality of life can only be accomplished when the people who are most vulnerable have been cared for and protected. The OCP clearly expresses a desire to meet social responsibility standards and to ensure that all residents are supported in their needs for housing, education, recreation and overall quality of life. The project and its proposed location meet the objectives of the Prince George OCP with respect to the provision of a community care facility.

- [32] Under the heading "Zoning" it was pointed out that the current zoning AR2 Rural Residential already allowed for "community care facility, minor" and "housing, single detached" as well as "complementary residential related uses that are compatible with the rural character of the area, such as a major auction, minor equestrian centre, general agriculture, greenhouse, and a bed & breakfast."
- [33] The rezoning to Z16: Therapeutic Community was proposed to allow the principal uses of community care facility major, community care facility therapeutic, agriculture general, greenhouse and plant, and housing, single detached.
- [34] Under the heading "Site Layout & Access", it was stated that the required parking stall allocation was 10 stalls although the proposal was for 20 stalls, and the frontage of the property was to be fenced so that privacy for the neighbourhood and the clients of the recovery centre would be provided.
- [35] Under the heading "Facility Operations" it indicated the facility would be governed by a Board of Directors and managed by an Executive Director and in addition a Neighbourhood Advisory Board would be established that would consult directly with both the Executive Director and the Board of Directors.
- [36] It also stated that the program would be abstinence based meaning there would be no narcotics of any kind allowed in the facility, all clients were required to be detoxified before acceptance into the program either through a medical facility or on their own and once accepted into the program residents would not be permitted to leave the facility grounds unattended.
- [37] There would be complete video surveillance of the entire facility and staff would be available 24 hours a day and trained to respond to any emergencies.

[38] A profile was set out of the women who would be cared for by the centre to include those "willing to live in an environment without alcohol and drugs", "motivated and committed to change", "conducive to community living", "open to living away from negative influences", and "willing to have limited contact with friends".

[39] It was also proposed that advanced clientele include "addiction combined with historical trauma i.e. sexual abuse survivors, victims of partner violence, historical abuse".

[40] Under the heading "Public Consultation" it was stated that "the property and building is designed for an institutional use and neighbours will notice little outward change compared to the historical school use."

[41] The "Conclusion" stated:

The governance and operation of the Northern Supportive Recovery Centre for Women will create a seamless transition between the existing residential uses and the proposed institutional use. Further, the existing building and site design has accommodated the institutional use of the property for many years and, as such, negative land use impacts, such as traffic and noise are not anticipated.

[42] Planning and Development staff forwarded a report to council together with the Proposal recommending that council approve the application to amend Zoning Bylaw 7850 as proposed by re-zoning 5877 Leslie Road to Z16 Therapeutic Community.

[43] Council was advised that the current use was as an unoccupied elementary school, the current zoning was AR2 Rural Residential and the OCP designation was Rural B.

[44] Under a section headed "Policy/Regulatory Analysis: Social Responsibility", the staff report said:

The City of Prince George recognizes the importance of improving and maintaining a high quality of life for the members of the community. Policy documents including the Official Community Plan, Integrated Community Sustainability Plan (ICSP) (i.e. myPG), and the Prince George Social Plan each outline the objectives and policies in place that aim to improve the quality of life of all citizens.

[45] The report stated under the heading "Integrated Community Sustainability Plan (myPG)":

The proposed recovery centre for women is consistent with myPG Social Development Policy 3.0 4, which states that "people of all backgrounds, ethnicities, and income levels can access services that help to meet their needs and improve their quality of life".

[46] Reference was also made to Policy 3.0 5, which was said to outline that "Prince George is a community that encourages and supports health and wellness".

[47] Reference was then made to Section 6.3.21 of the OCP and its contents as set out at para. 23 herein. Council was told there were no social services located in the Haldi Lake neighbourhood, the proposal was to remove women from their daily lives and severely limit contact with people outside of the centre, and the rural location would help accomplish this and not result in a concentration of similar services to one area.

[48] Reference was made to the Prince George Social Plan prepared by the Community Planning Council of Prince George which was said to include the objectives in regard to substance misuse of:

Ensure sufficient detox beds are available

Ensure relevant counseling programming is provided

Ensure a continuum of services is identified and implemented to provide full rehabilitation

[49] The report went on to say:

This proposal is consistent with the above-noted objectives that are included in the Prince George Social Plan as the recovery centre is intended to provide a service to women suffering from substance abuse, alcoholism, anxiety, co-dependency, avoidance, as well as grief and loss.

and

... the zone is consistent with the Official Community Plan designation which permits rural residential development and Section 6.3.21 which supports recovery facilities such as the one proposed.

[50] In conclusion it stated:

The Department recommends that Council approve this application as it is consistent with the policy direction of the Integrated Community Sustainability Plan (myPG), Official Community Plan, and Prince George Social Plan.

[51] The application went to a public hearing on October 3, 2011 where the Minutes indicate that many people attended and spoke, including present counsel for the petitioner who advised Council that he had been retained by the residents association to provide Council with a submission relating to land use and legal uses in connection with the application. It is recorded that he submitted the intended use did not fit with the area and was contrary to the OCP and set out in detail the basis for his position.

[52] Amendment Bylaw No. 8362 to rezone the property at 5877 Leslie Road to Z16 Therapeutic Community and to amend the City Zoning Bylaw No. 7850, 2007, was formally adopted by the City on December 12, 2011.

Submissions of the Petitioner

- [53] Counsel for the petitioner submits that the Amendment Bylaw is inconsistent with the planning policies expressed in the OCP since it purports to permit changes in density or type of land use contrary to relevant existing policy guidelines expressed in the OCP for rural residential living.
- [54] He points to the policy statement in Chapter 5 of the OCP dealing with rural residential lifestyles that states that a Rural B designation is intended to provide a rural residential option for those seeking that lifestyle and he submits that the "residents" in this proposed institution are not seeking that lifestyle but seeking treatment for their ailments in a medical/therapeutic setting.
- [55] He submits that an institution for recovery of up to 30 unrelated women addicts in residence, coupled with 14 permanent staff, with supervised visits by friends and family, is not a residential use of land and is inconsistent with the rural residential planning and policy statements in the OCP for rural residential living.
- [56] It is submitted that for existing residents such an institutional use cannot be part of building a strong neighbourhood offering an important lifestyle opportunity for families as an alternative to urban residential living.
- [57] He poses the question as set out the Vision Statement of the OCP dealing with future land use and planning decisions:

Does this decision respect the character and nature of the local neighbourhood? Does it make this neighbourhood a better place?

He submits the answer is "no".

- [58] It is submitted that if Council wished to rezone this property in rural residential designation Rural B it should have initiated a process to amend the OCP itself and by taking the route of an amendment to the zoning bylaw instead, Council has effectively amended the OCP itself "via the back door" and not through proper amendment procedures.
- [59] He submits that the Amendment Bylaw is not based on a reasonably consistent interpretation of the OCP since the Council did not actually consider the relevant policies of the OCP relating to rural residential but was guided by staff and the applicant to consider planning and policy statements of the OCP that relate exclusively to urban residential under Chapter 6 and not to the planning and policy statements that relate to rural residential in Chapter 5.
- [60] It is suggested that Council was misled into believing that the proposed usage was consistent with the rural residential designation under the OCP by the assurances of staff and the applicant.

- [61] Counsel submits that for consistency the provisions of a bylaw dealing with land use ought to be compared to the particular provisions in the OCP which deal with the land use provisions in the area affected and not to other provisions of the OCP that deal with different land uses in other areas such as in urban areas.
- [62] Accordingly he submits that the land uses in this Amendment Bylaw should have been compared with the land uses authorized in Chapter 5 of the OCP dealing with rural and agricultural, and not the land uses authorized in Chapter 6 of the OCP for Residential (Urban).
- [63] With respect to staff in its report to Council taking the position that the applicant's proposal was consistent with the objectives of the Social Plan, counsel points out that the Social Plan is only mentioned in Residential (Urban) Chapter 6.3 under Community Residential Facilities and is not mentioned at all in Chapter 5 under Rural and Agricultural.
- [64] Finally, it is submitted that the Amendment Bylaw purports to restrict occupancy to women only and only those not related by blood or marriage, and counsel submits that it is ultra vires as a matter of general zoning law to regulate the user of property and not the use of a property.
- [65] He places reliance upon the Supreme Court of Canada decision of *R. v. Bell*, [1979] 2 S.C.R. 212, where the Court set aside a bylaw that restricted use to "family" defined as "a group of two or more persons living together and interrelated by bonds of consanguinity, marriage or legal adoption".
- [66] In that case Mr. Justice Spence, writing for the majority, found that the adoption of "family" as the only permitted occupants of the dwelling was "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men" and the legislature never intended to give authority to make such rules and the device of zoning by reference to the relationship of occupants rather than the use of the building is one which is ultra vires of the municipality under the provisions of The Planning Act. (p. 223)

Submissions of the City

- [67] Counsel for the City begins by submitting that the consistency test engages deference to the City's decision as long as the decision falls within the range of rational choices that can be reasonably supported on an interpretation of the policies laid down in the OCP.
- [68] He submits that the more amorphous and broader the policy statements in the OCP, the wider and more generous is the field within which regulatory choices made by elected councils may be viewed as consistent.
- [69] He submits there is absolutely nothing in the OCP anywhere that prohibits a community care residential facility in the rural designated areas of the City.

[70] He submits that the decision of what reasonably constitutes a rural residential use in a rural area in the context of the OCP is one that Council is entitled to make as long as it does not make a choice that is in direct collision with the OCP.

[71] He cites the case of *Old St. Boniface Residents Association Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, where Sopinka J. for the majority, at p. 1202, said:

The question of conformity to an official plan is primarily a planning decision which is based on fact and policy. The opinion of the designated commissioner [here the Council] while not immune from judicial review should not be disturbed by an appellate court simply because it disagrees with the opinion in respect of policy or fact. The commissioner is in a much better position to assess whether a new development conforms to the planning policy of the municipality than is the court. ...

[72] Similarly, in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, the reasons for the majority stated at para. 54:

Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity ...

[73] He points to the Long-term Vision Statements in Part A of the OCP that recognize and support the diverse nature of the community, provide for the needs of all age groups, including social and economic considerations, ensure that all residents are supported in their needs for housing, and answer the question posed "Are the needs of all members of the community being met, including those who cannot speak for themselves?".

[74] He refers to the fact that s. 6.3.21 of the OCP deals with the need for facilities such as hostels, drop-in facilities, group homes and similar uses, states that such facilities should not be concentrated in one area, and refers to the Social Plan as providing further direction with respect to such facilities.

[75] He makes specific reference to the portion of the Social Plan cited in the staff report to Council that sets out the objectives in respect of substance misuse of ensuring sufficient detox beds are available, ensuring relevant counseling programming is provided and ensuring a continuum of services is identified and implemented to provide full rehabilitation.

[76] He points out that the proposed recovery centre is intended to provide these services and is to be located in an area where there are currently no social services which would meet the goal that Section 6.3.21 sets out of not concentrating these types of facilities in one area.

[77] He denies that staff misled Council, referring to the fact that there was a "extensive public hearing at which submissions were received from many including counsel for the petitioner himself".

- [78] He concludes by submitting that given the overarching policies and principles found in the OCP, it should not be implied by the placement of the policy for community residential facilities in Chapter 6 that such uses are only contemplated by the OCP in the urban area and he says again there is no prohibition in the OCP of community residential uses being in the rural area.
- [79] On the issue of whether the Amendment Bylaw purports to regulate the "user" of the land rather than the "use" of the land, he submits that the bylaw does not restrict the users to women, by its wording, even though the preamble to the bylaw may say that.
- [80] He submits with respect to the requirement in the bylaw that the users be "persons who are not related by blood or marriage", the real issue for determination is whether that is a reasonable or unreasonable provision.
- [81] He cites the decision of the Supreme Court of Canada in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, where the Chief Justice, writing for the Court said the following:

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. The fact that wide deference is owed to municipal councils does not mean that they have carte blanche.

25 Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw.

- [82] He cites the Court of Appeal decision of *Faminow v. North Vancouver (District)*, 1988 CanLII 2995, that dealt with the issues of "use" and "user". Hinkson J.A., writing the reasons, cited the decision of *Smith v. Tiny* (1980), 27 O.R. (2d) 690, upheld on appeal (29 O.R. (2d) 661), where the trial judge had distinguished the decision in *R. v. Bell* as follows:

I do not read the judgment of Spence J., who spoke for the 3:2 majority in *Bell*, as rendering invalid every zoning by-law making occupation of residential premises referable to a definition of "family" which includes in it consanguinity and marriage simply because consanguinity and marriage are included. The decision, in my opinion, does not go that far and must be interpreted in light of the particular by-law prohibition in issue in the case and the Court's conclusion as to the unreasonable and inequitable consequences which flow from it.

- [83] Hinkson J.A. considered that the trial judge properly interpreted the decision in *Bell* and had application in the circumstances and he concluded that the bylaw before him was not unreasonable or inequitable.

Analysis and Decision

[84] The standard for review to be applied on this petition is the reasonableness of the decision to re-zone 5877 Leslie Road from AR2 Rural Residential to Z16 Therapeutic Community, having regard to the processes followed and whether the outcome falls within a reasonable range of alternatives in light of the legislative scheme and contextual factors relevant to the exercise of the power (Catalyst Paper Corp. at para. 13).

[85] Paragraph 19 of Catalyst Paper Corp. states:

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. ... 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.

[86] Paragraph 25 of Catalyst Paper Corp. states:

Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw.

[87] Paragraph 32 of Catalyst Paper Corp. states:

In judging the reasonableness of a bylaw, it is appropriate to consider both process and the content of the bylaw.

[88] The statutory regime in place here that circumscribes the range of reasonable outcomes for the Amendment Bylaw is the Local Government Act and particularly s. 884(2) that requires all bylaws enacted to be consistent with the existing OCP.

[89] The OCP must be interpreted on a reasonable basis to determine whether it supports this bylaw as being consistent with it (paras. 41-42 of *Central Saanich Society v. Central Saanich (District)*, [2011] B.C.J. No. 708, 2011 BCSC 491):

41 Whether the development permitted by the bylaw is inconsistent with the concept of rural as set out in the District's Official Community Plan is a matter of interpretation. An Official Community Plan is not drafted in the terms of a statute but rather, in terms of objectives and policies, which are necessarily much less specific than statutory terms. It is obviously not possible to promote each of the many objectives of the Official Community Plan equally in a single instance, therefore decisions applying that plan must involve the exercise of judgement in balancing various objectives in each case.

42 The Court in considering a bylaw passed by a municipal council is not dealing with an adjudicative decision by an administrative tribunal, but a decision by elected council members, who have concluded in the exercise of their judgement, how best to accommodate the various policies and objectives they must serve. This does not empower council to misinterpret the Official Community Plan but it does suggest that the court ought not to interfere with any reasonable interpretation consistent with the OCP.

[90] Deference must be shown to council's decision to pass the Amendment Bylaw as long as that decision is reasonable in the context of the requirements of s. 884(2) of the Local Government Act.

[91] I start by rejecting the submission of counsel for the petitioner that City Council was misled by staff and the applicant to only consider planning and policy statements of the OCP found in Chapter 6 relating to Residential (Urban), instead of considering the provisions of Chapter 5 relating to Rural and Agricultural. I will however accept that staff persuaded Council to give consideration to Chapter 6 as well as Chapter 5.

[92] Petitioner's counsel attended at the public hearing and spoke to the proposed Amendment Bylaw, taking the position that the intended use was contrary to the OCP.

[93] The minutes of the public hearing that was conducted on October 3, 2011 include the following statement:

Mr. Roy Stewart, Barrister and Solicitor, advised he had been retained by the Residents Association to provide Council with his submission relating to land use and legal issues in connection with the subject rezoning application. Mr. Stewart submitted that the intended use did not fit within the area, and was contrary to the Official Community Plan. Mr. Stewart reviewed the practical issues that the proposed facility would create, as submitted by previous presenters, and suggested that the facility would be better suited to a truly remote location. He viewed the proposal as being "spot zoning" and submitted that the proposal must be sustained by a rational planning purpose. Mr. Stewart indicated that in his view the Official Community Plan does not support the rezoning application, and set out in detail the basis for his position.

[94] During the hearing that took place before me, the same Mr. Stewart as counsel for the petitioner informed the Court that he had informed Council on October 3, 2011 on the same basis as he submitted to the Court.

[95] Mr. Stewart is a former solicitor for the City of Prince George. I am confident that he brought to the attention of Council that this property fell within the land uses covered by Chapter 5 for rural residential and that some of the submissions of staff and the applicant were references to provisions of Chapter 6 dealing with urban land uses and not to Chapter 5 rural land uses.

- [96] I am confident that he set Council straight on what he considered to be the difference between the two land uses and advocated for the application of the provisions of Chapter 5 to reject the proposed Amendment Bylaw.
- [97] With petitioner's counsel appearing for the residents at the hearing on October 3, 2011 it is my conclusion that City Council had before it references to the provisions of Chapter 5 as well as those provisions of Chapter 6 that were brought to Council's attention by staff.
- [98] Counsel for the petitioner submits before me that the rural residential policies in the OCP are distinct and mutually exclusive from the urban residential policies expressed in that document.
- [99] He takes the position that if this were not so there would be no purpose in the OCP distinguishing between these types of residential uses and he submits that if the City wished to place this special needs housing in the rural residential area of the OCP, it should have gone about amending the OCP itself through proper procedures rather than attempting to obtain the same result through this Amendment Bylaw.
- [100] It is true that the only reference to community residential facilities is made within Chapter 6 of the OCP dealing with the residential (urban) designation and is not mentioned at all in Chapter 5 dealing with the rural and agricultural designation.
- [101] It is also true that the only reference to the Social Plan is in Chapter 6 in connection with community residential facilities and is also not mentioned in Chapter 5.
- [102] This Social Plan was not put into evidence on the application so the Court is not able to determine how broad or narrow its provisions are and whether they can as equally apply to the land in Chapter 5 as to the land in Chapter 6.
- [103] Counsel before me took competing positions on whose onus it was on the application to bring the social plan forward. With staff in its report to Council for the hearing of October 3, 2011 reciting portions of the Social Plan in support, in my view it was for the petitioner to bring the full Social Plan to the attention of the Court if there are any other relevant provisions to be considered.
- [104] In any event, the words of the Social Plan could not affect the decision of the City Council if otherwise the proposed Amendment Bylaw was not consistent with the OCP as s. 884(2) of the Local Government Act mandates.
- [105] Counsel for the City submits that there is some importance to the fact that community residential facilities are not specifically prohibited in the rural residential area in the OCP, and it should not be concluded that such facilities are only contemplated in the urban areas.
- [106] In my view this is not the question to ask because those facilities may not be specifically prohibited in other land use designations either, although inconsistent with those uses.

- [107] The question to ask is whether this Amendment Bylaw is consistent with the land use provisions of Part C Chapter 5 of the OCP.
- [108] The opening words of the Vision Statement say that the OCP is to establish a framework for directing future growth and land use in the City and to provide for long-term land use, such as residential, commercial and industrial development, greenspace, and comprises background information, policies and maps. The statement is made that the material in this document provides a long-term outlook and plan for the future of the city.
- [109] The Vision Statement is a summary statement of what is to be covered in the OCP within its framework and in my view that framework is the parts and chapters that make up the OCP.
- [110] I observe that community residential facilities in Chapter 6 are described as "particularly to provide a stable residential home environment to those with special needs or assistance with daily living".
- [111] The Northern Supportive Recovery Centre is described as a recovery centre providing recovery services for women suffering from substance abuse, alcoholism, anxiety, co-dependency, avoidance, as well as grief and loss. The clients are to live in the facility only during their recovery period, to then be replaced by other women.
- [112] The proposal of the applicant referred to the recovery centre as a therapeutic recovery facility and referred to a seamless transition between the existing residential uses and the proposed institutional use.
- [113] I question how this institutional use can provide a stable residential home environment.
- [114] The proposal of the applicant stated that Section 6.3.20 of the OCP supports community residential facilities in every neighbourhood, to mean every neighbourhood in the OCP.
- [115] I fail to see how the words of Section 6.3.20 can support this conclusion.
- [116] There is no definition of "neighbourhood" in the OCP.
- [117] On my interpretation in the context in which this word is found, "neighbourhood" can only be considered a reference to the residential (urban) neighbourhoods in Chapter 6.
- [118] Neither do I interpret the statement in Section 6.3.21 that "such facilities should not all be concentrated in one area" as endorsing a conclusion that this authorizes these facilities in rural residential areas as well.
- [119] In my view the word "area" is also to be confined to its context in the urban residential area because that is the context in which the words are found.
- [120] I recognize that the recovery centre is to operate in the old school that is to be equipped with a private fence and attendants with no authority of the occupants to leave the property on their own.

- [121] It appears to be a very secure site that will probably have little or no impact on the surrounding rural residents, although adding nothing to a sense of community.
- [122] However, this is not a relevant consideration in my view. The Amendment Bylaw is either consistent with the OCP or it is not.
- [123] The City pointed out in its submission that community care facility, minor, is already an allowed use within the current zoning AR2 Rural Residential, as well as certain other businesses such as auction, major and equestrian centre, minor.
- [124] Community Care Facility, Minor is defined in the zoning bylaw to include:
the use of a principal dwelling for:
- a) the residential care of up to six persons who are not related by blood or marriage, in a facility licensed under the Community Care and Assisted Living Act, including supervision provided to minors through a prescribed residential program, or adults who are vulnerable because of family circumstances, age, disability, illness or frailty, and are dependent on caregivers for continuing assistance or direction in the form of three or more prescribed services as defined in the Community Care and Assisted Living Regulation.
- [125] Community Care Facility, Major is defined to mean:
- a) The residential care of seven or more persons who are not related by blood or marriage, in a facility licensed under the Community Care and Assisted Living Act, including supervision provided to minors through a prescribed residential program, or adults who are vulnerable because of family circumstances, age, disability, illness or frailty, and are dependent on caregivers for continuing assistance or direction in the form of three or more prescribed services as defined in the Community Care and Assisted Living Regulation.
- [126] The Amendment Bylaw authorizes a Community Care Facility, Major in Z16 Therapeutic Community, limited to 30 persons.
- [127] Petitioner's counsel responds to the submission that the existing zoning AR2 allows Community Care Facility, Minor, by saying that simply because the existing zoning allows that use does not determine that it is consistent with the OCP and doesn't support a consistency of this therapeutic facility with the OCP.
- [128] The issue of consistency with the OCP of a Community Care Facility, Minor, or Major, is not before me so I do not need to decide whether they are consistent with the OCP or not. I do observe however that if they have any applicability there would be no reason to change the zoning to Z16 Therapeutic Community with a principal use of Community Care Facility, therapeutic, the definition of which describes this therapeutic facility with its purposes.
- [129] Staff supported the application before Council on the basis that it considered the proposed use to be consistent with the policy direction of the OCP as well as the Integrated Community Sustainable Plan (myPG) and the PG Social Plan.

- [130] I have already dealt with the fact that the Social Plan was not put before the Court on this application and the same comment is made about the Integrated Community Sustainability Plan.
- [131] The petitioner focuses on the OCP taking the position that the Amendment Bylaw is not consistent with the OCP and any other "plan" is therefore irrelevant.
- [132] I accept this submission as even if the Amendment Bylaw is consistent with the Social Plan and the Integrated Community Sustainability Plan, if it is not consistent with the OCP it fails under s. 884(2) of the Local Government Act.
- [133] It is my interpretation that the Amendment Bylaw is not consistent with the OCP and the declaration must be made as sought by the petitioner that the City of Prince George Zoning Bylaw No. 7850, Amendment Bylaw No. 8362, 2001, is invalid and quashed because it is inconsistent with the OCP of the City, contrary to the provisions of s. 884(2)(a) of the Local Government Act, R.S.B.C. 1996, c. 323.
- [134] In my view in order to authorize this recovery facility on this site City Council will be required to amend the OCP.
- [135] With respect to the submission that the Amendment Bylaw is also illegal because it purports to regulate the user of property and not the use of a property, I conclude that the Court of Appeal decision in *Faminow v. North Vancouver (District)* applies and it is not illegal for this reason.

Costs

- [136] The petitioner seeks special costs of the petition on the basis that this case is of significant public interest and will have a precautionary effect on the City and other municipalities in the future.
- [137] It is submitted that this is the first time this issue has come to court of a municipality or city attempting to import provisions and policies from one part of an OCP dealing with property in a certain area into another part dealing with property in a different area and the petitioner, being one owner of a number of owners in the Haldi Road area should not have to bear the full legal costs of bringing on this petition, the result of which is of benefit for not only herself but all other residents in the Haldi Road area.
- [138] It is submitted that without such special costs ordinary people such as her will have difficulty exercising their right of access to justice which should be encouraged with such an award of special costs.

[139] Reference is made to the petitioner's affidavit where she has expressed her reasons for bringing on the petition. It is submitted that she has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify her proceeding personally from an economical point of view, the City has a superior capacity to bear the costs of the proceedings and the petitioner has not conducted the litigation in an abusive, vexatious or frivolous manner.

[140] It is submitted the case involves matters of public importance that transcends the immediate interests of the parties and which have not been previously resolved.

[141] Reliance is placed upon the decision of the Court of Appeal in *Victoria (City) v. Adams*, [2009] B.C.J. No. 2451, 2009 BCCA 563, where the Court said at para. 188:

... the following may be identified as the most relevant factors to determining whether special costs should be awarded to a successful public interest litigant:

- (a) The case involves matters of public importance that transcend the immediate interests of the named parties, and which have not been previously resolved;
- (b) The successful party has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically;
- (c) As between the parties, the unsuccessful party has a superior capacity to bear the costs of the proceeding; and
- (d) The successful party has not conducted the litigation in an abusive, vexatious or frivolous manner.

[142] In opposition the City submits that the petitioner's affidavit really indicates that she is bringing this petition as a matter of personal concern for her, speaking about this being an area where she has chosen to live with her family because of its rural nature and she has always understood that the OCP recognized the rural lifestyle in this area and it would not change officially without her input and involvement.

[143] Reliance is placed upon the decision of Madam Justice Garson in chambers in *Residents and Ratepayers of Central Saanich Society v. Saanich (District)*, [2011] B.C.J. No. 1529, 2011 BCCA 340, where she dealt with an application for security of costs of appeal being opposed by the Central Saanich Society that had lost at trial before Mr. Justice Curtis at [2011] B.C.J. No. 708, 2011 BCSC 491, and was now appealing to the Court of Appeal.

[144] In her Reasons Garson J.A. raised the issue of whether the principles that have evolved in respect of liability for costs after a trial involving public interest litigants should be applied to applications for security of costs of an appeal in the Court of Appeal.

- [145] She ultimately concluded that while there was a considerable element of local public interest in the issue raised by the petitioners she did not consider that it transcended the interests of the parties before the Court as the case primarily turned on the specific subdivision application at issue. The real question at issue was whether the subdivision bylaw conflicted with the OCP and it could not be said to require the Court to resolve a broad legal question that had not previously been resolved.
- [146] She said that the question was more one of local importance than the kind of question at issue in *Victoria (City) v. Adams* where the question of homelessness was one of significant public and constitutional importance.
- [147] At the same time she said that she could not disregard the undoubted importance of the issue to the residents of Central Saanich.
- [148] The parties went back before Mr. Justice Curtis on the issue of costs of trial where the Society sought an order that each party bear its own costs on the grounds that it was a non-profit volunteer based organization that commenced the proceedings in the public interest to settle a legal controversy of some importance.
- [149] In Reasons for Judgment at [2012] B.C.J. No. 153, 2012 BCSC 121, Mr. Justice Curtis followed Madam Justice Garson in deciding that there was no publicly significant point of law settled in the litigation and all that had happened was that the Central Saanich Residents did not want a subdivision to go ahead but did not manage to stop it on the particular facts of the case.
- [150] I am persuaded that the petitioner has made this out as a personal issue for her own benefit and the interests of the other residents of the Haldi Road area do not transcend her personal interest. The only issue is whether the Amendment Bylaw is consistent with this particular OCP, an issue that does not involve any broad legal question.

Orders

1. City of Prince George Zoning Bylaw No. 7850, 2007 Amendment Bylaw No. 8362, 2011 is declared invalid and quashed as inconsistent with the Official Community Plan of the City of Prince George, contrary to the provisions of s. 884(2) of the Local Government Act.
2. The petitioner's application for a declaration that the Bylaw is invalid and quashed because it regulates users and not use is dismissed.
3. The petitioner will have her costs at Scale B of Appendix B of the Rules of Court.

"The Honourable Mr. Justice Truscott"

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