IN GOOD FAITH TO WHOM?

AN ANALYSIS OF JUDICIAL DEFERENCE TO MUNICIPAL AUTHORITY AND THE DISPUTE OVER THE ARBUTUS CORRIDOR

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I recall driving across the Arbutus Corridor daily on my way to school and being stopped by the familiar lights and sounds of a train crossing. Sometimes it would be only for a moment, and other times I might be waiting for what seemed like an hour. I later remember wondering (while really knowing) why the trains never passed by that crossing at 16th Avenue anymore. I also recall wondering how such an odd-shaped piece of land might be developed after it was no longer used for rail—perhaps it would remain undeveloped and be used as bike trails, or perhaps it would be a stretch of very narrow houses and shops. It never occurred to me that these musings might be the subject of consideration by our nation's highest court of appeal, the Supreme Court of Canada.

The legislature of British Columbia has empowered municipalities with broad powers of discretion over land use planning. Since these powers could be seen to conflict with the rights of landowners, these discretionary powers must often be enforced by the courts. While there is a general presumption in favour of the courts deferring to municipal authority, the courts can intervene and review municipal actions where they are outside the authority of the municipal government or where the actions are marked by "patent unreasonableness". Where the courts draw the line between deference and intervention has been debated over many years, but continues to lack the clarity the courts insist it has. Recently, the British Columbia

Court of Appeal overturned a lower court decision that struck out a by-law restricting development on private land owned by Canadian Pacific Railway (CPR), finding the city acted within its powers in enacting this by-law.

The goal of this case comment is to examine the current case before the Supreme Court of Canada (SCC) regarding the Arbutus Corridor, and to consider the likely outcome in light of the specific statutory context and past jurisprudence regarding judicial deference to municipal authority in municipal land use planning. Given these two formative factors, I conclude that the SCC will find against the private property rights of CPR and in favour of the by-laws enacted by the City of Vancouver. I will begin with an overview of municipal authority over land use planning, followed by an examination of case law, setting out the parameters of judicial deference to municipal authority. I will then look at municipal authority in relation to the current dispute between the City of Vancouver and Canadian Pacific Railway over the future use of the Arbutus Corridor.

Municipal Land Use and Planning

Though real property may be privately owned, an owner of land is restricted in what may be done with that land. Section 92 of the *Constitution Act, 1867* gives provinces authority over both "Municipal Institutions in the Province", and "Property and Civil Rights in the Province".[1] The most recent legislation governing municipal institutions is the *Local Government Act*, which confers on regional districts and municipalities authority over land use and planning. Provisions mandating long term strategies begin in Part 25, entitled "Regional Growth Strategies", while more localized planning and specific land use zoning is outlined in Part 26, "Planning and Land Use Management". In addition, more detailed local authority is set forth in the *Community Charter*[2] and the *Vancouver Charter*.[3] It is through

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[1] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[2] S.B.C. 2003, c. 26 (*Community Charter).*

[3] S.B.C. 1953, c. 55 (*Vancouver Charter).* It is useful to note that the *Vancouver Charter* predates both the *Local Government Act* and the *Community Charter.*

these legislative tools that a municipality may define land use restrictions and requirements.

Regional districts are required to create broad 20-year plans for regional growth. The purpose of these plans is to "promote human settlement that is socially, economically and environmentally healthy and that makes efficient use of public facilities and services, land and other resources".[4] As most of the specific land use planning authority is at the municipal level, the *Local Government Act* also sets out the requirement that municipalities (including Vancouver) are to incorporate a regional context statement into their official community plans (or, for Vancouver, official development plans) that outlines how each local government will align its planning with the overall growth strategy of the region.

As land use planning is a delegated authority under provincial legislation, local governments are free to make and change land use by-laws so long as they do so in accordance with the enabling legislation. This legislation prohibits so-called "people zoning", or zoning in a way that has a discriminatory effect on certain people or classes of people, as well as requiring that rezoning be done in good faith and for the promotion of community planning goals. Local governments are also prevented from rezoning private land to strictly public use unless they provide adequate compensation to the landowner.[5] Further, it is not presumed that rezoning will affect already developed property due to the notion of non-conforming use, which allows for the continued use of land for a purpose that was valid prior to rezoning, provided that use is not expanded.[6]

Judicial Deference to Municipal Authority

Canada adheres to a long history of judicial deference to municipal authority that can be traced back to the nineteenth century in

[4] *Local Government Act,* R.S.B.C. 1996, c. 323, s. 849.

[5] *Ibid.* s. 914.

[6] *Ibid.* s. 911.

England. In the case of *Kruse* v. *Johnson*,[7] Lord Russell of Killowen C.J. stated that "in matters which directly and mainly concern the people of the county who have the right to choose those whom they think best fitted to represent them on their local government bodies, such representatives may be trusted to understand their own requirements better than judges".[8] As such, courts have adopted a very narrow approach to determining whether or not to strike down an action of a municipal government. This approach includes incidences where a municipality has acted *ultra vires*, or outside of the authority to govern granted by provincial legislation[9] or, if that action was within municipal authority, then the standard of review is one of "patent unreasonableness".[10]

On the specific issue of land use planning, this pattern of judicial deference continues. In 1995 the BC Court of Appeal heard the case of *MacMillan Bloedel Ltd.* v. *Galiano Island Trust Committee* ("*MacMillan Bloedel*"),[11] in which the Galiano Island Trust Committee (GITC), the equivalent to a municipal council (with respect to land use jurisdiction) under the *Islands Trust Act*,[12] rezoned land belonging to MacMillan Bloedel to increase the minimum lot size and prevent family dwellings, with a view to preventing residential development on the Island. This rezoning was found to be both *intra vires* and not implemented in bad faith:

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[7] *Kruse* v. *Johnson* (1898), [1895-99] All E.R. Rep. 105 (Queen's Bench). This 1898 case was in reference to a by-law against singing in the streets.

[8] *Ibid.* at para. 7.

[9] *Shell Canada Products Ltd.* v. *Vancouver (City)*, [1994] 1 S.C.R. 231 (*Shell Canada*). In *Shell Canada* the City of Vancouver passed a by-law refusing to do business with Shell until it would withdraw from South Africa. This was found to be beyond the scope of municipal powers and therefore *ultra vires*.

[10] *Nanaimo (City)* v. *Rascal Trucking Ltd.*, [2000] 1 S.C.R. 232. Declaring a pile of soil to be a nuisance was found not to be an unreasonable assertion of municipal authority even after permits had been granted for the processing of that soil.

[11] (1995), 28 M.P.L.R. (2d) 157 (B.C.C.A.) (*MacMillan Bloedel*).

[12] R.S.B.C. 1996, c. 239 (*Islands Trust Act*).

> by the combined effect of ss.960 and 972 [now 914[13]], supra at p. 20, and s.963, supra at p. 19, the Legislature of British Columbia authorizes a municipality to "downzone", an exercise of power many persons would consider equivalent to expropriation, and to do so without paying compensation.[14]
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> Both their expressed motives, and their true motives, were directed towards furtherance of the objects of the Islands Trust Act. … It follows that the finding of bad faith can and should be set aside.[15]

The learned judge held that in his view "courts should be slow to find bad faith in the conduct of democratically elected representatives acting under legislative authority, unless there is no other rational conclusion".[16]

The Court of Appeal's decision in *MacMillan Bloedel* was more recently affirmed and applied outside of the *Islands Trust Act* in *Canada Mortgage and Housing Corporation* v. *North Vancouver (District)*, [*CMHC*][17] in which North Vancouver rezoned land owned by CMHC from zoning permitting residential use, to zoning only for recreational purposes. In language emulating that of Lord Russell, Esson J.A. stated that in interpreting the scope of municipal powers judges "should confine themselves to rectifying clear excesses of authority rather than using the terms such as 'improper purpose' and 'bad faith' to substitute the court's view of what is right for the view of the elected representatives".[18]

The Arbutus Corridor: History

The Arbutus Corridor is a stretch of land running north to south through Vancouver, which is owned by Canadian Pacific Railway (CPR), and has been an active rail line since 1901. It is approximately

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[13] *Local Government Act*, *supra* note 4.

[14] *MacMillan Bloedel, supra* note 11 at para. 94.

[15] *Ibid.* at para. 182.

[16] *Ibid.* at para. 191.

[17] 10 M.P.L.R. (3d) 1 (B.C.C.A.) (*CMHC*).

[18] *Ibid.* at para. 33.

10 kilometres long and comprises 45 acres, varying in width from 50 to 66 feet across. For the past five years, this land has been at the heart of a dispute between the City of Vancouver and CPR over its future use. While CPR has fee simple title to the Arbutus Corridor, this title is subject to conditions set out in the *Canada Transportation Act*.[19] The *Act* governs the use of the land for rail and then outlines requirements to be met in the event CPR wishes to discontinue its use as a rail line. As early as 1986, in anticipation of CPR no longer needing the Arbutus Corridor for freight transportation, by resolution Vancouver City Council stated their desire to preserve it for rapid transit purposes after decommissioning.

In 1995 the City added to this resolution an intention to use the corridor as a greenway as laid out in its *Vancouver Greenways Plan*.[20] This would allow for its use by pedestrians and cyclists, and preserve the land as green space. Within the *Vancouver Greenways Plan*, the City identifies the Arbutus Corridor as "a keystone of the Greenways system", and acknowledges that it is "owned by the Canadian Pacific Railway … [and is] in active rail use. In addition, the right-of-way is informally used as an urban trail by pedestrians and cyclists. … Possibilities exist to share transit and Greenway use when the rail line is redeveloped".[21]

Under the *Canada Transportation Act*, the decommissioning of a rail line is a three-year process designed to allow for the land's continued use as a rail line. Sections 142 to 146 outline the requirements to advertise for sale the lands for continued use as a rail line, followed by a condition obligating CPR to offer the land for sale to the City.[22] In early 1999 CPR indicated its intention to the City to begin the process of decommissioning the Arbutus Corridor and on October 14th, 1999,

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[19] S.C. 1996, c. 10.

[20] Adopted July 18th, 2000, this document is only available in hard copy from the City Planning Office. See also, Urban Structure Policy Report recommending its adoption online: City of Vancouver <http://vancouver.ca/ctyclerk/cclerk/950718/p2.htm>.

[21] *Ibid.* Quotes are taken from Madam Justice Brown's decision in *Canadian Pacific Railway Co.* v. *Vancouver (City)* (2002), 33 M.P.L.R. (3d) 214 (B.C.S.C. in Chambers) (*CPR Chambers*).

[22] *Canada Transportation Act*, *supra* note 19, s. 145.

officially began that process. Around the same time, CPR indicated to the City its own plans for developing the land involving both residential and commercial development, in addition to greenways. By June of 2000 CPR had completed a second round of public consultation on its development plans, with a third round to begin the next month.

Though an option to purchase the Arbutus Corridor was to come up in January of 2001, on July 25th of 2000 the City of Vancouver adopted the Arbutus Corridor Official Development Plan (AC ODP). At the heart of this dispute is the fact that the AC ODP effectively prevents CPR from following through with any of its development plans. Section 2.1 of the AC ODP makes the following restrictions with regard to development of the land:

> This plan designates all of the land in the Arbutus Corridor for use only as a public thoroughfare for the purpose only of:
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> (a) transportation, including without limitations:
>
> (i) rail;
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> (ii) transit; and
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> (iii) cyclist paths
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> …
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> (b) greenways, including without limitation:
>
> (i) pedestrian paths, including without limitation urban walks, environmental demonstration trails, heritage walks and nature trail; and
>
> (ii) cyclist paths.

While not specifically a rezoning of the Arbutus Corridor, s. 563 of the *Vancouver Charter* sets out that:

> (2) The Council shall not authorize, permit, or undertake any development contrary to or at variance with the official development plan.
>
> [and that]
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> (3) It shall be unlawful for any person to commence or undertake any development contrary to or at variance with the official development plan.

As a result, the only use CPR may make of its land going forward is its continued use as a rail line, which CPR clearly has no intention of doing. CPR would have no choice but to take the City to court.

In the Courts

In June of 2002, CPR's case against the City of Vancouver was heard before Madam Justice Brown of the BC Supreme Court. CPR alleged that the City's adoption of the Regional Context Statement Official Development Plan and the Arbutus Corridor Official Development Plan were *ultra vires* the authority of the City and constituted a taking of its property for a public purpose without compensation. The relief sought by CPR was compensation for the alleged expropriation of its property.

The legislation preventing a municipal government from rezoning private land to a strictly public use is found within s. 914 of the *Local Government Act*. This section reads as follows:

> 914 (1) Compensation is not payable to any person for any reduction in the value of that person's interest in land, or for any loss or damages that result from the adoption of an official community plan or a bylaw under this Division or the issue of a permit under Division 9 of this Part.
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> (2) **Subsection (1) does not apply where the bylaw under this Division restricts the use of land to a public use.** [emphasis added][23]

Since the disclaimer in subsection 2 above only refers to by-laws "under this division" (being division 7—Zoning and Other Development Regulation) and to the issuance of permits under division 9, and the case at bar does not involve rezoning, the exception does not apply. Further, as Justice Brown points out, "Section 569[24] is clear, at least to the extent that any exercise of

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[23] *Local Government Act, supra* note 4, s. 914.

[24] *Vancouver Charter, supra* note 3, s. 569 reads as follows:

Property injuriously affected

> **569.** (1) Where a zoning by-law is or has been passed, amended, or repealed under this Part, or where Council or any inspector or official of the city or any board constituted under this Act exercises any of the powers contained in this Part, any property thereby affected shall be deemed as against the city not to have been taken or injuriously affected by reason of the exercise of any such powers or by reason of

powers by the Council pursuant to Part XXVII of the Vancouver Charter cannot be deemed to be a taking".[25]

The chambers judge did, however, go on to find ambiguity within the *Vancouver Charter* as it applies to the present case. Justice Brown interpreted the creation of greenways outlined in the AC ODP as creating streets, or, in the alternative, parks. It is on this definition that Justice Brown applies s. 289 of the *Vancouver Charter*, which states that "Unless otherwise expressly provided, the real property comprised in every street, park, or public square in the city shall be absolutely vested in fee-simple in the city".[26] A hypothetical situation is introduced which Justice Brown asserts would lead to an absurd result and as such, she takes a reading of the *Vancouver Charter* as a whole to make the finding that "It is this ambiguity which leads me to conclude that passing the AC ODP, without a concomitant acquisition of the property, or other agreement with the owner, is not contemplated by the legislation and is ultra vires".[27] Accordingly, Justice Brown found the AC ODP to be invalid and set it aside.

On appeal to the BC Court of Appeal, the City of Vancouver argued that its actions were within its delegated authority under the *Vancouver Charter*. CPR cross-appealed on the grounds that the chambers judge erred in finding that the AC ODP did not constitute a taking, insisting that the City has effectively prevented CPR from making any use of its land other than public use. CPR also cross-appealed on procedural grounds, which was dismissed with relative ease.[28]

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such zoning and no compensation shall be payable by the city or any inspector or official thereof.

[25] *CPR Chambers supra* note 21 at para. 98.

[26] *Vancouver Charter, supra* note 3, s. 289.

[27] *CPR Chambers, supra* note 21 at para. 85.

[28] *Canadian Pacific Railway Co.* v. *Vancouver (City)* (2004), 237 D.L.R. (4th) 40 (B.C.C.A.) (*CPR Appeal).* CPR argued that the City did not follow proper procedures in enacting the bylaw by providing for an insufficient public hearing and failing to disclose the documents requested by CPR. As this

The majority judgment of Esson J.A. looked first to the City's appeal. Upon a close examination of ss. 561 to 563 of the *Vancouver Charter*,[29] Justice Esson found the by-law to have been validly enacted. The City is empowered to designate lands as public thoroughfares through an official development plan and, once enacted by by-law, must not permit development that conflicts with it, with the result of essentially freezing development on such land.[30] In stating these findings, Justice Esson concedes that "from the point of view of CPR, [this] is unfair and unreasonable" and has "no doubt that many right thinking people, not having CPR's direct interest in the issue, would agree", but goes on to state that "that is not a ground for setting aside the By-law. The Court's jurisdiction to set aside a by-law is a narrow one".[31]

With regard to the chambers judge's finding of ambiguity between s. 289 and ss. 561 to 563, Justice Esson disagreed: "[Section 289(1)] will come into play if and when the property is acquired by the City. It says nothing as to the manner or point in time at which the City must acquire title to the property, or at which it becomes a street".[32] Furthermore, s. 569 states clearly that no by-law enacted to establish a development plan can be deemed to be a taking, and hence compensation is not due. In acknowledging the chambers judge's

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was not a zoning bylaw there was no statutory duty to hold a public hearing, and further, in what appears to be an adaptation of the clean hands doctrine, CPR's request for "every piece of paper in any category of record which CPR, based on its sophisticated grasp of the history from 1886 to 2000 of consideration by the City of possible future uses of the Corridor, thought might be found in the City's files" was "so excessively broad and showed so little regard for the question whether any of the documents were pertinent or relevant or, for that matter, whether they ever existed, that the City was in my view fully justified in rejecting it out of hand".

[29] *Vancouver Charter*, *supra* note 3.

[30] *CPR Appeal*, *supra* note 28 at paras. 19-21.

[31] *CPR Appeal*, *supra* note 28 at para. 22.

[32] *CPR Appeal*, *supra* note 28 at para. 32.

assertion that a legislative interpretation that leads to an absurd result may be rejected, Justice Esson pointed out that absurdity "cannot be established by reference to a hypothetical set of facts far removed from the facts of the case at bar".[33] It is also asserted that finding the by-law invalid on the grounds that it is absurd is akin to a finding of unreasonableness, which is barred both by the case law discussed above with respect to deference, and by s. 148 of the *Vancouver Charter*.[34]

As a result, the majority opinion found that "the chambers judge erred in her interpretation of the provisions of the *Vancouver Charter* and in concluding that Council in enacting the By-law of July 21, 2000 exceeded its powers", and subsequently set aside the finding that the adoption of the AC ODP exceeded the powers of the City. He then dismissed both grounds of CPR's cross-appeal, finding from the legislation that the City's actions neither constituted a taking nor were adopted in a manner exceeding their authority.

In a very brief opinion concurring in the result, Southin J.A. found this to be a case where "in arriving at a conclusion … compelled by law" it was a case where she "was obliged to avert [her] nostrils".[35] Though a legally enacted by-law, Justice Southin found that it "can have no purpose but to enable the inhabitants to use the corridor for walking and cycling, which some do (trespassers all), without paying for that use".[36] Justice Southin goes on to insist that the parties negotiate a bargain for the purchase and sale of the land to the city, or, in the alternative, that the Province should intervene and impose a settlement between them. In her final statement, Justice Southin emphasizes her distaste for the situation by calling the current dispute

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[33] *CPR Appeal*, *supra* note 28 at para. 38.

[34] *Vancouver Charter*, *supra* note 3, s. 148 reads as follows:

148. A by-law or resolution duly passed by the Council in the exercise of its powers, and in good faith, shall not be open to question in any Court, or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them.

[35] *CPR Appeal*, *supra* note 28 at paras. 114-115.

[36] *CPR Appeal*, *supra* note 28 at para. 117.

"an absurdity unworthy of this Province which, on the way to the 2010 Olympic Games, is asserting to all and sundry that it is a marvellous place".[37]

On June 7th of 2004, CPR filed an application to the Supreme Court of Canada for leave to appeal and on December 16th of the same year that application was granted. A panel of seven judges of the Supreme Court heard this appeal on November 9th of 2005 and has reserved judgement. The average lapse in time between a hearing at the Supreme Court and the release of the decision is approximately four months.

Analysis

Stemming from the country's roots as a British colony, Canadian law follows the doctrine of parliamentary supremacy, which states that Parliament[38] can make or unmake any law. It is from this perspective, ultimately, that the BC Court of Appeal has examined and decided on this case. The *Local Government Act* and the *Community Charter* (or the *Vancouver Charter* in the present case) clearly set out what a municipal council may do in the governance of local matters. The wording in this enabling legislation with respect to the case at bar is clear in permitting a municipal council to create development plans designating public thoroughfares, as well as insisting that such development not require compensation to private landowners.

While judges have only a very narrow scope when it comes to reviewing municipal actions, it is still unclear where that line is to be drawn. Nevertheless, the case law does show some patterns. Thus far, land use by-laws that have been struck down have been predominantly, if not entirely, restricted to specific zoning by-laws. They have also predominantly been cases in which a zoning by-law was enacted for the purpose of negatively affecting property value with a view to purchasing it at a reduced cost.[39]

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[37] *CPR Appeal*, *supra* note 28 at para. 120.

[38] This refers both to the Parliament of Canada and to the legislatures of each of Canada's provinces and territories.

[39] *Re North Vancouver (District) Zoning By-law 4277*, (1973) 2 W.W.R. 260 (B.C.S.C.).

In 1974, however, the BC Supreme Court quashed a zoning by-law enacted by the City of Burnaby that rezoned land belonging to Columbia Estate Co. as a parking zone, with the intention that it may be used at some future date as a park-and-ride facility.[40] In light of more recent jurisprudence, however, I find it unlikely that this case would elicit the same response today. In *CMHC*, the District of North Vancouver rezoned lands belonging to CMHC from residential to purely recreational, effectively freezing future development. The District rezoned the land for the purpose of preventing immediate residential development, and since that was found to be a valid policy goal of the District and the rezoning was done within the District's statutory authority, the rezoning was upheld to be valid.

MacMillan Bloedel[41] was a case in which the Galiano Island Trust Committee enacted by-laws rezoning land belonging to MacMillan Bloedel to preclude residential development. While it was alleged that the zoning by-laws were enacted for motives ulterior to those expressed to Macmillan Bloedel, and this was the basis for a finding at trial of bad faith, the Court of Appeal overturned the trial decision, finding that since both the expressed and ulterior motives for the rezoning were valid objectives in land use planning, the by-laws were valid. The Court concluded: "An ulterior purpose that is within the ambit of the delegated power is not an improper purpose. To render the by-law illegal, the purpose of the by-law would have to extend beyond the powers of the delegated authority".[42]

Another common thread to the jurisprudence in land use planning is that land use planning by-laws will generally be upheld where the restriction does not affect current or historical use. It is in this vein that *Yuen* v. *Oak Bay (District)*, [*Yuen*][43] was decided. The owners of a cemetery in Oak Bay wished to subdivide part of their land that had

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[40] *Columbia Estate Co.* v. *Burnaby (District)* (1974), 49 D.L.R. (3d) 123 (B.C.S.C.). Note: contrary to *Re North Vancouver Zoning By-law 4277*, there was no expressed or implied intent to purchase the land at any time in the near future.

[41] *MacMillan Bloedel, supra.* note 11.

[42] *MacMillan Bloedel, supra* note 11 at para. 182.

[43] 90 B.C.L.R. (2d) 313 (C.A.), [*Yuen*].

never been used as a cemetery, for the purpose of developing that part residentially. The District of Oak Bay created a by-law outlining a minimum property size that could contain a cemetery (which, consequently, was a size larger than the plot of land at issue here) and zoned the land in such a way as to prevent residential development. Because the zoning affirmed the land's continued use as a cemetery, the by-laws were upheld.

Conclusions

In applying this jurisprudence to the present case, the following becomes clear. The AC ODP enacted by the City of Vancouver was enacted within the City's authority under the relevant legislation. Though not specifically zoning by-laws, the development plan does prevent any development of this land by CPR for the foreseeable future, and though it is clear CPR has no intention of continuing to operate a rail line along the corridor, a similar objection was rejected in *Yuen*, where the portion of the cemetery land in question was not usable for cemetery purposes.

Insofar as good faith and intention can be considered by the judiciary, there is a great deal of evidence on the part of the City that it long held (since 1986 at least) an intent to negotiate with CPR with a view to the acquisition of its land along this corridor. For example, a January 2000 policy report on urban structure summarized the various policy statements made by the City over the previous 15 years.[44] This document concluded with an acknowledgement of the various zoning by-laws that apply to different portions of the Arbutus Corridor and affirms policy direction towards acquiring this land. Further, on February 1st, 2000, in a regular council meeting, a motion was passed in relation to the Arbutus Corridor, concluding "[t]herefore be it resolved that the City of Vancouver enter into immediate discussions with the CPR with a view to assuming control of the Arbutus Corridor for the purpose of preserving and maintaining the integrity

[44] *City of Vancouver Policy Report on Urban Sructure*, Jan. 18, 2000, online: City of Vancouver <http://vancouver.ca/ctyclerk/cclerk/000118/P3.htm>.

of the corridor for transportation use".[45] As no negotiations have taken place to buy the land from CN, it is unclear where this case stands on the good faith of the City or whether the City's intent in passing the AC ODP has crossed the line into an area of judicial review open to the Supreme Court. As the current use being made of the corridor is principally an illegal one—trespassing by local citizens—and the AC ODP does nothing more than perpetuate that until such time as the City acquires the land from CPR, the Supreme Court may find room to interject and find the City has overstepped its bounds.

As a result of the principles of judicial deference to municipal authority that have been set forth in the cases discussed above, and in many others (which this paper does not have the scope to mention), courts are reluctant to interfere with municipal governance. As evidenced by several cases that have been overturned on appeal, including the present case, it seems a clearer direction is needed from our nation's highest court on that fine line between appropriate and improper purpose when it comes to legislating land uses in relation to private land. I expect this case to be the one to draw that line.

Postscript: Trespassers One and All

On Thursday, February 23rd, 2006, the Supreme Court of Canada delivered its judgement in relation to CPR's appeal of the BC Court of Appeal's decision to allow the by-law to stand.[46] With a noticeable lack of interest with concerns of fairness or attention to the reasons for the enactment of this particular by-law, the Court addressed the issues presented to it in a strictly statutory analysis. Noting twice in

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[45] City of Vancouver Council Meeting, *Motion*, Feb. 01, 2000, online: City of Vancouver <http://vancouver.ca/ctyclerk/cclerk/000201/motionb.htm>.

[46] *Canadian Pacific Railway Co.* v. *Vancouver (City)*, 2006 SCC 5

her decision her feelings of sympathy for CPR, Chief Justice McLachlin found that on the strict wording of the enabling statutes, the City of Vancouver was well within its powers to restrict development on the Arbutus Corridor. Further, it was also within the City's powers to refuse compensation.

Though it does not directly affect the private ownership of the land itself, the impracticality of any measures that might attempt to stop the public from trespassing on this land has effectively, for the foreseeable future, rendered this stretch of land public. In response to the judgement rendered, CPR has noted in a media release on its Web site that "[the ruling] does not change the current status of the property as a rail freight corridor nor does it provide for the corridor to become public lands", and that "[a]ny change from freight rail use will require purchase of the land from CP".[47] In fact, in anticipation of this decision, CPR has set up a Web site, <arbutuslands.com>, with the intention of creating a "[v]ision for the Arbutus Lands [that] will reflect the community's vision for the future of the Lands while considering [several] guiding principles of sustainability".[48]

Time will tell what will ultimately become of this stretch of land. It is abundantly clear, however, that without the potential for economic use, this land, once valued at over CDN$100 million,[49] is now likely available for a song. This substantial devaluation is directly attributable to the decision of the City of Vancouver to designate the land for use only as a public thoroughfare. With its collective hands

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[47] Canadian Pacific Railway Co., "Supreme court rules on Arbutus lands but future use still to be determined" news release (23 February 2006) online: CP Rail

<http://www8.cpr.ca/cms/English/Media/News/General/2006/Arbutus.htm>.

[48] Canadian Pacific Railway Co., online: <http://www.arbutuslands.com/guiding-principles/>

[49] Society Promoting Environmental Conservation (SPEC), "Majority of public wants to keep Arbutus Corridor for transportation" news release (26 January 2000), online: SPEC

<http://www.spec.bc.ca/ArbutusCorridor/public_opinion_poll.html>.

tied by the statutory authority granted by the legislative assembly of British Columbia to the City, the judiciary has had no choice but to allow this to happen.