

OFFICE OF THE MAYOR

For immediate release – September 23, 2011

A legal opinion from Bill Buholzer of Young & Anderson Barristers & Solicitors has confirmed Mayor Lois E. Jackson's advice to Councillors to be cautious in declaring their positions regarding the Southlands proposal prior to a public hearing.

Mayor Jackson's suggestion to Council arose in response to a request made by Century Group President Mr. Sean Hodgins, during his Southlands presentation to Council at the September 12, 2011 Regular Meeting, that current Council members declare their position on the Southlands development proposal.

Mr. Buholzer's letter to Delta's Municipal Solicitor, Greg Vanstone, clarifies the issue of election campaign statements relating to the Southlands development, advising that Mayor Jackson's statement at the September 12, 2011 Regular Meeting of Council was a "correct statement." Mr. Buholzer explains:

BILL BUHOLZER:

"We understand that Mayor Jackson made the following comments at a recent Council meeting:"

MAYOR JACKSON:

"I'm assuming before a public hearing and just for the record I have to state that obviously this Council if anything has come before us and it goes to first and second reading we can certainly talk about all those kind of things but we must take great care not to prejudice a decision of any member of Council in case it is seen by a court at any particular time as that person being biased one way or another. And as you remember when I go to public hearing we talk about sitting in a quasi-judicial setting. That means we have to be going into a public hearing with an open mind, looking at everything with new eyes and new ears from not only the applicant or the landowner but also from the public as well. So I just wanted to state that for people who may not maybe understand the question of the setting for a public hearing and any person that has perhaps been deemed to have already made up their mind may be disqualified from voting on an issue. So with that I would ask, Mr. Harvie were there any other comments you wanted to make, were there any questions that Council wanted to bring forward as a result of the presentation?"



BILL BUHOLZER:

“In our view, this is a correct statement of the law as set out above. Council members are entitled to hold opinions about matters that may come before them in a public hearing context, and to publicly state those opinions, but if they do so in a manner that indicates that they have prejudged the matter to the extent that what they hear at a public hearing cannot affect their views, they run the risk of having their participation in the hearing challenged on the basis of bias.”

Mayor Jackson noted of her request for a legal opinion “my request for a legal opinion was to provide information to our community regarding the legal implications for a member of Council that can arise from taking definitive positions on matters that would be subject to a public hearing process.”

The legal opinion is attached for reference.

For more information on this media release, contact the Mayor’s Office at (604) 946-3210 or e-mail mayor@corp.delta.bc.ca

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REPLY TO: VANCOUVER OFFICE

VIA EMAIL: gvanstone@corp.delta.bc.ca

September 22, 2011

Greg Vanstone
Municipal Solicitor
Corporation of Delta
4500 Clarence Taylor Cres
Delta, BC V4K 3E2

Dear Mr Vanstone:

Re: Apprehension of Bias and Election Campaigns
Our File No. 00076-0136

You have requested our opinion on the question of election campaign statements on the Southlands development, in relation to the common law obligation of council members to avoid any reasonable apprehension of bias in quasi-judicial decisions they might be called upon to make once elected, for example in the context of a public hearing held under Part 26 of the *Local Government Act* or under the *Agricultural Land Commission Act*.

The leading cases in this area of the law are *Old St. Boniface Residents Association Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1213 and *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213, concurrent decisions of the Supreme Court of Canada. In these cases, the Court considered the application to land use decisions involving a public hearing, of the general administrative law principle that decision-makers must base their decisions, and must be seen to be basing their decisions, on nothing but the evidence that is properly before them. The following passage from the Winnipeg case summarizes the Court's conclusion (at para. 57):

In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of Council who are capable of being persuaded. The Legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The

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party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of Council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.

From the foregoing, it is clear that avoiding an apprehension of bias in public hearing proceedings does not require that individual members of Council have avoided making any statements or taking other actions that give rise to an appearance of bias. As a practical matter, for example, all official community plan and zoning bylaws that are before a public hearing have already been voted on at least once, and if an actual vote for or against a bylaw gave rise to a reasonable apprehension of bias, all Council members would be disqualified from participating in a public hearing. The Supreme Court's observations do, however, implicitly counsel against the making of any statements of final opinion that cannot be dislodged, on a matter that may in future be the subject of a public hearing. Thus it is always prudent for Council members and candidates for Council, when commenting on such matters, to acknowledge the public hearing process and avoid giving the appearance of having a closed mind on the matter. We are not aware of any case decided since the Supreme Court's decisions in these two cases, in which it has been proven that an elected municipal official had in fact reached a final opinion that could not be dislodged, such that they were not entitled to participate in a hearing.

We understand that Mayor Jackson made the following comments at a recent Council meeting:

Um, the only other thing I wanted to mention Mr. Hodgins is that and you referred to understanding what was happening with Council and how they felt and actively being involved. I'm assuming before a Public Hearing and just for the record I have to state that obviously this Council if anything has come before us and it goes to first and second reading we can certainly talk about all those kind of things but we must take great care not to

prejudice a decision of any member of Council in case it is seen by a court at any particular time as that person being biased one way or another. And as you remember when I go to Public Hearing we talk about sitting in a quasi-judicial setting. That means we have to be going into a public hearing with an open mind, looking at everything with new eyes and new ears from not only the applicant or the landowner but also from the public as well. So I just wanted to state that for people who may not maybe understand the question of the setting for a public hearing and any person that has perhaps been deemed to have already made up their mind may be disqualified from voting on an issue. So with that I would ask, Mr. Harvie were there any other comments you wanted to make, were there any questions that Council wanted to bring forward as a result of the presentation?

In our view, this is a correct statement of the law as set out above. Council members are entitled to hold opinions about matters that may come before them in a public hearing context, and to publicly state those opinions, but if they do so in a manner that indicates that they have prejudged the matter to the extent that what they hear at a public hearing cannot affect their views, they run the risk of having their participation in the hearing challenged on the basis of bias.

Sincerely,

YOUNG ANDERSON



Bill Buholzer

buholzer@younganderson.ca

BB/ss