CLARK WILSON LLP

Reply to: Peter Kenward
Direct Tel: 604.891.7710
Email: PKenward@cwilson.com
File No: 48225.0001

CLARK WILSON LLP
Barristers & Solicitors
Trademark Agents
900-885 West Georgia Street
Vancouver, BC V6C 3H1 Canada
T. 604.687.5700 | F. 604.687.6314
cwilson.com

January 14, 2019

District of Kitimat
270 City Centre
Kitimat, BC V8C 2H7

Attention: Mayor and Council

Dear Sirs:

Re: Proposed Zoning and Official Community Plan Amendment Bylaw for 461 Quatsino Blvd

We act for Tammy and John De Medeiros of 16 Cranberry Street in Kitimat, and write in connection with the proposed R3-C Mixed Use Social Housing Zone and Official Community Plan Amendment Bylaw No. 1934, 2018 (the "Proposed Bylaw").

Our client is concerned with:

- many of the provisions of the Proposed Bylaw (including as to permitted uses, density, height, setbacks and parking); and
- the process that has been conducted in respect thereof as outlined herein.

Given the nature and magnitude of its concerns and objections, the De Medeiroses advise that if Council proceeds with the Proposed Bylaw as proposed, it should anticipate that legal proceedings challenging the Bylaw will follow.

A. Concerns

Our client's concerns and objections include but are not limited to the following.

1. The lands that the application relates to are not the lands that are to have their zoning and OCP status changed

(a) The lands the application relates to

The November 2018 Public Information Handbook that the District has made available in connection with the public hearing:

- states in the November 6, 2018 Council Report that the application is by Boni Maddison Architects on behalf of the Tamitik Status of Women ("TSW"); and

- includes the October 23, 2018 application for the proposed OCP amendment and rezoning, being an application dated October 23, 2018, for Lot 1 of the subdivision of Lot 13.

Under "Proposed Use and Development" the application describes a specific mixed-use project that included a new headquarters for the TSW (the "TSW Project"). The materials included the subdivision plan of Lot 13 into two lots, and hence indicate what the boundaries of Lot 1 were.

(b) The lands the Proposed Bylaw relates to

By contrast the copy of the Proposed Bylaw that is included in the Public Information Handbook applies to *all* of Lot 13.

Insofar as the Proposed Bylaw relates to the balance of Lot 13 (i.e. – the proposed Lot 2), there is therefore:

- no application for the amendment, and
- no "Proposed Use and Development"

against which the public can consider the need for, and appropriateness of, the terms of the bylaw amendment.

2. The public hearing notice mis-states what is proposed

To make matters worse, the public hearing notice that is included in the Public Information Handbook completely mis-states what is proposed. It:

- states that the applicant is Boni Maddison Architects on behalf of the TSW;
- states that the purpose of the application is to permit the TSW Project;
- includes a building concept that shows what the TSW Project would look like; and
- shows the outline of 461 Quatsino as the "location" of the lands that are the subject of the foregoing.

The clear implication from that description, and the lack of any reference to:

- the subdivision of Lot 13,
- any other applicant, or
- any other "Proposed Use and Development"

is that the building is on all of Lot 13, not simply half of it.

Further, given the scale of the building (i.e. – 13 windows across the face), the clear implication of the notice is that the structure that the Proposed Bylaw allows will be of a much smaller scale than is in fact the case.

Cases where bylaws have been held invalid based on defective public hearing notices include *Hall v Maple Ridge (District)* (1994) 15 M.P.L.R (2d) 165 at paras 55 to 57.

3. The applicant that is referenced lacks the required status to apply for the bylaw amendment

The Kitimat Municipal Code:

- defines "Development Application" as meaning all applications for bylaw amendments or permits governed by Part 14 of the *Local Government Act*; and

- provides at section 9.2.2. that "10. *Any development application shall be submitted in writing; by the property owner, or an authorized agent of the owner*; ..."

In keeping with that requirement, the application form that is included in the November 2018 Public Information Handbook requires that a state of title certificate be included, and that the signature of the property owner be provided.

The BC Supreme Court has held, including in *Vancouver (City) v Grant* (1993) 17 M.P.L.R. (2d) 2014, that the right to apply is subject to establishing a legal interest in the lands that are the subject of the application.

There was not only no signature by the owner in the present case, there is no indication of what legal interest, if any, the applicant has in the land.

The descriptions in the material that the District has circulated varies from:

- a statement in the December 13, 2018 staff report that one option in connection with the Proposed Bylaw would be to "amend the bylaw to only rezone portion of land that will be gifted to TSW pending approval of subdivision", to

- another reference in the Council package that contains that report to the effect that the "Society is the recipient of a municipal site which was transferred to the group at nominal cost."

There is no indication of what the TSW's legal interest is if any. It is unclear if the TSW has an interest in the proposed Lot 2, if the "will be gifted" statement is correct, if any such gifting has been committed, and if so on what terms (i.e. – is it subject to a Housing Agreement being entered into, etc.)

4. Material that is fundamental to the public's ability to meaningfully address the regulations in the Proposed Bylaw is not provided

The Council report in the November 2018 Public Information Package indicates that:

- the District has "received a draft multi-family development permit and subdivision applications for the project site" which will be "brought forward to Council pending adoption of zoning and OCP amendment bylaw" with the development permit process being "on target for planned March 2019 construction start"; and

- the proposed parking area does not meet the parking required in the zoning bylaw, and staff will "bring forward a recommendation once the development permit is finalized."

Many of the submissions made in opposition to the Proposed Bylaw thus far have been based on the tightness of the site for a building of the magnitude that is being proposed, and the implications of same for the surrounding neighbourhood.

The stated purpose of the Proposed Bylaw (at least insofar as Lot 1 is concerned) is to allow a specific TSW project, which is described as being on a tight timeline, to be approved.

It is clearly unfair to ask the public to give input on a bylaw that sets out regulations as to parking and setbacks etc. in order to allow a project, when it is known that the project will not comply with those regulations, but the particulars of the non-compliance is not revealed, even though the municipality has an undisclosed development permit application.

The BC Supreme Court has already held, in *548928 Alberta Ltd v Invermere (District)*, (1995) 28 M.P.L.R (2d) 109, that procedural fairness is denied where a municipality does not disclose variance applications prior to the public hearing to enable proper submissions to be made.

5. Parties related to the proponent appear to have been allowed to make representations to Council during the public hearing, but outside of it

During the discussion at Council following the adjournment of the public hearing from December 17, 2018 to January 14, 2019, the following discussion occurred:

> "Councillor Feldoff: Thank you Mr. Mayor. One thing that struck me this evening I suspect that a lot of concerns were about the location but I believe that the primary concern was the height of building and that was expressed by a few of the speakers. I would just ask staff prior to the next public meeting to have some discussions with TSW and their architect as to what might be involved if additional lands were made available to them in the contiguous parcel that we own, if we provided the whole lot to them. I know that they've put a lot of money into their design of their facility but what kind of impact that might have both on timing and the cost for the project and visually what it might look like. I'm kind of keen on better understanding what might be an option to move forward in that area but in a different design that is not as tall.
>
> Mayor: So basically you're making a motion to contact TSW to see if they would consider going to a shorter...
>
> Councillor Feldoff: For staff to investigate the idea of a lower building and a bigger footprint.
>
> Mayor: Okay. Excellent. Seconder on that? Yes okay. Councillor Goffinet seconding it"

The January 4, 2019 Council package indicates at pages 10 and 11 that a motion was passed seeking that staff investigate

> "if the Tamitik Status of Women proposed 461 Quatsino building can be built as a lower height building with a larger footprint"

There is nothing in that package that states what the outcome of those discussions was, and we have been advised that representatives of the TSW appeared before Council on January 7, 2019 and provided comments to Council related to the Proposed Bylaws and the TSW project.

It breaches basic principles of fairness for the proponent of a project to be given the opportunity to make submissions to Council outside of the public hearing process, especially on an issue that is critical to what the parameters of the bylaw should be and whether it should be passed.

The non-disclosure of information related to the development permit application, and the applicant's interest if any, also has heightened significance in the context of a situation where Council has specifically indicated it wants to consider the prospects for a larger site to allow a building that would entail different height, setback and parking parameters.

Case law that speaks to defective public hearing processes include the BC Court of Appeal decisions in *Pitt Polder Preservation Society v Pitt Meadows (District),* (2000) BCCA 415 and *Eddington v Surrey (District)* [1985] B.C.J. no 1925

6. Miscellaneous other process issues

(a) OCP consultation

The *Local Government Act* requires a consultation process in respect of Official Community Plan bylaw amendments over and above the public hearing process.

The Public Information Handbook indicates that the Proposed Bylaw was *not* referred to the School Board or the Regional District, even though it involves an Official Community Plan amendment that fundamentally changes the planning status and capacity of the lands at issue from "Residential Small Holdings" to the much more intensive "Neighbourhoods" category, on the basis that they did not have a "financial interest or stake".

That is not an appropriate test for an OCP consultation, and school planning would normally have to account for such changes.

(b) Characterization of support versus opposition

Further, the December 13, 2018 Council report, in speaking to "Public Comment" states that

> "Staff received 18 written submissions and one phone call in opposition and 18 written submissions in favour of this project, 13 of which were written in 2017".

It is unclear how submissions that were written more than 9 months before a bylaw application, when the site was unknown, can be said to be in support of a bylaw amendment.

B. **Next steps**

Our client is very concerned at what seems to be an effort to locate the TSW Project at an inappropriate site in an unreasonably tight time frame (a construction start two months from now), which time frame is leading to short cuts being taken on a myriad of matters, including:

- the scope of OCP consultation;
- a gross misdescription in the public hearing notice;
- the inclusion of the 'Lot 2' lands in the amendment without an applicant, and without any indication of why it is being included, or what kind of development within the altered regulations is contemplated;
- the non-disclosure of the nature of the applicant's interest in the 'Lot 1' lands, if it has one;
- the non-release of development permit application materials;
- the taking of submissions outside of the public hearing process;
- the misdescription of support versus opposition,

and so on.

Such shortcuts not only badly compromise public processes, they inevitably result in escalating downstream problems.

It can be noted for example that if the Proposed Bylaw is passed, such as to force legal proceedings, the setting aside of the bylaw would mean that approvals that come subsequent to and contingent upon the bylaw would also fall, such that construction must cease.

Given the tight timelines for construction, that can in turn entail a myriad of further downstream problems, including the potential loss of funding sources mid-stream and potential penalties to the construction contractor for a breached construction contract.

The De Medeiroses suggest that it would be better for all concerned if the District took care to ensure that the applicable public processes are fully and properly carried out and directed its energies to finding a collaborative outcome.

Yours truly,

CLARK WILSON LLP

Per: "Peter Kenward"

Peter Kenward

PHK/cal