IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dong v. Bowen Island Municipality,* 2016 BCSC 553

Date: 20160331
Docket: S155156
Registry: Vancouver

Between:

Shu Lin Dong and Zhen Wang

Petitioners

And

Bowen Island Municipality

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Petitioners:	D.Chen
Counsel for the Respondent:	C.S. Murdy
Place and Date of Hearing:	Vancouver, B.C. February 1 & 2, 2016
Place and Date of Judgment:	Vancouver, B.C. March 31, 2016

[1] The petitioners challenge a Bowen Island Municipality bylaw that prevents them from building docks in front of their two waterfront lots on Bowen Island, British Columbia. They seek an order quashing the bylaw or the portions of the bylaw that relate to their crown land tenure applications for private moorage.

Background

[2] The waterfront lands that are the subject of this application are part of the Cape Roger Curtis area of Bowen Island. For many years the Cape Roger Curtis waterfront has been a well-used public area.

[3] In December 2009 the Bowen Island Municipality (the "Municipality") approved the subdivision of lands at Cape Roger Curtis on Bowen Island by a developer named The Cape on Bowen Community Development Limited (the "Cape on Bowen"). Fifty-nine four-hectare (ten acre) lots were created of which 30 were waterfront lots. The petitioners own waterfront lots numbered 3 and 17.

[4] As part of the subdivision approval, a public access covenant was entered into establishing a 30-metre corridor from the high water mark inland along the waterfront fronting the lots. That corridor was reserved for public use. The area between high water mark and low water mark remained for public use. In addition dedicated allowances were made for public access to the sea at the ends of three roads.

[5] The Ministry of Forests, Lands and Natural Resource Operations "(the "Ministry") on behalf of the Crown administer the area below the high water mark. Use of such lands by an upland property owner requires tenure granted by the Ministry.

[6] After the subdivision of the area was approved residents raised concerns respecting the protection of the waterfront, public access and docks.

[7] In September 2011 four tenure applications from lot owners at the Cape on Bowen were submitted to the Ministry. At that time the Municipality did not have any

bylaws regulating docks, nor did it have any building bylaws respecting docks, nor did it require a permit to construct a private moorage. There is no dispute that the Municipality has authority to pass bylaws respecting such.

[8] The Ministry approved three of the tenure applications and three private moorages were built. The fourth application was not pursued. The three private moorages built ranged from 280 feet to 400 feet long and are four feet wide. Their lengths were required due to the tidal conditions in front of their respective lots. They have been “grandfathered” and are not affected by subsequent bylaws.

[9] The applications and resulting docks raised concerns among residents of Bowen Island and as a result on November 25, 2013 the Municipality proposed and passed Bylaws No. 335 and 336, 2013 regulating the construction of docks on the Island. Bylaws No. 335 and 336 applied to private and group moorage facilities in the “WG1 Zone” and applied to most of the Crown land covered by water extending 300 metres seaward from the high watermark around Bowen Island.

[10] Bylaw No. 335, 2013 amended the Land Use Bylaw No. 57, 2002 to regulate the size, length and location of moorage facilities and to prohibit boathouses and breakwaters within the WG1 Zone. Docks were limited to 40 meters or 131.23 feet in length.

[11] Bylaw No. 336, 2013 amended the Building Bylaw No. 65, 2002 to require building permits for the construction of moorage facilities and to require that “a copy of the foreshore tenure issued by the Province of British Columbia” be included in a building permit application for a moorage facility.

[12] Despite the 2013 bylaws members of the public remained concerned respecting the issue of docks at the Cape Roger Curtis area. Whether additional docks should be permitted became a significant issue in the local municipal election in the fall of 2014. A group named “Stop the Docks” was active during the election. Four members elected to counsel were individuals who had expressed concerns

respecting docks and the future of the Cape Roger Curtis area or were involved with or sympathetic to that group and its position.

[13] The petitioner Zhen Wang filed her Crown land tenure application with the Ministry on November 18, 2013 just prior to the passing of Bylaws No. 335 and 336. The petitioner Shu Lin Dong filed his application on January 22, 2014 two months after the bylaws were passed. Both applications comply with Bylaws No. 335 and 336 in terms of the dock lengths (both are approximately 39 meters in length).

[14] The Ministry refers such applications to the applicable municipality. In this case the referral was to the Bowen Island Municipal Planning Department (the "Planning Department") in order for the Municipality to inform the Province if the applications conformed to local bylaws. The Municipality had one to two months to advise the Province with its comments as to whether the application complied with its bylaws and its *Official Community Plan*.

[15] By letters dated August and September 2014 the Municipality informed the Ministry that the applications for private moorage complied with the Municipality's Land Use Bylaw No. 57, 2002 "provided that the applicant conducts a biophysical survey as well as a marine assessment determining that the proposed private moorage facility will not negatively impact eelgrass meadows, kelp beds, clam beds or mussel beds".

[16] The petitioners provided such biophysical surveys and marine assessments to the Municipality in November 2014. Those reports recommended some mitigation measures and concluded that the environmental impact of the docks would be low. Neither the Ministry nor the Municipality have commented on the reports.

[17] The petitioners are required to have building permits from the Municipality before construction of the docks can commence. They have to this date not applied for such permits.

[18] In a report dated January 12, 2015, titled "Cape Roger Curtis Crown Moorage Referrals Update" from the Planning Department staff to the Mayor and the Council

Members of Bowen Island, the Planning Department staff stated that "under the current bylaw amendment 335 for LUB WC1, if the applicant meets the requirements of the bylaw, the Municipality cannot impede the Provincial process."

[19] On January 23, 2015 and February 10, 2015 the Municipality sent emails to the Ministry requesting that they have more time to comment on the petitioner's applications for tenure. The Ministry by letter dated February 18, 2015 responded stating that there is a "hold" process of up to 30 days available if the Municipality has defendable reasoning for requesting the hold. However, the "*hold* procedure is intended to apply only in exceptional circumstances, not as a blanket means to extend the timeline for the review process." The Ministry asked that the Municipality "provide us with initial comments that they are asking the client [the petitioners] to provide more information and give us a time frame in which they are expecting to review the information and provide FLNR [the Ministry] with a formal response to our referral". The Ministry also stated "we are ready to make a decision on these files, but are still prepared to accept final comments from Council or staff if they are submitted within the next two weeks".

[20] On March 16, 2015 the Bowen Island Municipality held a Special Council Meeting and passed two resolutions. The resolutions stated:

> …
>
> **Moved and Seconded**
>
> That Council direct staff to commence preparation of an amendment to the Land Use Bylaw immediately that prohibits all private docks at the lands known as Cape Roger Curtis, District Lot 1548.
>
> …
>
> **It was Moved and Seconded**
>
> Whereas, pursuant to Letters Patent, Bowen Island Municipality has jurisdiction extending three hundred metres seaward from the high-water mark, including all foreshore areas; and Whereas, pursuant to the Provincial Community Charter, Bowen Island Municipality has jurisdiction over relevant subject matters, including land use planning, land use, public spaces, and stewardship of the environment; and
>
> Whereas, the construction of the proposed private docks at Lots 1,3,14,and 17 of Cape Roger Curtis, if approved, would be inconsistent with the Bowen Island Municipality Official Community Plan Bylaw objectives 40 and 6B and

> policy 152; and Whereas, if constructed the docks would abut and potentially damage upland areas subject to a covenant in favour of Bowen Island Municipality intended for the protection of environmental and recreational values with the desire to protect the uninterrupted aesthetic and coastal viewscape of our sensitive bluff ecosystem along the CRC shoreline, and to ensure that Bowen Island public and guests can enjoy this unique and valued viewscape as was the intent of the covenants;
>
> Therefore be it resolved that Council strongly recommends to the Ministry of Forest, Lands and Natural Resource Operations that they refuse the aforementioned applications.
>
> …
>
> **It was Moved and Seconded**
>
> That staff be directed to send a letter to the Ministry of Forests Lands and Natural Resource Operation enclosing a copy of this resolution as well as the referenced Official Community Plan policies and objectives.
>
> …

[21] Following the March 16, 2015 resolutions the Mayor sent a letter to the Ministry stating:

> …
>
> Please find enclosed our Municipal Council resolutions strongly recommending that your office refuse the crown leases applied for in the referenced documents.
>
> The issue of numerous docks being constructed along this particular stretch of coastline has created an enormous rift in our community. Our population is 3,600. The Stops the Docks group got 1,381 people to sign their petition denouncing the construction of docks in this area. There can be no doubt that the public consider the approval of crown leases in this area to be against the public interest. The enclosed resolution and extracts from our Official Community Plan Bylaw policies and objectives outline our rationale for requesting that your office refuse their applications.
>
> Work is about to commence on our Parks, Trails and Beaches Master Plan, which will be guided by our Official Community Plan. When it is complete we will have a detailed analysis of appropriate uses for each area of our coastline and a comprehensive bylaw outlining permitted uses in detail.
>
> If your office refuses the applications now before you, we will have the time required to complete this process. However, should your office approve these applications it will cause further discord in our community and frustrate reasoned debate during the public process surrounding this bylaw enactment. This is not a desirable option.
>
> …

[22] The Ministry responded in part as follows:

> …
>
> As noted in your table outlining the "Status of Cape Roger Curtis Crown Dock Referrals to Bowen Island Municipality", the current application on Crown land at Lots 1, 3, 14, and 17 have dock designs which comply with the current bylaw. The applicants have also carried out marine assessments. BIM's notes state that the applications are still under internal departmental review; however, the Province has provided ample opportunity for BIM to carry out this review and cannot continue hold these four applications in abeyance beyond the agreed upon 30-day period, which will bring us to April 20th, 2015. After this date, FLNRO [the Ministry] will proceed to decision on these applications.
>
> …

[23] On or about June 3, 2015 then Ministry sent unsigned specific permissions for private moorage to the petitioners. The petitioner Shu Lin Dong has since received a signed tenure agreement.

[24] As a result of the March 16, 2015 resolution Bylaw No. 381 came into being. The process involved four Bowen Island Municipality meetings to pass and enact the bylaw:

a) First Reading, on March 23, 2015;

b) Second Reading, April 27, 2015;

c) Public Hearing, on May 14, 2015; and

d) Third Reading and Adoption held on May 25, 2015.

[25] At first reading on March 23, 2015 the Bowen Island Municipal Council (the "Municipal Council") moved and seconded resolution #15-087 to prepare an amendment to the Land Use Bylaw prohibiting all private docks on the Cape Roger Curtis lands. The resolution referred the proposed bylaw to the Advisory Planning Commission and directed staff to send the proposed bylaw to the Ministry and the Island Trust Executive Committee for comments. It also directed staff to initiate a comprehensive geographic review and amendment of the WG-1 Zone island-wide in incremental phases and return to council with a work plan and implementation schedule as the second phase of Bylaw No. 335.

[26] The Advisory Planning Commission "expressed concern that future new owners have a mechanism available to them to also use the docks already built or a group dock" and unanimously "support[ed] the proposed Bylaw No. 381, 2015 with the … recommendation: that a maximum of two group moorage facilities be permitted to serve the neighborhood which may be in addition to the four permitted private docks".

[27] At second reading the Municipal Council moved and seconded the proposed Bylaw No. 381. They did not accede to the Advisory Planning Commission's suggestion that group moorage facilities be permitted.

[28] In early May 2015 Bylaw No. 381 was advertised twice in the Undercurrent newspaper in accordance with the requirements of the *Local Government Act*, R.S.B.C. 2015, c. 1. As well a notice of the public hearing to hear representations regarding Bylaw No. 381 was posted on the Municipality's web site starting Friday May 1, 2015 and ran until the public hearing on May 14, 2015. A link to the notice was placed on the municipal calendar and under "News and Notices". Additionally, notices of the public hearing were sent to all residents of Cape Roger Curtis neighbouring properties. The Advisory Panel recommendations were available prior to and at the public hearing and the Advisory Panel's minutes of its April 7, 2015 meeting were included in the public hearing agenda package and resolutions (recommendations) were included on the public hearing agenda.

[29] The public hearing was held on May 14, 2015; 102 written comments were received in support of the proposed bylaw; 121 written comments were *not* in support of the proposed bylaw; 14 speakers spoke in support for the proposed bylaw at the public hearing; and 9 speakers spoke at the public hearing against the proposed bylaw.

[30] Mr. Don Ho, president of the developer of the subdivision at Cape Roger Curtis, spoke at the public hearing and made a counter-proposal to the Mayor and the Council. The counter-proposal was to delay the passing of Bylaw No. 381, 2015 to allow the developer to work with the municipal planner to agree on compromises

that aligned with the recommendations of the Municipality's Advisory Planning Commission. The Municipality did not accept that proposal.

[31] The Municipal Council met on May 25, 2015 at a Special Council Meeting where the proposed Bylaw No. 381 was read a third time and adopted with three councillors voting against and four council members (including the Mayor) voting in favour.

Position of the Petitioners

[32] The petitioners challenge the bylaw on the basis it is *ultra vires* because the bylaw is inconsistent with the *Official Community Plan*, the bylaw was passed in haste and in bad faith, the bylaw is discriminatory, that the bylaw's consultation was inadequate, the disclosure to the public before the bylaw was passed was deficient, that when the bylaw was passed certain counsellors failed to consider the matter objectively, and there was a lack of procedural fairness when the bylaw was passed.

Position of the Respondents

[33] The respondents submit that Bylaw No. 381 was enacted in good faith and is compatible with the *Official Community Plan*. They note that zoning is discriminatory in its nature and that no improper motive has been shown. They say there was no breach of any procedural fairness rule.

Law and Discussion

Standing of the Petitioners

[34] Section 262 of the *Local Government Act*, R.S.B.C. 1996, c. 323, provides that an elector of a municipality or a person interested in a bylaw of the council may apply to set aside all or part of a bylaw for illegality. As property owners of waterfront lots in the municipality and as applicants for tenure applications for Crown Lands fronting Cape Roger Curtis, the petitioners have the standing to challenge Bylaw No. 381. The respondent does not dispute that the petitioners have standing.

Statutory Interpretation and the Standard of Review

[35] Municipalities are creatures of statute. They "can therefore exercise only those powers which are explicitly conferred upon them by a provincial statute" (*R. v. Greenbaum*, [1993] 1 S.C.R. 674). The *Community Charter,* S.B.C. 2003, c. 26, empowers and governs municipalities and their councils. It provides:

> **Purposes of Act**
>
> **3** The purposes of this Act are to provide municipalities and their councils with
>
> (a) a legal framework for the powers, duties and functions that are necessary to fulfill their purposes,
>
> (b) the authority and discretion to address existing and future community needs, and
>
> (c) the flexibility to determine the public interest of their communities and to respond to the different needs and changing circumstances of their communities.
>
> **Broad interpretation**
>
> **4** (1) The powers conferred on municipalities and their councils by or under this Act or the *Local Government Act* must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.
>
> (2) If
>
> (a) an enactment confers a specific power on a municipality or council in relation to a matter, and
>
> (b) the specific power can be read as coming within a general power conferred by or under this Act or the *Local Government Act,*
>
> the general power must not be interpreted as being limited by that specific power, but that aspect of the general power that encompasses the specific power may only be exercised subject to any conditions and restrictions established in relation to the specific power.
>
> …
>
> **Municipal purposes**
>
> **7** The purposes of a municipality include
>
> (a) providing for good government of its community,
>
> (b) providing for services, laws and other matters for community benefit,

> (c) providing for stewardship of the public assets of its community, and
>
> (d) fostering the economic, social and environmental well-being of its community.
>
> [Emphasis added]

[36] The interpretation of municipal legislation requires a broad and purposive approach, not a narrow one. In *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City),* 2004 SCC 19, the Supreme Court of Canada described the proper approach to the interpretation of municipal powers:

> 6 The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp. 244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo, supra*, at para. 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: *The Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M225; *Municipal Government Act*, S.N.S. 1998, c. 18; *Municipal Act*, R.S.Y. 2002, c. 154; *Municipal Act*, 2001, S.O. 2001, c. 25; *The Cities Act*, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes: *Shell Canada*, at pp. 238 and 245.
>
> 7 Alberta's *Municipal Government Act* follows the modern method of drafting municipal legislation. The legislature's intention to enhance the powers of its municipalities by drafting the bylaw passing provisions of the Act in broad and general terms is expressly stated in s. 9. Accordingly, to determine whether a municipality is authorized to exercise a certain power, such as limiting the issuance of taxi plate licences, the provisions of the Act must be construed in a broad and purposive manner.

[37] Whether a municipality acts within its jurisdiction or not is assessed on the standard of correctness. Where a municipality acts within its jurisdiction, any decision is subject to review on a standard of reasonableness. The Supreme Court of Canada in *Nanaimo (City) v. Rascal Trucking Ltd*., 2000 SCC 13, said this:

> 33 The fact that councillors are accountable at the ballot box, is a consideration in determining the standard of review for *intra vires* decisions

but does not give municipal councillors any particular advantage in deciding jurisdictional questions in the adjudicative context. As a result, the courts may review those jurisdictional decisions on a standard of correctness.

…

35 In light of the conclusion that Nanaimo acted within its jurisdiction in passing the resolutions at issue, it is necessary to consider the standard upon which the courts may review those *intra vires* municipal decisions. Municipal councillors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing *intra vires* decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the *intra vires* decisions of municipalities be reviewed upon a deferential standard.

36 *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.), has long been an authority in Canadian courts for scrutinizing the reasonableness of municipal by-laws. There, Lord Russell of Killowen offered [page358] the courts some cautionary language on findings of unreasonableness (at p. 100):

> A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say 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 in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.

Or as more recently expressed in *Shell, supra*, per McLachlin J., at p. 244:

> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.

37 I find these comments equally persuasive in the scrutiny of municipal resolutions. The conclusion is apparent. The standard upon which courts may entertain a review of *intra vires* municipal actions should be one of patent unreasonableness.

[38] As noted in *Hastings Park Conservancy v. Vancouver (City*), 2008 BCCA 117 at para. 34 "[t]he standard of review with respect to decisions made by the Council within its jurisdiction is patent unreasonableness: ***Nanaimo (City) v. Rascal Trucking Ltd***. (which as a result of the recent decision in ***Dunsmuir v. New Brunswick***, 2008 SCC 9, is now simply to be referred to as "unreasonableness" without the adjective "patent")".

[39] As is apparent from the quotation above from *Rascal Trucking Ltd.* the application of the reasonableness standard to municipal councils is accorded a higher level of deference given councillors are answerable to their constituents at elections and have experience relating to the needs and objectives of their community (See also *Catalyst Paper Corporation v. North Cowichan (District)*, 2010 BCCA 199 at paras. 36-37 aff'd *Catalyst Paper Corp. v. North Cowichan (District),* 2012 SCC 2).

[40] The petitioners agree that the standard of review is reasonableness when considering their submission that Bylaw No. 381 is *ultra vires* of s. 884 (now 478) of the *Local Government Act*. However, they submit their remaining grounds for review such as discrimination and bad faith, are to be "reviewed on the standard of correctness on the basis that those actions fall within the purview of intentionally or recklessly illegal acts and/or clearly irrelevant acts by the Municipality".

Section 884 (428) of the *Local Government Act*

[41] The petitioners submit that on a standard of reasonableness Bylaw No. 381 is inconsistent with the *Official Community Plan* and as a result is *ultra vires* and must be set aside.

[42] In *Residents and Ratepayers of Central Saanich Society v. Saanich (District),* 2011 BCCA 484, the British Columbia Court of Appeal summarized portions of the *Local Government Act* that govern official community plans:

> [3] Part 26 of the *Act*, headed "Planning and Land Use Management", deals with official community plans in Division 2. Such plans are not mandatory, but a municipality that proposes to adopt one must consult with

> persons and organizations that will be affected (s. 879). The affirmative vote of the majority of all council members -- a higher majority than is required for ordinary bylaws -- is required to adopt, amend or repeal an OCP (s. 882(2)(a)). Section 898 permits a council to establish an advisory planning commission to advise it on various matters, one of which is a proposed bylaw for the adoption of an OCP.
>
> [4] Section 875 describes an official community plan as "a statement of objectives and policies to guide decisions on planning and land use management". By virtue of s. 877, an OCP must include statements and map designations for various matters, including the type and density of residential development required to meet anticipated housing needs over a period of at least five years; the location, amount and type of present and proposed commercial, industrial, institutional, agricultural, recreational and public utility land uses; and related matters.

[43] The effect of an official community plan is addressed in s. 478, (formerly s. 884). It reads:

> **478** (1) An official community plan does not commit or authorize a municipality, regional district or improvement district to proceed with any project that is specified in the plan.
>
> (2) All bylaws enacted or works undertaken by a council, board or greater board, or by the trustees of an improvement district, after the adoption of
>
> (a) an official community plan, or
>
> (b) an official community plan under section 711 of the *Municipal Act*, R.S.B.C. 1979, c.90, or an official settlement plan under section 809 of that Act before the repeal of those sections became effective,
>
> must be consistent with the relevant plan.
>
> [Emphasis added]

[44] When then is a bylaw not consistent with an official community plan? For a bylaw to be prohibited pursuant to s. 478(2), it must be “incompatible” with the official community plan. This has also been described as requiring an “absolute and direct collision”. In *Rogers v. Saanich (District)* (1983), 146 D.L.R. (3d) 475, 22 M.P.L.R. 1 (B.C.S.C.) Locke J. stated when considering the nature of such a plan:

> [50] … the written efforts of planners are really objectives and unless there is an absolute and direct collision …they should be regarded, generally speaking as statements of policy and not to be construed as would-be acts of Parliament.

[45] A reason for the "incompatible" or "absolute and direct collision" test is that an official community plan is not a strict set of specific rules and prohibitions. Rather, it is a document drafted by planners setting out general objectives and policies.

[46] The British Columbia Court of Appeal considered and applied *Rogers* in *Residents and Ratepayers of Central Saanich Society* at paras. 39-40:

> [39] … As I read *Rogers*, the Court was simply using the "absolute and direct collision" terminology as a synonym for incompatibility and made no suggestion that the municipal council could act in a manner incompatible with an OCP. The point does, however, elucidate the fact that at least in this context, consistency or inconsistency with an OCP is usually likely to involve consideration of "guidelines" and expressions of policy rather than restrictions or mandatory rules. Thus the chambers judge's observation at para. 41 of his reasons that the question of inconsistency is a "matter of interpretation" and that it is not possible to promote each of the objectives stated in an OCP equally in a single instance.
>
> [40] This is an almost inevitable result of the fact that an OCP is intended to capture a long-term "vision" and provide "guidance" to municipal councils. Central Saanich's OCP is, like most OCPs, not couched in the terminology of a statute or bylaw; it contains a "long-term vision" or "philosophy" and suggests values that should "provide the foundation for the objectives and values" it describes. It cannot and should not be construed with the scrutiny accorded to a statute. As the cases cited above at para. 37 illustrate, British Columbia courts have consistently recognized this principle in approaching bylaw challenges under s. 884 and its predecessors. Where on the other hand the OCP does contain a specific rule, a bylaw that contravenes it will likely be struck down, as occurred in *Western ARP Services, supra*. In that case, an official settlement plan provided for a minimum lot size of 12 hectares but the bylaw in question increased it to 100 hectares. (Para. 38.) The Court found the bylaw to be "clearly in conflict" with the plan."

[47] Consideration of the official community plan as it applies to a challenged bylaw under s. 478(2) requires taking into account the entire official community plan. In *Striegel v. Tofino (District)* (1994), 20 M.P.L.R. (2d) 218, 46 A.C.W.S. (3d) 539 (B.C.S.C.) the Court held:

> …
>
> I conclude that there is no direct collision between the objectives in the official community plan nor is there a conflict between the bylaw and the official community plan. There may be a perceived conflict if only the environmental protection goal is addressed. When the bylaw is viewed in the context of the entirety of the plan, the perceived conflict disappears. The thrust of the official community plan expressed as one objective is to permit commercial development while accommodating environmental protection. The bylaw

> cannot be said to be in conflict with that goal. I find that it is not in contravention of s. 949(2) of the ***Municipal Act***." [Emphasis added.]
>
> …

[48] Judicial review of a municipal council's determination that a bylaw is not inconsistent with the official community plan is subject to review on a reasonableness standard. (*Residents and Ratepayers of Central Saanich* at paras. 44-51).

[49] In *Higgins v. Quesnel (City)*, 2013 BCSC 1365, in relation to an application to have the bylaw declared invalid as inconsistent with that city's official community plan Mr. Justice Schultes stated:

> [16] … At the end of the day the petitioners' submissions -- about the previous bylaw violation, the incompatibility with the OCP, the strong opposition to the suite during the hearing process, and the alleged flaws in Ms. Turner's assistance to Council during the stages of its enactment -- are really all just different ways of arguing that Council should not have reached the decision that it did about this suite on the merits.
>
> [17] If that is the petitioners' view then their remedy, as in the case of all contentious political decisions within a community, is at the ballot box. However unpopular it may be in certain circles, this decision was reasonably open to Council to make and in such a case a reviewing court will not invalidate the bylaw that resulted.

Discussion

[50] The Bowen Island *Official Community Plan* Bylaw No. 282*,* 2010 is, including various appendixes, 193 pages in length. It begins with the following statement:

> Towards a Sustainable Future: Framework & Foundations
>
> *Even though our island is a short ferry ride from three million urban residents, it is a world apart. Roads are winding and nights are dark. Lush vegetation and rugged topography define the island; homes and businesses fit into this landscape rather than remake it. There is a strong "islander" identity and a deep commitment to the stewardship of our remarkable natural environment. We take pride and pleasure in living in a resilient community that celebrates its arts, culture and heritage. We highly value and want to preserve our small community way of living, removed from the traffic and distractions of urban life. In recent years, we have turned our attention to how, as islanders, we can live in a more inclusive and sustainable way. A number of initiatives are underway, including this OCP Update, which will move the community forward in that direction.*

[51] The *Official Community Plan* sets out objectives and policies. Examples relevant to this application include:

> …
>
> ***Objective 1***
>
> *To maintain Bowen Island's unique environmental heritage, community identity and sense of place by ensuring that the island's natural landscapes and ecosystems are protected.*
>
> …
>
> **Section 2.2 Environmentally Sensitive Areas**
>
> …
>
> ***Objective 3****: To ensure that new development incorporates a "no net impact" strategy with respect to significant plant, wildlife and fish habitats.*
>
> …
>
> **Section 2.7 Terrestrial Features and Habitat**
>
> The natural terrestrial features and habitats are the basic elements of ecosystems and create a visual framework for Bowen Island. Their value extends beyond the physical character and becomes a component of the tangible and intangible qualities of the Bowen environment through contribution to wildlife, vegetation and landscape values.
>
> …
>
> ***Objective 24***
>
> *To preserve and protect terrestrial areas of fragile coastal ecosystems from further degradation.*
>
> …
>
> ***Policy 43***
>
> *The Municipality will:*
>
> - Use development permits, restrictive covenants, zoning, public land dedication, rights of way and other mechanisms to protect significant terrestrial habitat and significant terrestrial features;
>
> …
>
> **Section 2.9 Marine Resources / Foreshore**
>
> …
>
> ***Objective 35***
>
> *To protect the natural and scenic values of the coastline that provide the rural maritime atmosphere of the island.*
>
> ***Objective 36***
>
> *To protect coastline habitat areas for marine life.*
>
> ***Objective 37***

To contribute to the restoration of the waters of Howe Sound for future generations.

Objective 38

To identify, protect and preserve sensitive coastal vegetation.

…

Section 2.11

Cape Roger Curtis Lands and Shoreline

Objective 40

To encourage the retention of portions of Cape Roger Curtis in a natural state accessible to the public, including ecologically sensitive coastal bluffs, other sensitive ecosystems such as Arbutus and Douglas Fire Woodland, portions of the shoreline, archaeological features, viewpoints, and significant marine shorelines.

…

Section 3.4.6 Cape Roger Curtis Lands

Objective 68

To continue to promote the public interest in the development of the Cape Roger Curtis lands.

Policy 152

Notwithstanding that Cape Roger Curtis has an approved subdivision plan 28, the Municipality continues to promote the public interest at Cape Roger Curtis by encouraging the development of the site to:

- Conserve the majority of the coastline for eco-system protection, but especially the south facing ecologically sensitive and unique coastal bluff;
- Where there are no adverse ecological impacts, develop public waterfront, walking trails along the majority of the coastline, connecting to the cross-island greenway;
- Protect environmentally sensitive areas and rare species
- …
- Minimize and mitigate any negative impacts from Cape Roger Curtis development on the adjacent neighbourhoods and on the island community as a whole.

Policy 153

The Municipality may reconsider approved transportation access routes to the Cape Roger Curtis site as part of a rezoning application and/or changes to the subdivision plan, or as part of a future master transportation planning exercise for Bowen Island.

[Objective 38]

[To identify, protect and preserve sensitive coastal vegetation.]

> ***Policy 76***
>
> Private moorage and docks are subject to the following:
>
> - private moorage will not impede pedestrian access along the beach portion of the foreshore;
> - the siting of new private moorage will be undertaken in a manner that is consistent with the orientation of neighbouring private moorage and is sensitive to views and other impacts on neighbours; and
> - the Land use Bylaw will set out detailed provisions related to siting, setbacks, size, configuration, width, materials, and projections for private moorage. Additionally, owners and builders will refer to best management practices, published by Transport Canada, Navigable Waters Protection Division, prior to construction of any foreshore moorage or works.

[52] The petitioners submit that Bylaw No. 381 is in direct conflict with several provisions of the *Official Community Plan*. The inconsistencies relied on by the petitioners are:

a) Objective 99

   i. To provide safe and efficient transportation that meets the needs of residents and visitors.

b) Objective 106

   i. To facilitate water transportation services and private marine craft access for residents and visitors.

c) Policy 241

   i. The sharing of private docks among property owners is encouraged.

d) Policy 76 noted above

[53] The petitioners submit that Bylaw No. 381 is in direct conflict with Policy 241 because it does not encourage the sharing of private docks among property owners. Rather it is an outright prohibition of all docks.

[54] They further argue that Bylaw No. 381 ignores the needs of the residents of Cape Roger Curtis for water transportation noting transportation to the island is

primarily by way of the Snugg Cove ferry and that there is only one road from Snugg Cove to the Cape Roger Curtis area whereas private water transportation would provide an alternative route to Vancouver, BC.

[55] They also submit that Policy 76 contemplates the construction of private and community docks in a manner that is consistent with other *Official Community Plan* objectives such as the protection of the environment and public enjoyment of the foreshore. They say the intent of Policy 76 is a balanced one, but in passing Bylaw No. 381, the Municipality failed to consider Policy 76 or to even attempted to balance the competing objectives embedded in that policy.

[56] As a result they say while one of the objectives of the *Official Community Plan* is to protect the environment (which includes the Cape Roger Curtis area) another objective is to accommodate water transportation, including through the use of private moorages. In their view as counsel put it “the thrust of the OCP, as expressed as one objective, is to permit water transportation in the community while accommodating environmental protection”. They submit that in enacting Bylaw No. 381 the Municipality failed to consider the water transportation objective.

[57] In my view the petitioners are attempting to cherry pick from the *Official Community Plan*.

[58] The prohibition of docks is not incompatible with the objectives and policies relied on by the petitioners as showing inconsistency between the bylaw and the *Official Community Plan*. Objective 99 respecting water transportation is but one part of the *Official Community Plan* relating to transportation (as is Objective 106 respecting private marine craft access). Nor does Policy 241, respecting the encouraging of the sharing of private docks, elevate such a consideration to priority over all of the other objectives and policies found in the *Official Community Plan*. Policy 76 respecting restrictions on private moorage does not establish the right to such but rather applies to such private moorage if the environmental and other impact considerations are met. The *Official Community Plan* does not suggest that dock facilities can never be limited.

[59] As will be apparent from the other extracts from the *Official Community Plan* noted above there are a substantial number of matters and concerns to be taken into account, several of which specifically relate to the Cape Roger Curtis area. As a result zoning restrictions that prohibit docks in certain areas are consistent with the *Office Community Plan* objectives that protect natural and scenic coastline values, marine life habitat and public access to beach areas.

[60] The petitioners' argument that the Municipal Council failed to consider the water transportation objective appears to be based on the lack of apparent discussion of such at various readings of the bylaw. That submission however ignores the fact that the very issue was that of moorage and what that implied. It further ignores the fact that council had before it extensive material addressing this highly contentious bylaw. For example, as part of its request for decision of the Island Trust, Islands Trust staff noted that Bylaw No. 381 was supported by the *Bowen Island Official Community Plan* under Objectives 3, 24, 35, 36 through 38, Policy 76 and Policy 241. At page 5 it is stated:

> …
>
> Islands Trust staff recognize that Bylaw Amendment no. 381 is one step in the process to achieve the above noted objectives and policies.
>
> Islands Trust staff is of the opinion that the proposed zoning amendment and the Cape Curtis Roger area analysis generally meets the objectives and policies in the Bowen Island Municipality Official Community Plan. Based on the information provided in the Bowen Island Municipality staff report dated March 23, 2015, it can be concluded that there will be no inconsistencies between Bylaw 381 and the Bowen Island Municipality OCP.
>
> …

[61] In addition the evidence is that the Municipal Council had before it a comprehensive planning department report that directly addressed the issue of consistency with the *Official Community Plan*.

[62] As stated in *Catalyst Paper Corporation v. North Cowichan (District),* 2012 SCC 2 at para. 13, respecting the standard of reasonableness:

> [13] … If the applicable standard of review is reasonableness, the reviewing court requires that the decision be reasonable, 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. …
>
> …
>
> [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*.

[63] Applying the applicable legal principles I conclude that there is no specific policy in the *Official Community Plan* that constitutes a "direct or head on collision" with Bylaw No. 381 and that on a standard of reasonableness the bylaw is consistent with the *Official Community Plan*, is not *ultra vires*, and therefore is not to be set aside on that basis. Bylaw No. 381 is not, in my opinion, one that no reasonable body could have enacted.

[64] The objection that the Municipal Council exceeded its jurisdiction by passing a bylaw inconsistent with the *Official Community Plan* is therefore dismissed.

[65] I turn now to the other grounds advanced by the petitioners.

Issue of Bad Faith by Alleged Targeting of the Petitioners

[66] The petitioners submit that in passing Bylaw No. 381 the Municipality acted in bad faith.

[67] In *Macmillan Bloedel Ltd. v. Galiano Island Trust Committee* (1995), 126 D.L.R. (4th) 449, 10 B.C.L.R. (3d) 121 (C.A.), Finch J.A. reviewed the concept of bad faith as follows:

> [153] The words "bad faith" have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal, and

> renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact.
>
> [154] Bad faith, however, is also used to describe the exercise of power by an administrative body, that is beyond the scope or the ambit of the powers delegated to that body by the legislature. In those cases the exercise of powers is sometimes described as unauthorized, or beyond the scope, or outside the limit of the delegated power. It is an act that is *ultra vires*. Frequently, allegations of bad faith include both the aspect of illegality in the first sense, and in the sense of *ultra vires*. To the extent that the allegation focuses on the way the delegated power was exercised, or on the conduct of the administrative body, there is an issue of fact. In those cases where powers are said to have been exceeded, however, there is another issue. That is the scope, or the amplitude, of the powers delegated by the legislature. That issue invariably requires an interpretation of the empowering statutes, and that raises an issue of law.

[68] The burden of proving that a municipal body acted "contrary to the public interest or from an improper or sinister motive or "in bad faith and through partiality", is on those who make such charges." (*Macmillan Bloedel Ltd*. at para. 134).

[69] Finch J.A. also stated in *Macmillan Bloedel Ltd.*:

> [178] … In my 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.
>
> …
>
> [182] Once it is determined that the trustees acted within the scope of their legislative authority, I do not think it matters that they attempted to support their conduct on the grounds other than those found to be the true basis for their actions. Both their expressed motives, and their true motives, were directed towards furtherance of the objects of the *Islands Trust Act*. 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. In that even it would not matter whether the trustees acted for an ulterior purpose, because in that event the by-law would have been *ultra vires*.

[70] In *Common Exchange Ltd. et al v. City of Langley*, 2000 BCSC 1724, the above principal was applied by the Court in upholding a bylaw that restricted a particular use to a zone. In *Rascal Trucking Ltd*. the Supreme Court of Canada stated:

> 35 … Municipal councillors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than

> are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing *intra vires* decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the *intra vires* decision of municipalities be reviewed upon a deferential standard.

[71] The leading case on considering allegations of bias is *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1170. The Supreme Court of Canada held that in order to demonstrate bias, the court must be satisfied that there has been prejudgment of the matter to be decided, so that "any representations at variance with the view, which has been adopted, would be futile". [Emphasis added.]

[72] The petitioners allegations of bad faith are:

> …
>
> The true and expressed motives of the Bowen Island Municipality were not within the scope of its legislative power because while stating the expressed motive of Bylaw No. 381 was environmental protection the Council refused to mention, discuss or disclose the results of the environmental reports commissioned by the Petitioners.
>
> The true and expressed motive of the Municipality in passing Bylaw 381 was to target the Petitioners and their Tenure Applications.
>
> …

[73] The petitioners allege the following evidence of bias by the Mayor and the three Councillors who voted in favour of Bylaw No. 381:

> 145. In the present case, the Mayor and the three Councillors who voted for Bylaw No. 381 acted with bias. For example, at the public hearing, at least half of the residents did not want to pass the bylaw. Also, the developer offered to work with the city planner for alternatives to reduce the number of docks at CRC. These representations were summarized for the Council at the third reading but these representations were futile: they had their minds set already.
>
> 146. The actions, comments, and questions of the four council members who voted yay to Bylaw No. 381 throughout the meetings were not at all concerned with the public interest. Instead, they were only concerned with accomplishing what Stop the Dock wants.
>
> 147. Even in the face of being made aware and hearing the strong opposition to such a draconian bylaw, these four council members

> have not stopped even for one second to consider what truly is for "public interest".
>
> 148. The very reason why Bylaw No. 381 was adopted is best said by the Mayor at the end of the third reading meeting on May 25, 2015: "Nobody likes the docks".
>
> 149. The above when combined with BIM's intentional hindrance and delay to the approval of the Petitioner's Tenure Application with the Ministry, and BIM's use of the Misleading Map to incite irrational fear in the community, BIM has acted in bad faith and Bylaw No. 381 should be set aside.

[74] The difficulty with these assertions is that they are the petitioners' interpretation or impression of what occurred. The fact that the Mayor and other counsellors may have, before they were elected, been members of or in agreement with the Stop the Docks group does not establish bias. Presumably their position during the election was just that and they were elected to council with the electorate well aware of or because of their views on this issue. Indeed that may have been why they were successful in the election.

[75] Nor is an assertion that voting against the docks when one half of the population did not oppose the docks evidence of bias. Councillors are elected to represent the electors and to make their decisions in good faith and in accordance with, for example, the *Local Government Act* and the *Official Community Plan*. That may or may not result in a decision based on some numerical assessment of electors' views.

[76] The petitioners' submission includes an objection to a map that was made available by the Municipality purporting to show the coastline of the Cape Roger Curtis area if every waterfront lot had a dock. While the map may not have accurately shown the length of each dock it does show what would occur if every lot owner built a dock. There is no evidence that no further dock applications would be forthcoming from other waterfront property owners in the area. I fail to see how providing such information was intended to "incite irrational fear in the community". The illustration simply showed what could occur if every lot owner built a dock.

[77] What the argument of the petitioners fails to recognize is that in a democratic electoral process the electors chose to elect whom they wish and that such a decision may well be based on the candidates' views on one or more issues. Once elected, just because a councillor votes consistently with the position they took during the election, does not mean their minds were already made up. The evidence relied on by the petitioners to suggest that the four individuals who voted in favour failed to consider all of the materials and arguments is without an evidentiary foundation. It is simply speculation and selectively seizes on certain evidence and interprets it in their favour.

[78] For example, in their petition they state "views and public enjoyment of the foreshore were sufficiently protected by (the previous bylaws)". That is just their opinion and it is not bad faith for a duly elected Municipal Council to come to the opposite conclusion, particularly where there were other supportable positions.

[79] While the petitioners assert they have been targeted or singled out, the evidence is that after the first three docks were built public concern grew and the petitioners' applications to build docks increased that concern. In the context of the *Official Community Plan* and the prospect of numerous and substantial docks in the area, such concerns are understandable. This does not mean the petitioners were targeted. In my opinion what has occurred is that after the initial three docks were built and public concerns arose the Municipal Council reacted and took steps to further address the issue after their initial efforts in the 2013 bylaw appeared inadequate. In other words while the petitioners applications may have motivated Municipal Council to revisit the issue of docks in the Cape Roger Curtis area, the issues that the Municipal Council had to address extended beyond the issue of the petitioners' two tenure applications.

[80] Nor is the Municipal Council obliged to come to "a more balanced solution … and take into account" the petitioners' interests. That is, Municipal Council is not obliged to reach a compromise.

[81] In my opinion Bylaw No. 381 was within the jurisdiction of the Municipal Council under the *Islands Trust Act*, R.S.B.C. 1996, c. 239, the *Islands Trust Policy Statement* and the *Local Government Act.* The petitioner has failed to show that the public interest was not the basis for the decision of the majority of the Municipal Council who voted to adopt Bylaw No. 381. The petitioner has not shown there was some other motive or basis for adopting that bylaw.

Discrimination

[82] The petitioner alleges that by refusing permission to Cape Roger Curtis property owners to build moorage structures Bylaw No. 381 is discriminatory and therefore illegal.

[83] Zoning bylaws are by their nature inherently discriminatory, in that some uses are permitted and some are not. Section 479(4), formerly 903 (3) of the *Local Government Act* expressly authorizes bylaws that may be different for different zones. Section 479(3), formerly 903 (4) authorizes Municipal Council to prohibit any use or uses within a zone:

> **479** …
>
> (3) The power to regulate under subsection (1) includes the power to prohibit any use or uses in a zone.
>
> …

[84] The inherent discrimination of zoning bylaws is well recognized. In *Petro-Canada v. North Vancouver (District of)*, 2001 BCCA 203, Mr. Justice MacKenzie, writing for the Court of Appeal, stated at para. 14:

> [14] Zoning bylaws by their very nature are inherently discriminatory. They are invalid only if they are unreasonably discriminatory: ***Arcade Amusements Inc. v. Montreal (City)***, [1985] 1 S.C.R. 368 at 416. A zoning bylaw may discriminate between existing and future uses lawfully "downzone" or reduce the permitted uses of land: ***Wall & Redekop Ltd. v. Vancouver*** (1974), 16 N.R. 435 (S.C.C.); 16 N.R. 436 (B.C.C.A.). The existing use becomes a non-conforming use, permitted only so long as it continues without major alteration."

[85] In *511784 BC Ltd. et al v. Salmon Arm*, 2001 BCSC 245, Madam Justice D. Smith also noted at para. 44:

> [44] … All discretion is inherently discriminatory in that decisions are made which result in a choice or distinction being made. The exercise of discretionary power is only unlawful if the discretion is exercised in an improper discriminatory manner, that is for some improper purpose or on some irrelevant basis. (See ***Bignell Enterprises Ltd. v. Campbell River (District)*** (1996) 34 M.P.L.R. (2d) 193 (B.C.S.C.).

[86] Mr. Justice McEwen applied this principal in *Young v. Cowichan Valley Regional District*, 2005 BCSC 114 at para. 31, in dismissing the petition of a person who had built a workshop without a required permit. McEwen J. then noted the test set out in *Rascal Trucking Ltd*. , which adopted the rationale of McLachlan J. in *Shell Canada Products v. Vancouver (City)*, [1994] 1 S.C.R. 231:

> [31] …
>
> … courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in Greenbaum, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate bodies as community representatives.

[87] The test to be applied in determining if discrimination is unreasonable was addressed in *Century Industries Ltd. v. Dickinson,* 1991 CanLII 823 (B.C.S.C.). The Court held that a proposed bylaw will not be characterized as discriminatory merely because it is directed at one particular person or lot. Two elements must be met to satisfy a finding of discrimination:

> …
>
> (1) The by-law must in fact discriminate. By-laws discriminate if they give permission to one and refuse it to another.
>
> (2) The factual discrimination must be carried out with an improper motive of favouring or hurting one individual without regard to the public interest.
>
> …

(See also International *Bio Research v. Richmond (City)*, 2011 BCSC 471 at para. 68).

[88] The petitioners submit that Bylaw No. 381 denies all waterfront owners in the Cape Roger Curtis area the ability to have private moorage, or any moorage at all (such as a group facility) while waterfront owners everywhere else on Bowen Island are not subject to the same restriction. They argue this factual discrimination was carried out with an improper motive, that of favouring individuals in the Stop the Docks group at the expense of and to the prejudice of the petitioners. In addition they say that the Municipality failed to address the public interest by ignoring entirely the public's opposition to the passing of the bylaw evidenced at the public hearing.

[89] I note that the discrimination is potentially temporary, as Municipal staff has been directed to review the issue on an island-wide basis after a work plan is developed.

[90] With respect to the second part of the test, that is that the factual discrimination was carried out with an improper motive, the evidence of such is limited and inferential at best. The evidence referred to by the petitioners is mostly based on documents appended to affidavits. No one has deposed to the truth of the facts alleged in the petition.

[91] The argument of the petitioners implies that it is improper for a member of council to have strong views on a matter of public interest. That is not improper provided it is within a Municipal Council's legislative discretion.

[92] For example, in *Save Richmond Farmland Society v. Richmond (Township*), [1990] 3 S.C.R. 1213, an alderman had stated he would not change his mind no matter what was said at the public hearing but who also said he would listen attentively and it would take something significant to change his mind was not prevented from voting. The Court held that he did not have a closed mind despite such strong views and therefore he was not disqualified on the basis of bias.

[93] There is no evidence that the councillors voting in favour of Bylaw No. 381 did so without regard for the public interest. Indeed the level of interest in the issue and the comprehensive information provided to the public and to council would accentuate the public interest. The evidence does not show that the council members ignored or failed to consider all relevant factors and issues.

[94] The petitioners point to examples that they say supports their position in the comments for example of one counsellor who referred to the docks as “mega” docks implying it is a pejorative term. Given the term means “very large” that is simply a description of that counsellor’s perception of the docks. The word was used by the counsellor in question in the context of comparing the new technology used in new docks as compared to older docks on the Island. In any event if it was used pejoratively a councillor is entitled to have strong views of the existing and proposed docks.

[95] Similarly the Mayor’s comment at third reading that no one at the public meeting said they liked the docks or that more docks was a good idea was factually correct. In my view all the Mayor was doing was commenting on the matter and that it does not mean that he did not have an open mind.

[96] The fact that the Cape Roger Curtis area cannot have docks while other waterfront owners may do so, while factually discriminatory, is not discriminatory in law if no improper motive exists. Zoning that permits something in one area but not in others is perfectly proper. In addition it is clear that the Cape Roger Curtis area has been treated as raising specific and unique concerns for the reasons referenced in the *Official Community Plan* that support the need for specific zoning.

[97] For these reasons I find no discrimination in law. The evidence does not establish any improper motive, purpose or other irrelevant considerations by Municipal Council.

Procedural Fairness and Legitimate Expectations

[98] The petitioners submit that the Municipality failed to publicly disclose the environmental reports provided to the Municipality by the petitioners and that such failure breached procedural fairness. They assert that the reports provide "a sound basis as to how environmental impact may be minimized to construct the proposed docks". The petitioners also challenge aspects of the public debate and hearing.

[99] The Municipality must comply with s. 890 (now 464) of *the Local Government Act* in the holding of a public hearing. That section provides:

> **Requirement for public hearing before adopting bylaw**
>
> **464** (1) Subject to subsection (2), a local government must not adopt
>
> (a) an official community plan bylaw,
>
> (b) a zoning bylaw, or
>
> (c) a bylaw under section 548 *[early termination of land use contracts]*
>
> without holding a public hearing on the bylaw for the purpose of allowing the public to make representations to the local government respecting matters contained in the proposed bylaw.
>
> …
>
> **Public hearing procedures**
>
> **465** (1) A public hearing under section 464 (1) must be held after first reading of the bylaw and before third reading.
>
> (2) At the public hearing, all persons who believe that their interest in property is affected by the proposed bylaw must be afforded a reasonable opportunity to be heard or to present written submissions respecting matters contained in the bylaw that is the subject of the hearing.
>
> (3) Subject to subsection (2), the chair of the public hearing may establish procedural rules for the conduct of the hearing.
>
> (4) More than one bylaw may be considered at a public hearing and more than one bylaw may be included in a notice of public hearing.
>
> (5) A written report of each public hearing, containing a summary of the nature of the representations respecting the bylaw that were made at the hearing, must be prepared and maintained as a public record.
>
> (6) A report under subsection (5) must be certified as being fair and accurate by the person preparing the report and, if applicable, by the person to whom the hearing was delegated under section 469.

(7) A public hearing may be adjourned and no further notice of the hearing is necessary if the time and place for the resumption of the hearing are stated to those present at the time the hearing is adjourned.

Notice of public hearing

466 (1) If a public hearing is to be held under section 464 (1), the local government must give notice of the hearing

(a) in accordance with this section, and

(b) in the case of a public hearing on an official community plan that includes a schedule under section 614 (3) (b) *[designation of heritage conservation area]*, in accordance with section 592 *[giving notice to owners and occupiers]*.

(2) The notice must state the following:

(a) the time and date of the hearing;

(b) the place of the hearing;

(c) in general terms, the purpose of the bylaw;

(d) the land or lands that are the subject of the bylaw;

(e) the place where and the times and dates when copies of the bylaw may be inspected.

(3) The notice must be published in at least 2 consecutive issues of a newspaper, the last publication to appear not less than 3 days and not more than 10 days before the public hearing.

(4) If the bylaw in relation to which the notice is given alters the permitted use or density of any area, the notice must

(a) subject to subsection (6), include a sketch that shows the area that is the subject of the bylaw alteration, including the name of adjoining roads if applicable, and

(b) be mailed or otherwise delivered at least 10 days before the public hearing

(i) to the owners, as shown on the assessment roll as at the date of the first reading of the bylaw, and

(ii) to any tenants in occupation, as at the date of the mailing or delivery of the notice,

of all parcels, any part of which is the subject of the bylaw alteration or is within a distance specified by bylaw from that part of the area that is subject to the bylaw alteration.

> (5) If the bylaw in relation to which the notice is given is a bylaw under section 548 *[early termination of land use contracts]*, the notice must
>
> (a) subject to subsection (6), include a sketch that shows the area subject to the land use contract that the bylaw will terminate, including the name of adjoining roads if applicable, and
>
> (b) be mailed or otherwise delivered at least 10 days before the public hearing
>
> (i) to the owners, as shown on the assessment roll as at the date of the first reading of the bylaw, and
>
> (ii) to any tenants in occupation, as at the date of the mailing or delivery of the notice,
>
> of all parcels, any part of which is subject to the land use contract that the bylaw will terminate or is within a distance specified by bylaw from that part of the area that is subject to that land use contract.
>
> (6) If the location of the land can be clearly identified in the notice in a manner other than a sketch, it may be identified in that manner.
>
> (7) Subsection (4) does not apply if 10 or more parcels owned by 10 or more persons are the subject of the bylaw alteration.
>
> (8) The obligation to deliver a notice under subsection (4) or (5) is satisfied if a reasonable effort was made to mail or otherwise deliver the notice.

[100] I will first address the disclosure issue and then the public debate and hearing issue.

Disclosure

[101] The concept of procedural fairness in the context of zoning bylaws was considered by the British Columbia Court of Appeal in *Pitt Polder Preservation Society v. Pitt Meadows (District)*, 2000 BCCA 415. In *Pitt Polder* the petitioner sought to quash bylaws to re-zone certain property on the ground that the District had failed to disclose all documents. The Court stated at para. 43

> [43] It appears to me that, in the present context, determining the content of the duty of fairness would include consideration of the nature of the statutory scheme for making decisions on land use and zoning bylaws, the process that must be followed in making such decisions, the function that a participatory process serves in the ultimate decision being made by local

> government in respect of the bylaws, and the importance and consequences of the decision to those who might be affected by it.

[102] The Court in *Pitt Polder* referred to *Norman v. Port Moody (City)* (1995), 17 B.C.L.R. (3d) 208, 60 A.C.W.S. (3d) 169 (S.C.), where the municipality had developed a land use policy bylaw in relation to a 381-acre area on the north shore of Burrard Inlet. To address environmental concerns, the municipality commissioned an environmental assessment of the area but complete disclosure of the results was not made available to the public in advance of the public hearing. The Court in *Norman* concluded that the city had a duty to disclose information at a public hearing:

> [23] The above-cited case law provides a very general demarcation of permissible standards of procedural standards. Though the *Wiswell* categorization of the public hearing process as quasi-judicial may no longer be appropriate, it is clear that rules of natural justice, and the maxim *audi alteram parten*, will continue to apply. It is settled law in British Columbia that there is a disclosure requirement at a s. 956 [now s. 890(1)] public hearing. Recent decisions from the Supreme Court of Canada suggest that the nature and extent of the City's duty to disclose information, and to otherwise abide by the rules of natural justice, will depend upon the nature of the public hearing in question. [Emphasis added.]

[103] The Court in *Pitt Polder* also addressed the reason for disclosure in advance of public hearings as follows:

> [54] In my opinion, the cases to which I have just referred support the view that in order to provide the opportunity for informed, thoughtful, and rational presentations in relation to proposed land use and zoning bylaws it is necessary that interested members of the public have the opportunity to examine in advance of a public hearing not only the proposed bylaws but also reports and other documents that are material to the approval, amendment or rejection of the bylaws by local government.
>
> …
>
> [63] The right to be heard before Council makes a decision on proposed land use or zoning bylaws must encompass more than an opportunity to express approval or disapproval of the proposed bylaws. If the participatory process that is mandated by the statute is intended to provide Council with a meaningful examination and discussion of the issues material to Council's decision, it appears to me to have been essential for members of the public to have been given access to impact reports and other relevant documents in sufficient time to prepare reasoned presentations.
>
> [Emphasis added.]

[104] The petitioners do not have to provide evidence of what members of the public might have done had the reports and other relevant documents been made available in advance of the public hearing (*Pitt Polder* at paras. 66-67).

[105] The obligation to disclose is not the same in every case. In addition a Municipality is not obliged to make available to the public all information that could be potentially relevant.

[106] In *Wilde v. Metchosin (District) and Attorney General for British Columbia*, 2004 BCSC 782 Mr. Justice Vickers held that:

> [14] The duty of disclosure must be weighed against the costs that might be incurred by a municipality if the court were to impose rules and procedures akin to an adjudicative procedure. For example, it could not be argued that copies of all relevant documents should be sent to each elector. Only a small portion of electors would be interested to the extent of advancing inquiries concerning a proposed bylaw and then taking the time to inform Council of their views, for or against that bylaw.
>
> …
>
> [19] In my view, when an elector comes to the respondent seeking information concerning a bylaw, the respondent has no obligation to determine the issues that concern that elector and direct him or her to the appropriate documents. Electors have the obligation to make specific requests. …

[107] The Court of Appeal affirmed the decision in *Wilde v. Metchosin (District)*, 2005 BCCA 453, noting:

> [12] There is no statement of the law as to what is required for procedural fairness in every case. In each case, whether the disclosure process employed was fair will depend upon the circumstances of the case: see ***Eddington v. Surrey***, [1985] B.C.J. No. 1925 (Q.L.) (BCSC).

[108] This principle was applied in *Abbotsford Families United v. Abbotsford (City),* 2009 BCSC 463, where Mr. Justice Myers concluded:

> [36] … The proposition advanced by the petitioner, then, comes to this: a local government which posts some relevant information on its website must post *all* the relevant information. That would no doubt be convenient for members of the public, however to require a local government to do that imposes too rigid a standard which would not be in accord with the principle underlying the *Wilde* decision.

[109] The principle was also applied in *Fisher Road Holdings Ltd. v. Cowichan Valley (Regional District)*, 2011 BCSC 1540, by Mr. Justice Butler, who, in relation to the minutes of an advisory committee, wrote:

> [34] The minutes of the Advisory Committee meetings fall into a different category. The minutes were related to the fulfillment by that committee of the advisory capacity which had nothing to do with the Bylaw amendment. While the minutes have peripheral relevance to the zoning issue, they are not material to the approval or rejection. It would be burdensome to require local governments to disclose every document with peripheral relevance. *Pitt Polder* confirms that the disclosure obligation is less than the standard required in criminal or civil proceedings. As the courts in *Wilde* and *Abbotsford Families United v. Abbotsford (City)*, … there is an obligation on an interested party to request specific documentation if they wish to see it. The minutes of the Advisory Committee meetings fall into that category. …

[110] In *Community Association of New Yaletown v. Vancouver (City)*, 2015 BCCA 227, the British Columbia Court of Appeal recently confirmed the disclosure rule as requiring disclosure of materials council will consider in making the zoning decision. The Court discussed *Pitt Polder* and at para. 85 said this:

> [85] Importantly, the Court in *Pitt Polder* held that the reports should have been disclosed because they pertained to the very development that was under consideration at the public hearing. That is why the reports were "material to the approval, amendment or rejection of the bylaws" (at para 54). [Emphasis added.]

[111] At para. 91 the Court stated:

> [91] The City complied with this by-law in this case. There is a long line of authority to the effect that a municipality will generally meet its disclosure obligations if, as By-law 9756 requires, it discloses everything that was or will be considered by council …

[112] And at para. 153:

> [153] When the City is considering rezoning a property, local residents have two important rights. They have the right to be given information sufficient to enable them to come to an informed, thoughtful and rational opinion about the merits of the rezoning. They also have the right to express this opinion to the City at a public hearing. When citizens feel they have been denied one or both of these rights, they may seek a remedy in the courts by petitioning for judicial review. However, judicial review has well defined limits. Citizens who disagree with the City's view of the public interest must seek change through the political process rather than the courts.

[113] The information that was disclosed by the Municipality consisted of the notice of public hearing, an agenda stating the purpose of the hearing, the staff reports as of January 12, 2016 consisting of 10 pages, relevant extracts from the January 12, 2015 regular council meeting, a video of that meeting, public submissions relating to the January 12, 2015 staff report consisting of 13 pages, relevant excerpts from the January 26, 2015 and a video link to the February 23, 2015 regular council meeting, the Municipality referral responses to the Ministry, relevant extract from the March 16, 2015 special council meeting, a video link to that meeting, 29 pages of submissions from the March 16, 2015 meeting, a senior planner report dated March 23, 2015 of 33 pages, a 6 page power point presentation from the senior planner, excerpts from the March 23, 2015 regular council minutes and video link to that meeting, public submissions in the April 13, 2015 regular council package, the senior planner report at second reading consisting of 27 pages, relevant excerpts from the April 27, 2015 regular counsel minutes and video link, correspondence from the Ministry, referral comments from the Islands Trust, referral comments from the Ministry, referral comments from the Advisory Planning Commission meeting of April 7, 2015, and further written submissions from the public received up to May 8, 2015. In total 255 pages of written material were available.

[114] The petitioners allege that the Municipality "failed to disclose all relevant information to the public before the hearing" including the Advisory Planning Commission's recommendations" and the environmental studies prepared on behalf of the petitioners.

[115] In fact the Advisory Planning Commission's recommendations were included in a report to council presented for the Regular Council meeting on April 27, 2015 and were discussed at that meeting. In addition to being available to anyone for the asking, the report was linked to the minutes, both published online. Thus, the Advisory Planning Commission recommendation was available to the public online as part of that report, along with the proposed bylaw, the Islands Trust Executive review of the proposed bylaw, the Islands Trust staff review, and referral comments from the Ministry. As a result I am satisfied that the first assertion of the petitioners

that the Advisory Planning minutes were not disclosed is in error. I turn then to the alleged failure to disclose the environmental reports prepared by the petitioners.

[116] The environmental reports referred to are those prepared by the petitioners in support of their moorage tenure applications to the Ministry. What is somewhat unusual in this instance is the petitioners' complaint relates to material that the petitioners had prepared, that was in their possession and which they had provided to the Municipality. No explanation is offered as to why they did not make such material available at the public meeting or request that the Municipality do so, or that council include it in their deliberations. Presumably they reviewed the material made available to the public and would have noted the absence of their environmental reports.

[117] I need not determine if that is fatal to their complaint as the issue in fact turns on that of relevance.

[118] Procedural fairness in zoning applications requires that the public have access to documents material to the bylaw approval in time to consider and respond to them. That sufficiency of such disclosure however is determined by the purpose of the hearing. In this instance the purpose of the public hearing was to give those affected by the proposed zoning the opportunity to be heard at a full and impartial public hearing (*Pitt Polder* at para. 52; *VAPOR v. British Columbia (Environment)*, 2015 BCSC 1086 at para. 88).

[119] The purpose of the public hearing was not to address the applications of the petitioners to construct moorage facilities. It was the broader issue of moorage facilities generally in the Cape Roger Curtis area. The petitioners' reliance on *Norman*, where the impugned non-disclosure related to an environment report respecting the area in issue, does not assist factually as the reports here were limited to the specific docks of the petitioners and not to the Cape Roger Curtis area as a whole.

[120] The environmental reports provided by the petitioners specifically address the environmental impact of the docks in question relating to lots 3 and 17. The assessments are restricted to the specific docks proposed and the immediate area they are proposed to occupy. They do not provide nor do they purport to provide an environmental assessment of the entire Cape Roger Curtis shoreline nor the effect of the addition of docks to all or a majority of waterfront lots. They are very much site specific.

[121] While a single study relating to a single lot application may be very relevant to the applicant seeking a tenure from the Ministry, the concerns that led to the adoption of Bylaw No. 381 were broader, including not only the protection of ecosystems within the Cape Roger Curtis area as a whole, but also public values placing importance on maintaining a natural and scenic coastline and public access to shorelines and beaches. The impacts of previously built moorage structures, and ultimately the potential for numerous similar structures being located along that part of the coastline, could only be addressed by a zoning amendment.

[122] As a result, the environmental reports provided by the petitioners in support of their tenure applications are not relevant to the matters under consideration by Municipal Council. All that can be said of them is that the environmental issues related to the construction of the two docks in their specific locations, if built in accordance with the proposed plans, and with certain mitigation measures, could be built in a manner reducing their environmental impact. In addition and in any event the environmental impact of docks generally is but one of the considerations the *Official Community Plan* references.

[123] Since the obligation of the Municipality is to disclose relevant material and material upon which they rely, the lack of the environmental reports relevance and the fact they were not relied on by Council answers the petitioners' complaint. Municipal councils are not obliged to make available to the public all information that could be potentially, incidentally or possibly relevant. The failure to produce the

environmental reports in this instance or to rely on them is not a breach of procedural fairness.

Public Debate

[124] The petitioners also allege that the Municipality breached its duty of procedural fairness because, *inter alia*, the Municipality:

a) Attempted to limit public debate and pass Bylaw No. 381 as quickly as possible;

b) Attempting to delay Ministry approval of the requested tenure agreements;

c) Failed to engage or consult with the petitioner, and

d) Breached the petitioners' legitimate expectation that their applications would be approved or denied based on the existing regulatory framework.

[125] There is no evidence that the Municipality limited or attempted to limit public debate. There is no evidence that anyone was prevented from saying anything at the public hearing. All who wished to speak were permitted to do so.

[126] In accordance with s. 892 of the *Local Government Act*, the Municipality gave public notice of Bylaw No. 381 in its proposed form and held a public hearing on May 14, 2015. The petitioner was given full opportunity to be heard at the public hearing.

[127] The petitioners were aware of the public hearing, had the opportunity to express their concerns about the effect of the proposed amendments, and did so. As well petitioners' counsel wrote a letter dated May 12, 2015 to Council of the Municipality on behalf of the petitioners setting out his clients' opposition to the proposed Bylaw No. 381. The letter indicates that the petitioners were fully aware of public concern about dock building in the area and of the public interest in the decision to be made. It noted "it is clear that the island residents are divided on this issue." Mr. Chen, representing the petitioner, also attended and spoke twice on behalf of the petitioner at the public hearing.

[128] That public concern is not new. In 2013, the *Bowen Island Municipality Land Use* Bylaw No. 57, 2002, Amendment Bylaw No. 335, 2013, was enacted on November 25, 2013, to permit private moorage for each waterfront lot in the Cape Roger Curtis area and the dock issue was the subject of intense public interest within the Bowen Island community both at that time and thereafter. This was evident by the election campaigns of the 2014 local election and also by the numerous letters and submissions received by the Municipality on the subject up to the public hearing of May 14, 2015.

[129] With respect to the allegation that the Municipality passed the bylaw as quickly as possible, which the petitioners say leads to the inference that they were trying to trump the tenure approvals and limit public debate, the evidence does not indicate that to be the case. While they wished to address the issue of docks at Cape Roger Curtis before anymore were approved and built, the evidence does not establish that the approval process was abridged or subverted in any way. There is no allegation that they failed to comply with the *Local Government Act*.

[130] In any event, Municipal Council was authorized, under the *Local Government Act*, s. 894 (1)(a), to adopt or defeat the bylaw after the public hearing and without further notice or hearing. In the case of Bylaw No. 381, Municipal Council did not vote immediately after the public hearing, but instead, having received a staff report describing the responses from the Advisory Planning Commission, the Islands Trust, the Ministry, and the hearing outcomes, gave it third reading and adoption at its meeting of May 25, 2015.

[131] As a result I am of the opinion that the Municipality did not limit or attempt to limit public debate nor to pass Bylaw No. 381 as quickly as possible in order to subvert public debate. Nor does the evidence support a failure to engage or consult with the petitioners.

[132] I turn therefore to the petitioners' next objection, that the Municipality breached the petitioners' legitimate expectation that their applications would be approved or denied based on the existing regulatory framework.

Legitimate Expectations

[133] The “legitimate expectation” relied on by the petitioners is that the existing regulatory framework would not be changed from the time they initially applied to build a dock and their approval and completion. The doctrine’s application however does not have the substantive effect the petitioners suggest. In *Pollard v. Surrey (District)* (1993), 76 B.C.L.R. (2d) 292, 14 M.P.L.R. (2d) 121 (C.A.), Madam Justice Proudfoot for the Court of Appeal said this:

> 26 The chambers judge dealt with this argument with these comments:
>
> The petitioners submit that Surrey denied their legitimate expectation to be provided with "notice that the application before them contradicted the policy" and of its intention not to follow that policy.
>
> The principle is set out in ***Attorney General of Hong Kong v. Ng Yuen Shui***, [1983] 2 A.C. 629, 2 All E.R. 346 (P.C.), at p. 636:
>
> > Accordingly 'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis: …
> >
> > The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be as assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct.
>
> The doctrine was discussed in ***Old St. Boniface Residents Assoc. Inc. v. Winnipeg (City)***, [1990] 3 S.C.R. 1170 at p. 1204 as follows:
>
> > The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.

> The petitioners submit that the legitimate expectation arising is that of "notice that the application before them contradicted the policy" or "that it intended to amend or repeal the policy".
>
> I find there [sic] no such legitimate expectation arises from the language of the general resolutions published as "policy", nor has such an expectation been created through regular practice.
>
> In any case, the doctrine or rule of reasonable expectations is part of the rules of procedural fairness which govern administrative bodies, and does not apply to the legislative process. (***Re Canada Assistance Plan*** (1991), 58 B.C.L.R. (2d) 1 (S.C.C.)).
>
> 27 In my view, it is impossible to accept the appellants argument, if I understand it correctly, that there was a “legitimate expectation” on the part of the appellants that there could never be a variance form the initial golf course policy.
>
> 28 The only legitimate expectation, in my view, is one of procedural fairness which a public body must follow in the conducting of its business with the public. In the case at bar, the public had notice, there was a hearing and all information relating to the issue of the variance of the gold course policy was available. In those circumstances there can be no denial of legitimate expectations.

[134] As a result the doctrine of “legitimate expectation” does not apply to the legislative process. It does apply to decisions that are administrative in nature. The nature of municipal bodies however is different from administrative bodies. In *Rascal Trucking Ltd.* this was explained:

> 31 First, in contrast to administrative tribunals, that usually adjudicate matters pertaining to a specialized and confined area, municipalities exercise a rather plenary set of legislative and executive powers, a role that closely mimics that of the provincial government from which they derive their existence. ...
>
> 32 Second, municipalities are political bodies. Whereas tribunal members should be and are, generally, appointed because they possess an expertise within the scope of the agency’s authority, municipal councillors are elected to further a political platform. ... Finally, as opposed to administrative tribunals, council decisions are more often by-products of the local political milieu than a considered attempt to follow legal or institutional precedent. To a large extent council decisions are necessarily motivated by political considerations and not by an entirely impartial application of expertise.

[135] Because the decision in question was legislative as opposed to administrative the doctrine does not apply. As a result not only did the petitioners not initially have a

"right" to the zoning that permitted a private moorage for every lot nor do they have a "right" to that zoning never being altered. In *Macmillan Bloedel Ltd.* Madam Justice Southin said at para. 130:

> [130] … I see nothing in any provision of the *Islands Trust Act* or the *Municipal Act* which prevents this downzoning which is intended to prevent development while the governing authority gathers up all the advice and information it thinks helpful relating to the lands in issue and thereupon coming to a solution which it perceives to be in the long-term best interests of the community. Land use issues are difficult. … these bylaws were enacted for the purposes or the objects of s. 3 [of the *Islands Trust Act*] as well as for the health and welfare of the inhabitants of Galiano Island. They therefore had a lawful purpose.

[136] While Southin J. was referencing s. 3 of the *Islands Trust Act,* the principal was applied by both her and Finch J.A. to the *Local Government Act*. In *CMHC v. North Vancouver (District)*, 2000 BCCA 142, Mr. Justice Esson held that s. 903 of the *Municipal Act* (now the *Local Government Act*), while being less specific than those of s. 3 of the *Islands Trust Act* would not preclude a municipality from pursuing the object of preserving and protecting the amenities and environment of a large portion of land for the benefit of all the residents.

[137] I do not accept the petitioners submission that the overall situation is that the petitioners are "victims of a ruthless bylaw that was passed to target the petitioners for no justifiable reason". In my view the bylaw, while prompted by concerns raised by the grandfathered docks and the petitioners' proposed docks, does not target the petitioners nor is there "no justifiable reason". The *Official Community Plan* encompasses broader issues affecting the public interest, an interest that is clearly of significance given the subject is the construction of moorage facilities on the foreshore and into the sea, areas that are Crown property and are open to public access.

[138] Nor do I accept that the Municipal Council prejudiced and deprived the petitioners of rights because "subjectively" they did not like the view and on a "whim" they deprived the petitioners' of substantive rights attached to their land. That

characterization ignores the fact that the *Official Community Plan* includes the issue of viewscapes and public access.

[139] The petitioners' argument in essence, as noted in para. 16(d) of the petition where they allege the Municipality "failed to come to a reasonable solution," is that the Municipality was obliged to behave reasonably in a manner that favoured the petitioners. It is not for this Court to substitute its decision for that of the Municipal Council where they have acted lawfully and within their authority. As noted in *Pollard* at para. 51:

> 51 … A municipal council acting within its statutory powers is answerable to the electorate and to the Legislature. It is not answerable to this or any other Court.

[140] The petition is dismissed with costs to the respondent.

"Punnett J."