

## Definitive Court Ruling On LGA Section 943

Section 943 of the Local Government Act provides a one-year grace period regarding bylaws which are adopted after an application for a subdivision has been submitted. The section reads as follows:

943. If, after

- (a) an application for a subdivision of land located outside a municipality has been submitted to a district highway manager in a form satisfactory to that official, or
- (b) an application for a subdivision of land within a municipality has been submitted to an approving officer and the applicable subdivision fee has been paid,

a local government adopts a bylaw under this Part that would otherwise be applicable to that subdivision, the bylaw has no effect with respect to that subdivision for a period of 12 months after it was adopted unless the applicant agrees in writing that it should have effect.”

Unfortunately, Section 943 does not specify a list of bylaws it applies to but states:

*...a bylaw under this part that would otherwise be applicable to that subdivision...*

Some developers have attempted to argue that the one-year grace period applies to any bylaws under Part 26 of the Local Government Act rather than limiting the application of the section to only those that would be applicable to the subdivision.

On April 17, 2008, the BC Supreme Court ruled in 694385 B.C. Ltd. v. Capital Regional District that the Capital Regional District was correct in limiting the application of the one-year grace period granted by Section 943 only to bylaws that affect the subdivision of land under the Land Title Act and not to other bylaws under Part 26 that regulate building and development.

The Petitioner in this case applied for a building permit to proceed with the construction of single-family houses on lots that were in a development permit area. The building inspector refused to issue the building permits until the Petitioner applied for and obtained the required development permit. The Petitioner brought the Court application seeking an Order that it was not required to obtain development permits because the Official Community Plan Bylaw imposing development permit requirements had been adopted less than one year before the application for the building permit and after it had submitted its application for a subdivision to the Approving Officer and was therefore exempted from the development permit requirements by Section 943 of the LGA.

The Court disagreed with the Petitioner’s argument and dismissed the Petition. The Court noted that the word “subdivision” is specifically defined by Section 872 to mean a subdivision as defined in the Land Title Act, meaning the division of land into

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## **Definitive Court Ruling On LGA Section 943**

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two or more parcels. The Official Community Plan Bylaw in this case imposing the Development Permit requirements did not affect the subdivision of land under the Land Title Act but rather affected building and development on the land that once it was subdivided.

The question of what was the meaning of the words “a bylaw under this part that would otherwise be applicable to the subdivision” had before this decision never been definitively ruled upon by the Courts. In *Schickendanz Properties B.C. Ltd. v. City of Fernie*, the BC Court of Appeal in 2002 found that it did not have to answer the question in that particular case and left the issue to be decided in the future. Other cases either did not discuss the issue at all or simply made non-binding comments on the interpretation of the section.

This case answers for now the appropriate meaning to be given to the one year grace period in Section 943 of the Local Government Act. The Petitioner is currently appealing this decision to the Court of Appeal.

**Guy McDannold**

## **Tendering Law Update**

In our Logo Notebook Winter 2007/2008 Issue No. 64, we told you about the important British Columbia Court of Appeal decision in *Tercon Contractors Ltd. v. British Columbia*. The Court allowed the Province’s appeal and overturned the 3.3 million dollar trial judgment awarded by the B.C. Supreme Court to Tercon. We recommended that you revise your tendering documents to include the “no claim for compensation” clause the Court of Appeal approved of in that case.

It appears that this story is not over yet. On Thursday, July 10, 2008, the Supreme Court of Canada granted Tercon leave to appeal from the B.C. Court of Appeal decision. The final chapter on whether the same or similar “no claim for compensation” clauses will be effective will have to wait until the Supreme Court of Canada gives its decision in this appeal.

In the meantime, we still recommend that you include such a clause in your tendering documentation. We will advise you once the Supreme Court of Canada has given its decision in this appeal.

**Guy McDannold**

## Court Upholds Order To Remove Septic System

On May 7, 2008, the BC Court of Appeal upheld a Provincial Court Judge's order finding a property owner guilty on two counts: constructing a septic system without a permit under the former Sewage Disposal Regulation and failing to comply with a Section 63 Health Act order to remove the system. The property owner was fined \$5,000.00 on each count and also ordered to remove the septic system.

The facts in *R. v. C.B. Abbott* are that Mr. Abbot installed a septic tank and drainage field in August 2002 without obtaining the required permit. The system was installed within 30 metres of Shawnigan Lake and created a possible health hazard. In September 2002, the Environmental Health Officer issued a Section 63 Health Act order requiring Abbott to remove the septic tank and sewage disposal field by the end of the month. Abbott did not comply with the order and did not pursue an appeal of the order.

In December of 2002, Mr. Abbott was charged and, after a trial, was convicted on both counts in September 2004. An appeal to the BC Supreme Court was dismissed in September 2005 and now the BC Court of Appeal has dismissed a further appeal to that Court.

The Court of Appeal specifically found that the Provincial Court Judge had the authority under Section 104.1 of the Health Act, which provides the following additional sentencing authority:

*“Additional sentencing authority*

*104.1(1) If a person is convicted of an offence under this Act, in addition to any punishment imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order containing one or more of the following prohibitions, directions or requirements:*

*(b) directing the person to take any action the court considers appropriate to remedy or avoid any harm to the environment that resulted or may result from the commission of the offence;”*

In interpreting this provision the Court of Appeal stated:

*The clear intention of that section is to remove ‘any menace to public health’.*

*The grammatical and ordinary meaning of s. 104.1(1) is clear. It is obvious that the legislature intended to confer on the court broad sentencing powers having regard to ‘the nature of the offence and the circumstances surrounding its commission’. The available sanctions are clearly directed at deterrence, denunciation and remediation in the context of legislation that is aimed at the protection of public health and enforcement of the legislative scheme. The sanctions available under s. 104.1 are discretionary. The sentencing judge focused on s. 104.1(1)(b). Her remarks concerning Mr. Abbott’s continuing contravention of the Act, expressed in terms of him continuing to use a system which he installed without applying for a permit, might just as easily have been made in the context of s. 104.1(1)(h), which allows an order to be made to prevent the offender from repeating the offence.*

*The nature of Mr. Abbott’s offence was the installation of a sewage disposal system without a permit or authorization and the failure to remove the system after being ordered to do so. The circumstances surrounding the*

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*commission of the offence included the proximity of the sewage system to a public drinking water source. It is in this context that the sentencing judge had to consider the appropriate penalty.*

*In my opinion, a fair, large and liberal interpretation of s. 104.1(1)(b) mandates an interpretation beyond the narrow remedial meaning ascribed to it by Mr. Abbott. Under s. 104(1)(b), the power to make a removal order is not confined to circumstances of actual harm. It is also available to ‘**avoid any** harm to the environment’ that ‘**may result** from the commission of the offences’ (emphasis added). This broader interpretation achieves one of the central objectives of the Act, namely the protection from health hazards. To interpret the section narrowly would mean that, absent demonstrable harm, failing to abide by the Act would allow one to escape from penal sanctions. That is clearly not the intention of the legislature. Indeed, it is plain that one of the risks of non-compliance is an order for removal. Such risk promotes compliance and deters non-compliance with regulations that are clearly designed to protect public health.*

*It cannot be forgotten that the circumstances of this offence were very serious – the threat of sewage infiltrating a public drinking water source with potentially very serious damage.*

*In any event, as already discussed, it is plain that proof of actual harm to the environment is not a condition precedent for the imposition of a removal order. The sentencing judge was obviously persuaded that there was a potential risk of harm. The harm, as she noted, was in the deliberate contravention of the legislative scheme designed to protect the environmental and public health.”.*

**Guy McDannold**

## **Bill 23 — Public Health Act**

Bill 23 introduces a number of reforms in the area of public health that may have far-reaching implications for local government and the role that local government is to play in connection with the management of health and social issues.

### **Local Governments No Longer Local Boards Of Health**

The Health Act of British Columbia has, until now, given most municipalities the powers of a local board of health within their jurisdictions. As local boards of health, local governments were given specific statutory authority to make orders to deal with certain specific health and sanitation issues. The role of local government as the local board of health has now been eliminated. Under the Public Health Act, orders may be made by the Minister and by Health Officers appointed by the Province and the Health Regions.

### **Health Officers**

Health Officers are given powers to issue orders to deal with:

- health hazards (section 30);
- circumstances that may constitute a risk of a health hazard;
- contraventions of the Public Health Act and Regulations;
- bringing someone into compliance with a term or condition of a licence or permit held by that person (section 31(1)(d)).

The specific types of things that can be included in orders are outlined in section 32 of the Public Health Act.

There are also supplementary powers under section 33 for the Health Officer to make follow-up orders where an owner or occupier has failed to act on the order.

### **Public Health Plans**

A key component of Bill 23 is the establishment of a scheme for the creation and implementation of public health plans.

Public health plans can address one or more of the following matters:

- identify and address the health needs of particular groups from the population, including Aboriginal peoples;
- monitoring and assessing the status of the health of the population, including through public health surveillance and monitoring indicators of, or factors influencing, the health of the population;
- prevention and mitigation of the adverse effects of diseases, disabilities, syndromes, psycho-social disorders, injuries and health hazards;
- identification, prevention and mitigation of the adverse health effects of health impairments;
- solicitation and planning for the delivery of core public health functions;
- to achieve a prescribed purpose.

Section 3(1) gives the Minister of Health the power, by order, to “require a public body to make, in respect of a specific issue or geographic area, a public health plan.”

Under section 3(6), a public body that is subject to an order under this section must comply with the order.

The section, then, obviously allows the Minister to order public bodies, such as municipalities, regional districts, as well as including health authorities, to make plans dealing with a wide variety of health related issues. Some of these issues have not

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hitherto been under the direct jurisdiction of local government and some, such as the health needs of Aboriginal peoples, are very clearly the responsibility of the Federal Government and not of local government.

The Minister is given the power to approve a health plan under section 4.

Once a health plan has been made and approved by Cabinet under section 4, then, for the purposes of implementing a public health plan, Cabinet may make a regulation

- requiring a specific part of the government or a local government, to consider the public health plan during strategic or operational planning processes;
- require that the results of specific government or local government strategic or operational planning processes be consistent with the public health plan;
- provide that specified government or local government strategic or operational plans, bylaws or other planning documents have no legal effect to the extent of any inconsistency with the public health plan.

In other words, the public health plan can be made to override other local government planning processes such as regional growth strategies, official community plans and servicing plans. In some circumstances, this could require local governments to provide municipal water service to areas to overcome a health concern, regardless of the local government's policies and bylaws regarding service extension that may have been put in place in order to avoid suburban sprawl or inappropriate development.

Note that it may not be the local government that is required to bring in the health plan. The Minister could order the Health Region to prepare a health plan to address a certain issue, and then, by regulation under section 6 of the Public Health Act, require the local government to consider that public health plan as part of its strategic or operational planning processes.

## **Other Powers of Cabinet**

Under section 120 of the Public Health Act, Cabinet may make the following regulations in respect of local governments:

- to promote or protect the health of the people within its jurisdiction;
- to address a condition, thing or activity that could adversely affect a health promotion or a health protection initiative;
- require the local government to take action to monitor for a health hazard or a health impediment and respond to a health hazard or a health impediment;
- requiring a local government to deliver a public health function;
- authorizing the Ministry to order a local government to modify or “rescind” a bylaw, operational or strategic plan or planning process.

If a duty is to be imposed on one or more local governments or an order to rescind a bylaw made by one or more local governments, then consultation with each local government is required under section 120(4). However, if an order of this type is to affect local governments generally, then the Province may, in place of consultation with local governments individually, consult with the Union of British Columbia Municipalities.

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### Duties in Relation to Health Hazards and Prescribed Health Impediments

If a local government becomes aware of a health hazard or “health impediment”, section 83(1) requires the local government to take the action required by a regulation under section 120.

The effects of a “health impediment” are defined in section 1 but the term itself is to be “prescribed” i.e. listed specifically by regulation. The concept, in terms of the effect of a health impediment, is defined very broadly in section 1. Any condition, thing or activity that causes chronic disease or disability or interferes with or is inconsistent with the goals of public health initiatives, or that is associated with poor health could be prescribed as a “health impediment”. In theory this could apply to a wide range of activities and matters such as smoking, fast food, chemical additives in foods, pesticides, supplements or use of mood altering drugs or alcohol.

Local governments are also required under section 83(1) to consider advice or information provided to the local government by a health officer. How this duty can be fulfilled is partly stated in section 83(2) which requires a local government to designate one of its members, or an officer or employee of the local government, as the local government liaison for the purposes of section 83 and to send notice of the designation to the regional health authority in its area. That would cover information coming from the medical health officer or environmental health officer. Perhaps the provincial health officer would disseminate information through the regional health authority.

Presumably, a local council or regional board could delegate the power to consider advice from a local Health Officer or Provincial Health Officer to a specific member of staff. In certain circumstances, however, the health concern may obviously be of such a serious and immediate nature that it would be wise to bring the matter before council/board to determine whether there is any action which council/board can or wishes to take with respect to the matter.

### Conclusion

Bill 23 is drafted in a way that permits a more comprehensive and top down management of health issues and health crises, with local governments being tasked with the responsibility (and expense) of taking a front line and active role with respect to emerging and chronic public health issues.

**Colin Stewart**

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2nd Floor, 837 Burdett Avenue  
Victoria, BC, Canada V8W 1B3  
Telephone (250) 380-7744  
Fax (250) 380-3008  
logolaw@sms.bc.ca  
www.sms.bc.ca

and to become an email subscriber, contact [webmaster@sms.bc.ca](mailto:webmaster@sms.bc.ca).  
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