

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WEN RESIDENTS SOCIETY

PETITIONER

AND:

CITY OF VANCOUVER

RESPONDENT

PETITION TO THE COURT

ON NOTICE TO:

City of Vancouver
Legal Services
453 W. 12th Avenue
Vancouver, B.C. V5Y 1V4

This proceeding has been started by the petitioner(s) for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within

35 days after that service,

(c) if you were served with the petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: The Law Courts 800 Smithe Street Vancouver, B.C. V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioner is: c/o Baker & Baker, 1708-808 Nelson Street, Vancouver, BC V6Z 2H2 Fax number address for service (if any) of the petitioner: NONE E-mail address for service (if any) of the petitioner: nbaker@bakerbaker.ca
(3)	The name and office address of the petitioner's lawyer is: Nathalie Baker, Baker & Baker, 1708-808 Nelson Street, Vancouver BC V6Z 2H2

Claim of the Petitioner

Part 1: ORDERS SOUGHT

The petitioner applies for the following orders:

1. A declaration that Section 3.1 of Vancouver Bylaw No. 9755, *A By-law to impose development cost levies in the general area of the city* ("Bylaw No. 9755") is *ultra vires* section 523D(10.5) of the *Vancouver Charter*, S.B.C. 1953, c. 55;
2. A declaration that Section 3.1 of *Area Specific Development Cost Levy By-law* No. 9418 ("Bylaw No. 9418") is *ultra vires* section 523D(10.5) of the *Vancouver Charter*, S.B.C. 1953, c. 55;
3. An order quashing s. 3.1 of Bylaw No. 9755 and Bylaw No. 9418;
4. Costs to the petitioner;
5. Such other order as this Honourable Court deems just.

Part 2: FACTUAL BASIS

1. The petitioner, the WEN Residents Society (hereinafter referred to as "WEN"), is a non-profit society incorporated under the *Society Act*, R.S.B.C. 1996, c. 433 and has its head office at 60-1386 Nicola Street, Vancouver, British Columbia, V6G 2G2.

2. The respondent, the City of Vancouver (the “City”), is a municipality incorporated pursuant to the *Vancouver Charter*, S.B.C. 1953, c. 55 as amended, with a business address of 453 West 12th Avenue, Vancouver, British Columbia, V5Y 1V4.
3. WEN is a non-profit society consisting of volunteers residing in the West End neighbourhood of Vancouver, which is located West of Downtown and bounded by English Bay, Coal Harbour, and Stanley Park (the “West End”).
4. WEN’s Constitution sets out its purpose as follows:

The West End Neighbours is a non-profit coalition of volunteers who recognize the unique character of their community and strive to maintain the core assets and relationships within the neighbourhood.
5. WEN was formed in 2010 and since that time it has strived to:
 - (a) preserve the quality of life of West End residents;
 - (b) preserve the unique and distinctive character and heritage of the West End; and
 - (c) ensure that the respondent’s land use decisions and decision-making processes are transparent and democratic.
6. In accordance with its objectives, the petitioner’s activities include:
 - (a) Informing West End residents and the general public about issues and changes affecting the West End;
 - (b) Informing West End residents of Council meetings and appearing before Council regarding issues or changes affecting them and the West End;
 - (c) Assisting West End residents to voice their concerns and opinions;
 - (d) Circulating petitions; and
 - (e) Organizing and hosting community meetings to discuss issues relevant to West End residents.
7. On or about June 18, 2009, the City of Vancouver Council endorsed a program called the Short Term Incentives for Rental Program (hereinafter referred to as “STIR”).
8. The June 2, 2009 Report to Council by the STIR Steering Committee (the “STIR Report”) stated that the primary goal of STIR was to increase the supply of rental housing in Vancouver. In order to meet this goal and encourage the development of new residential market rental housing, the City proposed to provide various incentives to developers, including the waiver of Development Cost Levies (“DCLs”).
9. A DCL is a fee paid by property developers to raise revenue to pay for improvements and amenities such as sewage, water, drainage and highway facilities, park land, child care facilities and replacement housing made necessary by growth and development. The fee is an important source of revenue for the City.
10. DCL Bylaws adopted pursuant to the *Vancouver Charter* establish boundaries, set the rate and describe how to calculate the fee. Levies collected within each DCL district must be spent within the area boundary. DCL bylaws may also establish if and when a development qualifies for a reduction or waiver of the applicable levy.
11. In order to proceed with the STIR Program and increase rental housing, City Council was

required to amend certain bylaws including:

- (a) Parking By-law No. 6059 to relax parking requirements for rental housing generally; and
 - (b) Vancouver Bylaw No. 9755, *A By-law to impose development cost levies in the general area of the city* and *Area Specific Development Cost Levy By-law No. 9418* (both of which impose DCLs on development projects) to waive DCLs with respect to rental housing developments.
12. Both Bylaw No. 9755 and No. 9418 impose DCLs on development projects throughout Vancouver. Most of the West End, however, is subject to Bylaw No. 9755, while Bylaw No. 9418 applies to other specific areas including parts of downtown.
13. In a meeting of Council held on or about June 18, 2009, Councillor Woodsworth moved to refer the STIR Program back to staff in order for them to provide a definition of “affordable housing”. The Chair ruled the motion out of order, it was not put to Council and the term remained undefined.
14. On or about July 7, 2009, the Council adopted Bylaw No. 9899 *A By-law to amend Vancouver Development Cost Levy By-law No. 9755 regarding eligible developments* (“Bylaw No. 9899).
15. Bylaw No. 9899 repealed s. 3.1 of Bylaw No. 9755 and replaced it with the following:
- 3.1 Subject to this By-law, Council imposes, on every person entitled to delivery of a building permit authorizing development in the general area, the levies set out in section 3.2, except that Council waives the levy otherwise required under section 3.2 for construction of for-profit affordable rental housing:*
- (a) which the City Manager, after considering the finishing, size, location and other design considerations, and proposed rents, determines to be affordable; and*
 - (b) against title to which the owner of the property on which such housing is situate has registered an instrument, in form and substance, and with priority of registration, satisfactory to the Director of Legal Services, restricting the tenure of such housing to rental only for:*
 - (i) the longer of the life of the building in which they are situate and 60 years, or*
 - (ii) such other term to which the city and owner may agree.*
- [emphasis added]
16. Bylaw No. 9899 also amended Bylaw 9755 by adding the following definition:
- “for profit affordable rental housing’ means three or more dwelling units in the same building or project, determined by the City Manager under s. 3.1 to be affordable, but does not include alterations of or extensions to such units”.*
17. Council also adopted Bylaw No. 9900, *A Bylaw to amend Area Specific Development Cost Levy Bylaw No. 9418 regarding eligible developments*. Bylaw No. 9900 amended Bylaw 9418 to include the same provisions as those set out in Bylaw No. 9899.
18. The term “affordable”, however, is not defined in Bylaw No. 9755, Bylaw No. 9418 or the *Vancouver Charter*. However, pursuant to STIR’s – “Frequently Asked Questions” created by the City of Vancouver and dated May 11, 2010, the Bylaw allows the City Manager to “determine affordability” which STIR defines as “market rental housing for those who

cannot afford to buy a home”.

19. The STIR Program ran for 2½ years and ended on December 15, 2011. As of March 27, 2012 4 development permits had been issued, 6 had been approved with permits pending and 16 applications were in progress. These developments are located throughout Vancouver, including the West End.
20. On or about May 15, 2012, the City Council approved the Secured Market Rental Housing Policy, May 2012 (“*Rental 100*”). As is noted in the Staff Report dated May 8, 2012 and the Policy itself, the Rental 100 Program, like STIR, is aimed at increasing the supply of “secure market rental housing that is affordable to moderate income households.”
21. Under Rental 100 “affordable” rents are to be primarily achieved “through tenure as renting is inherently less expensive than owning”.
22. On or about May 15, 2012, the Director of Planning issued Rental Incentive Guidelines (the “Guidelines”) relating to development applications under Rental 100. It provides that the City manager will determine whether a project meets the definition of “*for-profit affordable rental housing*” after considering various factors including finish, size, limited on-site common amenities, location and other design considering and proposed rents but does give any indication as to how these factors are to be taken into account. In addition, the Guidelines state that rents will “reflect market rents for newly constructed rental units with rental increases governed by the *Residential Tenancy Act*, S.B.C. 2002, c. 78.”
23. On September 24, 2013, the City of Vancouver will hold a public hearing regarding a proposal to rezone 3068 Kingsway from C-2 Commercial District to CD-1 Comprehensive District. The proposal is for 30 units of market rental housing. Although the rezoning application is being considered under the STIR Program, it provides an example of how the City is applying the Bylaw under both STIR and Rental 100.
24. The City staff report dated July 9, 2013 supporting the application states that the main focus of the STIR Program (and now Rental 100) is to “increase the supply of rental housing that is affordable to households seeking rental housing in the regular housing market as an alternative to home ownership.” The staff report also demonstrates that while the proposed rents are less than the average rents for new buildings city wide, they are more than average markets rents in Vancouver South, where the development is located.
25. In addition, the report states that that “*The City Manager, pursuant to the Vancouver Development Cost Levy By-law, has determined that the rental housing proposed in this application is affordable in the context of the STIR program incentives.*”
26. The DLC Waiver for the market rental units for this proposed development is approximately \$382,125.

Part 3: LEGAL BASIS

Limitation periods and Standing

1. S. 2 of the *Judicial Review Procedure Act* (“JRPA”) provides:

Application for judicial review

2 (1) An application for judicial review must be brought by way of a petition proceeding.

(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:

(a) relief in the nature of mandamus, prohibition or certiorari;

(b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

2. In addition, s. 524 of the *Vancouver Charter* provides:

Illegal by-law or resolution may be quashed

524. On the application of an elector or a person interested in the by-law or resolution, a Judge may declare the by-law or resolution void in whole or in part for illegality.

3. Notwithstanding the limitation period set out in s. 526 of the *Vancouver Charter*, the Petitioner's application for judicial review is not time barred.

S. 11 of the *JRPA*

Loring v. City of Victoria, [1989] B.C.J. No. 1695

Signcorp v. Vancouver (City), [1986] BCJ No. 1107, at Para. 6

4. WEN has standing to bring this Petition pursuant to s. 524 of the *Vancouver Charter* and/or the *JRPA* as a person *interested* in the Bylaw. The Petitioner consists of residents and electors of the City of Vancouver, who live in the West End. Accordingly, Bylaw 9755 directly affects WEN and its members. It results in an increase in development without the corresponding increase in revenue necessary to provide for the improvements and amenities made necessary by growth and development.

Saanich Inlet Preservation Society v. Cowichan Valley (Regional District),
[1983] 4 W.W.R. 673 (B.C.C.A) paras. 15 and 25

Abbotsford Families United v. Abbotsford (City), 2009 BCSC 463

5. WEN also claims standing based on the effect on the public interest of the misuse of municipal powers.

Lambert v. Resort Municipality of Whistler 2004 B.C.S.C. 342 March 15, 2004, Vancouver Registry L032807 pars. 18 – 20

The Bylaw Delegates Legislative Power to the Manager Without Authority

6. A delegate may not re-delegate a legislative authority, unless that delegation is expressly authorized by the legislation.

Vic Restaurant v. City of Montreal, [1959] SCR 58

7. Section 523D (10.4) of the *Vancouver Charter* confers legislative authority on Council to “waive or reduce a levy under this section for an ‘eligible development’”. There is nothing in the *Vancouver Charter* that allows Council to delegate its discretionary power conferred by s.523 (D) (10.4)-(10.5) to the City Manager or any other official.
8. Pursuant to s. 523D(10.3) an “eligible development” means a development that is eligible in accordance with an applicable bylaw under this section if it falls within one or more of the following categories:
 - a. *for-profit affordable rental housing;*
 - b. *a subdivision of small lots that is designed to result in low greenhouse gas emissions;*
 - c. *a development that is designed to result in a low environmental impact.”*
9. Section 523D(10.5) provides that for the purpose of subsection 10.4 the Council, by bylaw:
 - (a) *shall establish what constitutes an eligible development or a class of eligible developments for the purposes of one or more categories of eligible development described in subsection (10.3),*
 - (b) *shall establish the amount or rates of reduction for an eligible development, which may be different for different categories of eligible developments described in subsection (10.3) or different classes of eligible developments established in the by-law, and*
 - (c) *may establish the terms and conditions that must be met in order to obtain a waiver or reduction under subsection (10.4).*
10. Section 523D of the *Vancouver Charter* thus empowers Council to waive DCLs. To do so it must determine two things: (1) That the development is “affordable” within the meaning of the phrase “for profit affordable rental housing;” (s. 10.3) and (2) that it is an “eligible development” within the requirements of s. 10.5.
11. Council cannot delegate its power under section 523(D)(10.5) to establish what constitutes an “eligible development”. Section 3.1 of Bylaw No. 9755 and Bylaw No. 9418 illegally delegate to the City Manager Council’s legislative power to determine what constitutes an “eligible development” and to determine what constitutes “affordable” rental housing for the purposes of Vancouver Charter 523 D (1) s. 10.3(a). The absence of sufficient criteria to determine whether or not a development qualifies for the DCL waiver constitutes an invalid delegation of an absolute discretion to the City Manager. Such a power of discretion could only be granted to the City Manager by the legislature.

Barthropp v West Vancouver (1979), 17 BCLR 202 (SC)
12. S. 3.1 of Bylaw 9755 and Bylaw 9418 provides that “ ...Council waives the levy otherwise required under section 3.2 for the construction of for-profit affordable rental housing (a) which the City Manager, after considering finishing, size, location and other design considerations and proposed rents, determines to be affordable; However, the Bylaw does not define “affordable” or set out any specific criteria for what constitutes “affordable rental housing”.
13. Furthermore, the section gives no guidance as to how the listed factors (finishing, size etc.) are to be weighed and considered. There is no criteria for measuring or comparing proposed “affordable” developments to “non-affordable” developments i.e. market rates

for equivalent housing units or income levels of the intended occupants. To the contrary, the Manager has been delegated an unfettered discretion to waive DCL's for projects that are not "affordable" at all but simply market rental.

14. Council could have provided a clear and comprehensive definition of "*for profit affordable rental housing*" as was done in *Greater Vancouver Sewerage and Drainage District Development Cost Charge Bylaw No. 254, 2010* s.3.1 (i) but it chose not to.
15. Council has improperly given the City Manager an absolute and unfettered discretion to decide whether a development qualifies for a DCL waiver, contrary to section 523D(10.3)-(10.5) of the Vancouver Charter.

"Affordable Housing" and "Rental Housing" have different meanings under the Vancouver Charter

16. S.3.1 of Bylaw No. 9755 and Bylaw No. 9418 empowers the City Manager to waive DCLs for "*market*" rental housing, as opposed to "*affordable*" rental housing, contrary to the powers granted under s. 523D(10.3) – (10.5) of the Vancouver Charter.
17. There is nothing in the definition of "*for profit affordable rental housing*" or section 3.1 of Bylaws No. 9755 and No. 9418 that limits the granting of the DCL waiver to "affordable" housing. To the contrary, the context of the bylaw, including the STIR policy, Rental 100 and staff reports, makes it clear that the waiver is to be granted to developments that are not "affordable" at all but rather market rate rentals.

Perry v. Vancouver (City), [1994] B.C.J. No. 293 para. 14

18. To the extent that "*affordable*" means *market rental* housing, as opposed to freehold ownership, both Bylaw No. 9755 and Bylaw No. 9418 are *ultra vires* the *Vancouver Charter*.
19. It is a fundamental rule of statutory interpretation that the legislature avoids superfluous or meaningless words, or speaks in vain. "*Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.*" In addition, "*all words in a statute must be given meaning*".

R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., 2008 at 210

Winters v. Legal Services Society, [1999] 3 SCR 160, 177 DLR (4th) 94 at para. 48,
citing *Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193

20. The provincial legislature has used both the term "*affordable*" and "*rental*" in describing one type of "*eligible development*." Both "affordable" and "rental" must therefore have different meanings. The legislature cannot have intended the term "*affordable*" to mean market rate rentals versus ownership. Such an interpretation would render the word "affordable" or "rental" superfluous and without meaning.
21. S. 561(3) of the *Vancouver Charter* supports the distinction between "*affordable housing*" and "*rental housing*." If "*affordable housing*" was intended to mean "*rental housing*" at market rates section 561(3) would have been drafted without reference to "*rental housing*." "*Affordable housing*" must therefore mean something different than rental housing at market rates.
22. To the extent that Bylaw No. 9755 and Bylaw 9418 define "*for-profit affordable rental*

housing” as “affordable” because it is “rental” housing, the Bylaw is *ultra vires* the *Vancouver Charter*.

The petitioner will rely on the following:

- (a) The *Vancouver Charter*, S.B.C. 1953, c. 55;
- (b) The *Local Government Act*, R.S.B.C. 1996, c. 323;
- (c) The *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;
- (d) Rules 2(1)-(2), 14-1, and 21-3(1) of the *Supreme Court Civil Rules*;
- (e) The inherent jurisdiction of the court.

MATERIAL TO BE RELIED ON

1. Affidavit #1 of Virginia Richards, made on September 18, 2013;

The petitioner estimates that the hearing of the petition will take 1 day.

Dated at Vancouver, British Columbia on September 18, 2013.

Signature of
[] petitioner [X] lawyer for petitioner(s)
Nathalie Baker

To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this petition

with the following variations and additional terms:

.....

.....

Date:

.....
Signature of Judge Master