IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *WEN Residents Society v. Vancouver (City),* 2014 BCSC 965

Date: 20140530
Docket: S136977
Registry: Vancouver

Between:

WEN Residents Society

Petitioner

And

City of Vancouver

Respondent

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

Counsel for the Petitioner:	Natalie Baker
Counsel for the Respondent:	Iain K. Dixon Grant Murray
Place and Date of Hearing:	Vancouver, B.C. April 9-10, 2014
Place and Date of Judgment:	Vancouver, B.C. May 30, 2014

Introduction

[1] The petitioner is a non-profit society of volunteers residing in the West End neighbourhood of Vancouver, interested in preserving the neighbourhood and in the City of Vancouver's decisions and processes regarding land use.

[2] The City has certain statutory authority to waive development charges in relation to "for-profit affordable rental housing". Purportedly acting under this authority, the City adopted s. 3.1A of City of Vancouver by-laws No. 9755, *Vancouver Development Cost Levy By-law,* (25 November 2008), and No. 9418, *Area Specific Development Cost Levy By-law,* (18 January 2007) (the "By-laws").

[3] The petitioner seeks judicial review of s. 3.1A of the above By-laws. The petitioner's challenge asserts that the City has not in fact provided a scheme for "affordable" rental housing, but rather, has provided a scheme which subsidizes private developers to build market-based rental housing.

[4] Alternatively, the petitioner says that the City has unlawfully delegated to staff its authority to determine eligibility of rental housing developments as "for-profit affordable rental housing".

[5] The petitioner says that the City has therefore instituted a program of waiving development charges that falls outside its statutory authority. The petitioner seeks a declaration that s. 3.1A of the By-laws is *ultra vires* and an order quashing the same.

[6] The petitioner's standing to bring this Petition is not challenged.

Background

[7] The City of Vancouver has certain powers given to it by the legislature of British Columbia, enacted in the *Vancouver Charter*, S.B.C. 1953, c. 55.

[8] Section 523D of the *Vancouver Charter* authorizes the City to impose Development Cost Levies ("DCL") on developers at the building permit stage of a development. A DCL is a fee paid by 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 development. The purpose of the levy is to help defray or offset the anticipated cost of upgrading infrastructure.

[9] DCL By-laws 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. Pursuant to s. 523D(10) levies cannot be imposed in certain specific circumstances including developments with less than four self-contained units or for social housing.

[10] The *Vancouver Charter* was amended in 2008 to permit the City of Vancouver to waive or reduce DCLs for specific types of developments, including “for-profit affordable rental housing”. This category of housing was not defined in the *Vancouver Charter*, which left it to the City to establish by-laws setting out what constitutes an eligible development, the amount of any waiver or reduction of DCLs, and the terms and conditions to be met in order to obtain a waiver or reduction of DCLs.

[11] Specifically ss. 523D(10.3)–(10.5) of the *Vancouver Charter* provide as follows:

> (10.3) In subsections (10.4) and (10.5), "eligible development" means development that is eligible in accordance with an applicable by-law under this section as being for 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.
>
> (10.4) Subject to a by-law under subsection (10.5), the Council may waive or reduce a levy under this section for an eligible development.
>
> (10.5) For the purposes of subsection (10.4), the Council, by by-law
>
> (a) shall establish what constitutes an eligible development or a class of eligible development 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

> development described in subsection (10.3) or different classes of eligible development 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).
>
> [Emphasis added.]

[12] On July 7, 2009, the City adopted a by-law to repeal and replace s. 3.1 of By-law No. 9755 with provisions relating to waiving DCLs for construction of "for-profit affordable housing".

[13] In the original Petition herein, the petitioner challenged that amended by-law as *ultra vires*, as not authorized by the *Vancouver Charter* and also as an unlawful delegation of power to the City Manager.

[14] The petitioner says that under its unlawful program, the City has foregone over $10 million in developer charges that it otherwise would have collected. This foregone revenue increases the tax burden on residents.

[15] A few days before the date set for hearing of the Petition, the City amended its By-laws on December 3, 2013. Council adopted new by-laws to add s. 3.1A to By-laws 9755 and 9418. These amendments sought to address many of the legal challenges raised in the Petition.

[16] The new provision, s. 3.1A of the relevant By-laws, is set out below following s. 3.1:

> 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.
>
> 3.1A Notwithstanding section 3.1, Council waives the levy otherwise required under section 3 for construction of for-profit affordable rental housing, which shall mean housing where:
>
> (a) all dwelling units in the building are rental units;
>
> (b) no dwelling units are strata units;
>
> (c) the average size of the dwelling units is not greater than:
>
> (i) 42 square meters for studio units,
>
> (ii) 56 square meters for one bedroom units, or
>
> (iii) 77 square meters for two bedroom units,

> except that the floor area used for stairways within two bedroom townhouse units of two or more storeys is excluded from the calculation of maximum unit size;
>
> (d) agreed upon average rents per unit type for initial occupancy do not exceed the following specified rents:
>
> (i) $1,443 per month for studio units,
>
> (ii) $1,517 per month for one bedroom units, or
>
> (iii) $2,061 per month for two bedroom units,
>
> except that such rents shall be adjusted annually on January 1 to reflect the change in average rent for all residential units built since the year 2000 in the City as set out by the Canada Mortgage and Housing Corporation in the Rental Market Report published in the previous calendar year;
>
> (e) the proposed construction costs for the rental residential floor area do not exceed $2,475 per square meter, except that such costs shall be adjusted annually on January 1 to reflect any change in medium level construction costs for Residential Apartments as set out by Altus Group in the Construction Cost Guide published in the previous calendar year; and
>
> (f) the owner of the property on which such housing is situate has registered against title to that property an instrument, in form and substance, and with priority of registration, satisfactory to the Director of Legal Services, ensuring the initial rents are in accordance with 3.1A (d) and restricting the tenure of such housing to rental 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.

[17] In the By-laws, Council defined “for-profit affordable rental housing” as follows:

> “for-profit affordable rental housing” means a new building containing multiple dwelling units, which meets the requirements of section 3.1A to be for-profit affordable rental housing, but does not include alterations of or extensions to those dwelling units.

[18] The petitioner has considered the new By-laws and remains of the position that s. 3.1A is *ultra vires*. This Petition has therefore been amended to challenge the new s. 3.1A of the By-laws.

Context

[19] It is important to understand the context of the City's actions in enacting s. 3.1A of the By-laws.

[20] The City's evidence as to the background of the two sets of By-laws is essentially unchallenged. This evidence explains that as a result of the introduction of condominium ownership and the cessation of Federal tax incentives for market rental housing, during the 1970's the supply of new market rental housing in Vancouver fell from an average of nearly 2,000 units per year from 1960 to 1974, to fewer than 400 units per year during the following three decades.

[21] From 2006 to 2010, the City approved about 80 units of privately initiated market rental housing per year.

[22] The City created a three year time-limited program called the Short Term Incentives for Rental Program ("STIR") in 2009, in conjunction with the amendments to the *Vancouver Charter* to allow for a waiver of DCLs for "for-profit affordable rental housing".

[23] The City acknowledges that the STIR program was targeted at moderate income households who cannot afford to own a home in the City.

[24] In 2012, after the end of the three year pilot program, STIR, the City reviewed the results of the program. It concluded that mixed use developments were less effective at delivering affordable housing as compared to projects that were 100% market rental housing.

[25] The City then adopted a new program, called the Secured Market Rental Housing Policy, known as "Rental 100". The program is essentially the same as the STIR program, with the exception that it is only available for projects that are 100% rental housing.

[26] The City's objective remains the same, to enable the development of rental housing that is affordable to moderate income households that cannot afford home ownership.

[27] After the initial Petition herein, City staff prepared a report to Council dated November 22, 2013, setting out the recommendations for changes to the relevant by-laws (the "November 2013 Staff Report"). This was the report before Council at the meeting on December 3, 2013 when Council voted to change the By-laws to the present form, of which s. 3.1A is the subject of the petitioner's amended challenge.

[28] Council did not adopt the exact amendments proposed by City staff, although it is clear that Council must have accepted most of the recommendations in adopting the current s. 3.1A of the challenged By-laws.

[29] The November 2013 Staff Report set out that the high cost of home ownership in Vancouver was well-documented, and that rental housing provides an affordable alternative because rents for a comparable unit are much lower than a mortgage payment.

[30] In the November 2013 Staff Report, under the heading "Monitoring Affordability", City staff made a comparison between home ownership and rental costs. This was illustrated with the example of the monthly cost to purchase a two bedroom unit condominium priced at $389,000, factoring in mortgage interest, strata fees and property taxes, versus the cost to rent a two bedroom apartment. This resulted in a comparison of a cost of $2,552 per month for ownership versus $1,455 per month for rental. City staff assumed the affordability could be measured as 30% of income, and so concluded someone would need an income of $102,000 to purchase the condominium versus an income of $58,200 to rent the apartment in this example.

[31] The November 2013 Staff Report reported that the STIR program had resulted in 19 projects with 1,330 market rental units, in contrast to the approximately 80 units per year being created from 2006 to 2010.

[32] The November 2013 Staff Report noted that the Mayor's Task Force on Housing Affordability had identified a target household income range of $21,500 to $86,500 for the City's affordable housing initiatives.

[33] The November 2013 Staff Report recommended that the initial maximum rents in the amendments to the By-laws be based on the CMHC average rents for rental housing built since 2000 plus 10%. It was the City staff view that these rents would be affordable to households within the targeted income range, except for the three bedroom units proposed.

[34] Council decided not to approve three bedroom units in the amended By-laws and not to approve an additional 10% maximum in rents above the CMHC average for new market rentals.

[35] While the amended By-laws dealt with limits on initial rents, the November 2013 Staff Report noted that future rents would be regulated by the Province of BC through the *Residential Tenancy Act*, R.S.B.C. 1996, c. 406.

[36] Following Council's decision to approve s. 3.1A of the amended By-laws (the provisions now subject to fresh challenge), the City has filed further evidence explaining the process by which the DCL waivers are granted for rental housing projects meeting the City's new criteria.

[37] Two developments have been presented to council in relation to this program since then, however as I understand it no new projects have been completed yet under the amended By-law.

[38] The City evidence explains that the administration of the DCL waiver is complicated by the timing of various City approvals. The DCL payments are triggered by the issuance of a building permit. However, the building permit follows several preliminary steps that the developer must first go through prior to building the project.

[39] The rental projects that might qualify under the City's criteria for DCL waivers typically involve rezoning and redevelopment of a property. For those that require it, the rezoning approval and related by-law enactment must take place prior to the issuance of a development permit and the building permit.

[40] There is a City staff report to Council on those projects seeking rezoning, which also discusses that project's eligibility for the DCL waiver. Council will consider those projects' eligibility for the DCL waiver as part of the analysis when Council is considering whether or not to adopt the related rezoning by-law, known as a CD-1.

[41] The report to Council in respect of the rezoning application on such projects is a preliminary evaluation of the project. Ultimately if the rezoning is approved by Council, it is a message to the developer that Council approves in principle the rezoning and if the project continues as proposed, the development will qualify for the waiver. The actual waiver of DCLs occurs at building permit issuance, which can be a long time after the report is considered by Council.

[42] The proposed construction costs are accepted at face value based on an analysis of the developer's pro forma documents submitted as supporting documents for the rezoning application. These are not subsequently reviewed to determine whether the actual construction costs were higher or lower than the proposed construction costs.

[43] The size of the units and the number of bedrooms is controlled by the development and building permits.

[44] Regardless of whether or not the particular project does require rezoning approval, each project that qualifies for the DCL waiver as a "for-profit affordable rental housing" project must be subject to a housing agreement.

[45] The housing agreement is the legal mechanism by which the City controls the initial rents and secures all dwelling units in the building as rental units for the life of the building or 60 years, whichever is greater, in accord with s. 3.1A of the amended By-laws.

[46] Section 565.2 of the *Vancouver Charter* authorizes Council to enter into a housing agreement, by by-law. Such housing agreements must then be filed by the

City in the land title office, which has the effect of making the land subject to the housing agreement.

[47] The housing agreements referred to in s.3.1A of the By-laws are ultimately approved by Council by way of Housing Agreement By-law.

Issues

[48] Two issues are raised by the petitioner's challenge:

a) is s. 3.1A of the challenged By-laws authorized by s. 523D(10.3)-(10.5) of the *Vancouver Charter* as for the purpose of establishing a class of eligible development of "for-profit affordable rental housing" ; and,

b) does s. 3.1A of the challenged By-laws unlawfully delegate Council's powers to City Staff?

[49] A third issue is what is the applicable standard of review, to which I will turn first.

Analysis

Standard of Review

[50] The Supreme Court of Canada in *Catalyst Paper Corp v. North Cowichan (District),* 2012 SCC 2 [*Catalyst*], identified the limited power of the courts to set aside municipal by-laws. The guiding principles are:

a) municipalities only have the powers delegated to them by the provincial legislatures and must act within those powers (para. 11);

b) the by-laws passed by municipalities must comply with the rationale and purview of the statutory scheme which delegated power to the municipality (paras. 15, 25);

c) the court reviewing the exercise of municipal powers must apply either a standard of review of correctness or reasonableness, depending on the grounds for review (para. 13);

d) the reasonableness standard of review asks the question of whether the by-law at issue is reasonable having regard to process and to the range of possible outcomes (para. 16);

e) in respect of process, this can vary with the context and nature of the decision. The municipality must follow required processes and cannot act for improper motives (paras. 28-29);

f) in respect of possible outcomes, reasonableness must be assessed in context of the decision being made and the relevant factors elected councillors may legitimately consider, such as social, economic, political and other factors (paras. 18-19). Only if the by-law is contrary to one that a reasonable body informed by these factors could have taken will it be set aside (para. 24).

[51] The Supreme Court of Canada in *Catalyst* emphasized the deference that courts must show to decisions taken by municipalities, appreciating that councillors are not making quasi-judicial decisions but are instead taking legislative action when passing by-laws, noting at para. 19 that:

> In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.

[52] In *Catalyst*, the parties agreed that the applicable standard of review was reasonableness. In that case, there was no challenge to reasonableness of the municipality's processes or motives for passing the by-law in question.

[53] In the present case, there is no challenge to the reasonableness of the municipality's process and no argument that Council acted for improper motives.

[54] However, the petitioner asserts that the applicable standard of review here is one of correctness, not reasonableness. This is because the petitioner argues that the City did not have jurisdiction to pass the challenged amendment to the by-laws as the amendment does not fit the statutory purpose of establishing "for-profit affordable rental housing".

[55] Alternatively, the petitioner argues that the City did not have jurisdiction because it delegated its authority to City staff to establish what is an eligible development.

[56] The petitioner relies on the Supreme Court of Canada's judgment in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, applied in *R.G. Facilities (Victoria) Ltd. v. British Columbia*, 2013 BCCA 402, for the proposition that the standard of review for questions of jurisdiction is correctness.

[57] The respondent says that on close examination the petitioner's challenge is not really to the City's jurisdiction but rather to the reasonableness of the City's challenged By-laws, and as such, the standard of review is reasonableness.

[58] I conclude that the question of whether or not the challenged s. 3.1A of the By-laws is within or outside the legislative purpose is a question of the City's jurisdiction and is governed by the standard of correctness; however, if it is within the legislated purpose, then the question is whether it meets the test of reasonableness.

[59] On the reasonableness standard of review, it must also be taken into account that s. 148 of the *Vancouver Charter* contains a privative clause:

> A by-law or resolution duly passed by the Council in the exercise of its powers, and in good faith, shall not be open to question in any Court, or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them.

[60] This further emphasizes the high degree of deference the courts must give to decisions of City council for purposes of the reasonableness standard of review: *Sahota v. Vancouver (City),* 2010 BCSC 387 at para. 49.

First Issue

[61] The petitioner says that the first issue involves the question of whether or not the City exercised its powers in passing s. 3.1A of the By-laws in accordance with the statutory purpose for which the City's powers were granted by the legislature. It

submits that the Court must determine whether the City "had the power to do what it did in the manner it chose to do it and for the reason stated": *356226 British Columbia Ltd. v. Vancouver (City),* [1998] B.C.J. No. 1331 at para. 23.

[62] The City says it had authority to pass s. 3.1A of the By-laws based on the *Vancouver Charter*, s. 523D(10.3) and (10.5), which gave the City power to "establish what constitutes an eligible development" or a "class of eligible development", meaning development that is "for-profit affordable housing" and thereby eligible for a waiver of DCLs.

[63] The petitioner says that s. 3.1A of the challenged By-laws does not meet the purpose of the authorizing legislation.

[64] The main focus of the petitioner is on the meaning of "affordable".

[65] The evidence indicates that the goal of the program developed by the City under s. 3.1A of the challenged By-laws is to create rental housing for moderate income households who cannot afford to own a home in the City of Vancouver. The City is not attempting by this program to create rental housing for low income households.

[66] The City submits that through the challenged s. 3.1A of the By-laws it has established criteria for the purpose of creating rental housing that is both "for-profit" and "affordable". In determining how to best accomplish the twin goals of affordability and for-profit for construction of new rental housing, the approved s. 3.1A of the By-laws establishes the following criteria:

a) all dwelling units in the building must be rental and none strata;

b) size limits on the units;

c) maximum limits on average rents per unit or less as agreed;

d) limits on proposed construction costs;

e) registration of an instrument on the title of the property ensuring that the initial rents are in accordance with the by-law and restricting the

> tenure of the housing to rental housing for the longer of the life of the building and 60 years or such other term as the City and owner may agree.

[67] The City explains that the size limits of the units are deliberately small, in the expectation that these will rent for less than larger units and this thereby will encourage affordability. These size limits were informed by BC Housing Guidelines for social housing.

[68] The City also explains that the limits on proposed construction costs are intended to result in more moderate finishing standards. The By-laws refer to the medium level of construction costs as determined by an annual report published by the Altus Group. Tying the proposed construction costs to this report avoids having to reinvent a standard each year. The City links the proposed costs to moderate finishing standards with the expectation that these units will therefore rent at lower rates than units with higher finishing standards, especially over time. The City says that this is also in pursuit of the goal of affordability.

[69] Also, the maximum average rents chosen by the City as parameters in the By-laws were based on the reported average rents for buildings built since 2000, as set out by the Canada Mortgage and Housing Corporation ("CHMC") in its annual housing report. As noted above, City staff had proposed that the maximum rents be an additional 10% higher than the CMHC reported averages, but Council rejected that suggestion.

[70] The City explains that there are two reasons for its choice of imposing maximum rental rates tied to CMHC averages for newer rental units.

[71] The first reason for tying the maximum rental rates to the CHMC reported average rental rates for units built since 2000 is that the City is of the view that in order to meet the legislative goal of making the rental housing "for profit", the rents should be tied into market rates for newer buildings.

[72] The City's evidence is that the vast majority of rental housing in the City's West End neighbourhood was built prior to 1975 and is at least 40 years old. Between 1962 and 1975, more than 220 mid- and high-rises were built in that neighbourhood. The City's view is that newly built rental accommodation will naturally attract higher market rents than much older rental stock and so this is why it decided to use the comparator of market rentals for units built since 2000.

[73] Second, the goal of also making the rents affordable was to be served by making the maximum initial rent the average of market rents. Setting this maximum would thus exclude higher than average rents for newer units.

[74] The petitioner is highly critical of the decision to impose maximum rental limits as high as the CHMC average rental rates for relatively new rental stock buildings built since 2000. This results in the rental rates being higher than the average for all rental stock. The petitioner argues that this takes the program outside the statutory purpose of providing "affordable" rental housing.

[75] The petitioner says that the City is in error in defining "affordability" in relation to home ownership and in allowing rents to be the average market rents of new rental stock.

[76] The petitioner argues that the word "affordable" must mean below market rates for rental buildings, not below the cost of home ownership, if one looks at the legislative scheme as a whole. Otherwise why refer to the word "affordable rental housing", the legislature could have simply referred to "rental housing".

[77] The petitioner also points to the fact that in addition to "for-profit affordable rental housing", s. 523D(10.3) of the *Vancouver Charter* lists two other forms of "eligible developments": "a subdivision of small lots that is designed to result in low greenhouse gas"; and, "a development that is designed to result in low environmental impact".

[78] The petitioner submits that the meaning of the word “low” in ss. (10.3)(b) and (c) of s. 523D of the *Vancouver Charter* clearly means below the typical or standard amount.

[79] Thus, the petitioner submits that in enacting ss. 523D(10.3)-(10.5) of the *Vancouver Charter* the legislature has made clear that it considers providing an incentive or subsidy to developers, by way of waiver of or decreased DCLs, to be worthwhile in order to achieve either one of two specific goals: rental housing which is below market rates for rentals; and, developments that are lower than average in impact on the environment.

[80] The City disagrees with the petitioner’s analysis.

[81] The City submits that the crux of the petitioner’s argument is that the petitioner would draw the line as to what is “affordable” in a different place than Council did in establishing the impugned s.3.1A of the By-laws, by concluding that it must be rental housing that is below market rates for other rental housing.

[82] I accept the City’s submission and do not accept the petitioner’s argument that the legislature intended by the words “for profit affordable rental housing” to require that the rental housing be at rental rates below the average of market rental rates. The legislature did not use the words “below market rental rates”. The legislature used the words “for-profit” and “affordable” and these words have to be read together.

[83] The word “affordable” is a relative term, raising the question of “affordable to whom”? The words “for-profit” are also subjective, begging the question, “how much profit”?

[84] A fair interpretation of the statutory authority is that the legislature recognized that there are many possible permutations and combinations of housing incentive schemes that could contribute to profit for a developer and affordability for residents. The legislature thus deliberately chose subjective terms to allow the City wide

latitude in how it chose to accomplish the goal of establishing a “for-profit affordable rental housing” scheme.

[85] The petitioner relies on evidence that the rental rates for new units created under the City’s prior scheme (under the previous version of the challenged by-law) are renting at considerably higher than average rental rates for all rental stock. Also, there is evidence that suggests new rental projects will be barely viable at full market rents for new rental housing.

[86] The petitioner says that what the new scheme will likely produce is small, moderately finished rental units renting at higher rates than they would otherwise rent in the market. In other words, the petitioner’s position is that what the City has chosen to do is to subsidize developers to build substandard products for renters, at no real benefit to renters of modest means.

[87] But this evidence simply emphasizes the difficulty of the task faced by Council in coming up with a scheme to incentivize the private development of rental housing that is both “for profit” and “affordable”. Further, Council’s task is not to think only of the short-term but also of the long-term impact of this program. There is evidence to suggest that over time the rental units created under this program will likely attract less and less rent in the marketplace compared to larger, newer, better-finished units, and thus over time the “affordability” aspect of the rental stock will increase.

[88] The subjective nature of what is “for-profit”, and the relative nature of “affordability” creates considerable room for disagreement but I also find that it creates considerable room for Council to exercise its judgment. I conclude that this is what it has done.

[89] Despite the thoughtful arguments advanced by the petitioner, I find that the petitioner’s position falls into the category of criticism of Council’s political choices. That is not a matter on which the Court ought to weigh in. Instead, the forum for these arguments is the ballot box.

[90] I find that Council did not act outside the parameters of the *Vancouver Charter* in choosing the scheme it adopted by s. 3.1A of the challenged By-laws. The Council had power to establish what constitutes an eligible development of "for-profit affordable housing" and s. 31A was its method of doing so. As such, the City did not act *ultra vires*.

[91] The petitioner argues in the alternative that the By-laws are unreasonable. This challenge is subject to the standard of review of reasonableness and must also fail.

[92] As mentioned, the reasonableness test is whether or not the by-law is one that no reasonable body could have taken, informed by the wide background of factors elected councillors may consider: *Catalyst* at para. 24.

[93] Here the factors the councillors are entitled to consider include the perceived social and economic benefits to the City by virtue of subsidizing the creation of a larger body of privately developed rental unit stock in the City, with features some may consider desirable and some may not in terms of size and finish of the units, aimed at residents with moderate incomes as opposed to residents with low incomes.

[94] The core of the petitioner's concern is that the By-laws have the effect of subsidizing developers at the cost to other taxpayers without solving a larger problem of affordable housing.

[95] As is made clear in *Catalyst*, the fact that a by-law imposes a greater share of the tax burden on one class of ratepayers as compared to another is not a reason for setting aside a by-law.

[96] I have also already commented that if the members of the petitioner society do not like the form of development that the By-laws encourage and do not feel the City has gone far enough in establishing affordable housing in the City, this is a matter to raise in elections but is not for the Court on this challenge.

[97] This ground of the Petition is therefore dismissed.

Second Issue

[98] The alternative argument of the petitioner is that the challenged s. 3.1A of the By-laws unlawfully delegated a legislative function to City staff, under the guise of administrative or executive discretion.

[99] The petitioner argues that this is because s. 3.1A leaves it to City staff to reach agreement with the developer as to actual initial rents to be charged, without any guidelines other than the maximum limits on those rents.

[100] The petitioner argues that s. 3.1A of the By-laws does not therefore establish what is an "eligible development" as required by the *Vancouver Charter*, rather it leaves this to City staff to determine.

[101] The petitioner relies on the principle of law that in the absence of express statutory authority, a municipal council that has been granted a delegated authority cannot assign to an official any legislative or discretionary powers that have been vested in Council: I.M. Rogers, *The Law of Canadian Municipal Corporations*, loose-leaf (consulted on 22 May 2014), vol. 1, 2nd ed. (Toronto: Carswell, 2000) ch. VIII at 381; *Vic Restaurant Inc. v. Montreal (City)*, [1959] S.C.R. 58 [*Vic Restaurant*]; *Verdun (City) v. Sun Oil Ltd.,* [1952] 1 S.C.R. 222 [*Verdun*].

[102] The petitioner points out that the current scheme would allow City staff to reach agreement with one developer that requires initial rents to be well below the maximums allowed by the By-law; and reach an agreement with another developer of a similar project to allow for rents at the maximum allowable. Thus City staff have been given authority by Council to be arbitrary in determining initial rents, so long as they are below the maximums in the By-laws, and thus City staff likewise have arbitrary power to determine which development is "eligible".

[103] I accept the premise that the legislature has by statute given the task to the City to establish by By-law what constitutes an eligible development of for-profit affordable housing. If the City has delegated responsibility for determining what is an eligible development to staff, this would be *ultra vires*. This means that the City's

alleged improper delegation of authority is subject to the same standard of review as the first issue, correctness.

[104] The issue is therefore whether or not in fact s. 3.1A of the By-laws does improperly delegate authority to staff.

[105] The petitioner's argument has its parallel in the facts of *Verdun*. There, the city had been given the power by the legislature to regulate zoning and certain aspects of the construction of buildings. Instead of doing so by by-law, the city passed a by-law which provided that someone wishing to erect a building for purpose of a gasoline station had to apply in writing to the city to do so; and upon the city's receipt of such an application, the Building Inspector would inspect and provide a certificate as to whether it met the requirements of the by-law, following which city council at its complete discretion could grant or deny the application.

[106] In *Verdun*, the Supreme Court of Canada held that the challenged by-law "transforms an authority to regulate by legislation into a mere administrative and discretionary power" (at 229). The Court noted, by comparison to the case of *Corporation du Village de Ste-Agathe v. Reid*, Q.R. (1904) 10 R. de J. 334, that it would result in arbitrary decisions made by whim, open to discrimination and that the by-law was therefore *ultra vires*.

[107] The petitioner also relies on *Vic Restaurant*. There the legislature gave the city authority to enact by-laws for the general welfare of the city; to fix the terms of issuing licenses; and to license, regulate or prohibit musical saloons or establishments where liquor was sold. The city had enacted a by-law providing that a person could not carry on a business without obtaining a permit from the Director of Finance, who must obtain written approval from directors of affected departments. The process that developed for permits for restaurants was to require approval from the director of the police department. The restaurant in question applied for a permit and was refused because the director of the police department refused to approve it.

[108] In *Vic Restaurant*, Locke J. found that giving the discretion to approve the permit to the director of the police department was beyond the powers of council.

However, the Court indicated that had council "prescribed a state of facts" pursuant to which the permit might be refused, this might have been acceptable. Locke J. held at 82-83:

> The manner in which the licences are to be issued has been fixed by the by-law by vesting the ministerial act of issuing them in the Director of Finance. The power to fix the terms upon which they are to be issued has been vested in the city council. For that body to say that before the Director of Finance may issue a licence, the Director of Police, in his discretion, may prevent its issue by refusing approval is not to fix the terms, but is rather an attempt to vest in the Chief of Police power to prescribe the terms, or some of the terms, upon which the right to a licence depends. In this case, granted the necessary power had been given to the council by the charter, the by-law might, as pointed out in the judgment of this Court in *Bridge's* case, have prescribed a state of facts the existence of which should render a person ineligible to receive a permit, as by providing that none such shall be granted to persons who were guilty of repeated infractions of the city by-laws as to hours, or of the provisions of the *Quebec Liquor Act* or who permitted prostitutes to congregate on their premises or who were otherwise persons of ill repute. Nothing of this nature appears in this by-law but, as in the cases to which I have referred in the other provinces, it has been left without direction to the Chief of Police to decide whether the applicant should or should not be permitted to carry on a lawful calling.

[109] In *Vic Restaurant*, Cartwright J. set out the applicable rule of law in relation to permits and licenses at 99:

> The applicable rule of law is, in my opinion, correctly stated in the following passages in McQuillin on Municipal Corporations, 3rd ed., vol. 9, p. 138:
>
> > The fundamental rules that a municipal legislative body cannot delegate legislative power to any administrative branch or official, or to anyone, that it cannot vest arbitrary or unrestrained power or discretion in any board, official or person, or in itself, and that all ordinances must set a standard or prescribe a rule to govern in all cases coming within the operation of the ordinance and not leave its application or enforcement to ungoverned discretion, caprice or whim are fully applicable to the administration and enforcement of ordinances requiring licenses or permits and imposing license or permit fees or taxes.
>
> and at pp. 141 and 142:
>
> > Administrative, fact-finding, discretionary and ministerial functions, powers and duties as to licenses, permits, fees or taxes in connection therewith can be and usually are delegated by ordinances to boards and officials. But as stated in the preceding section, any discretion vested in them must be made subject to a standard, terms and conditions established by the licensing ordinance, which must govern the

> board or official in granting or denying the license or the permit.

[110] The City submits that what the By-laws do is require City staff to apply a set of rules to a particular case. If the developer meets the criteria in the By-laws, the development will be entitled to waiver of DCLs. The City submits that City staff are performing an administrative function only and do not have authority or discretion to require the developer to meet additional criteria outside of that in the By-law.

[111] The City relies on the judgment of Dickson J. (as he then was) in *British Columbia Development Corporation v. Friedmann (Ombudsman)*, [1984] 2 S.C.R. 447 at 470, adopting with approval a passage by S. A. de Smith in his *Judicial Review of Administrative Action*, 4th ed. (London, UK: Sweet & Maxwell, 1980), where he said at p. 71:

> A distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.

[112] The City also relies on *R. v. Joy Oil Co. Ltd.,* [1964] 1. O.R. 119 (C.A.) [*Joy Oil*]. There the Ontario Court of Appeal considered a by-law which provided that certain properties where flammable liquids were stored must "be provided with foam fire-extinguishing equipment and such quantities of foam-producing material ready for immediate use as may be directed by the Chief of the Fire Department". The petitioner sought a declaration that the by-law was *ultra vires* as an unlawful delegation of power to the Fire Chief.

[113] In *Joy Oil*, the Court held that the power of direction conferred on the Fire Chief was administrative only; that the by-law was as specific as it could be given the great variety of circumstances that might apply, and that there was no discretion vested in the Fire Chief as to the type of fire-extinguishing equipment or materials to be used. The Court held at 123:

> The capacity and location of that equipment and its efficiency and the sufficiency of the materials will, of course, vary, and are matters that of sheer necessity would have to be left to the decision of the Fire Chief as matters of administration.

[114] The thrust of the City's argument is that the petitioner misunderstands the nature of the reference to "agreed upon average rents" in s. 3.1A of the challenged By-laws. This does not involve a negotiation between City staff and a developer, whereby City staff can demand that the developer have initial rents below the By-law maximums and can thereby exercise arbitrary discretion in determining eligibility for the DCL waivers.

[115] Rather, the City submits that so long as the development meets the requirements of the By-laws, and charges initial rents at, or if the developer so chooses below, the maximums set out in the By-laws, and meets the other criteria in the By-laws, the developer will qualify for the DCL waiver. But the only way to enforce the initial rent restrictions and the rental tenure is by way of a housing agreement. This is why the By-law uses the phrase "agreed upon average rents": to secure the developer's binding agreement to the criteria in the By-laws, and not to give authority to staff to demand an agreement containing terms other than the criteria in the By-laws.

[116] I am satisfied that the reference to "agreed upon initial rents" is properly interpreted in the manner submitted by the City: that it does not mean that City staff are given power to demand that the developer agree to an arbitrary initial rents, but only that City staff have the administrative function of overseeing the requirement that the developer enter into a housing agreement that accords with the maximum initial rents allowed in the By-laws, or, if the developer chooses, a lesser amount of initial rents. The housing agreement is the mechanism by which the requirements of s. 3.1A of the By-laws are administratively implemented and is not a process by which the City staff imposes arbitrary requirements to determine eligibility for the DCL waiver.

[117] The facts of the present case are different than the facts in *Verdun* or *Vic Restaurant*. I find that here that s. 3.1A of the By-laws does establish criteria that if

met by a developer will result in the DCLs being waived. It cannot be said that the City has delegated its regulating authority to the arbitrary discretion of staff or City council. City staff have clear direction as to what is required to have the DCLs waived, and that is that the developer meet the criteria set out in s. 3.1A. Once the criteria are met, s. 3.1A provides that "Council waives the levy otherwise required".

[118] I conclude that there has not been unlawful delegation of legislative authority by the City and that this ground of the Petition must be dismissed.

Conclusion

[119] The Petition is dismissed. The City did not exceed its statutory authority in enacting s. 3.1A of the By-laws. This section is properly within the City's authority to establish an eligible development of "for-profit affordable rental housing".

[120] I am indebted to counsel for their careful and thorough submissions. The objective nature of the written legal submissions was of great assistance.

"S.A. Griffin, J."
The Honourable Madam Justice Susan A. Griffin