Victoria
14-Aug-18
REGISTRY

Form 33 (Rule 8-1 (10))

No. VIC-S-S-172167
VICTORIA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SAHTLAM NEIGHBOURHOOD ASSOCIATION, ISABEL RIMMER, KATHARINE HEATHER MERCER, ALAN ROSS MERCER, JOHN YARNOLD, CATHERINE MacNEILL and JOHN MacNEILL

PLAINTIFFS

AND:

MUNICIPALITY OF NORTH COWICHAN, 1909988 ONTARIO LIMITED and 1946328 ONTARIO LIMITED doing business as VANCOUVER ISLAND MOTORSPORT CIRCUIT

DEFENDANTS

NOTICE OF APPLICATION

Name of the Applicant:	Municipality of North Cowichan (the "Municipality")
To:	The Plaintiffs
And To:	1909988 Ontario Limited and 1946328 Ontario Limited doing business and Vancouver Island Motorsport Circuit (together, the "Owner/Occupier")

TAKE NOTICE that an application will be made by the Municipality to the presiding Judge or Master at the Courthouse at Victoria, British Columbia in the week of August 27, 2018, at 10:00 a.m. for the Orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order pursuant to Rules 9-5(1)(a) and (d) striking the following paragraphs, or portions of paragraphs, from the Notice of Civil Claim:

   (a) Part 1: Statement of Facts – The entirety of Paragraph 5;

   (b) Part 1: Statement of Facts – The words "The C-8 zoning was created to permit the use of land as a "Race Track" as the Zoning Bylaw and more particularly, the I-2 zone did not permit such use" in Paragraph 12;

   (c) Part 1: Statement of Facts – The entirety of Paragraph 17;

(d) Part 1: Statement of Facts – The words "or neglected to" in Paragraph 18;

(e) Part 1: Statement of Facts – The entirety of Paragraph 20;

(f) Part 1: Statement of Facts – The words "in contravention of the Noise Control Bylaw" in Paragraph 12;

(g) Part 2: Relief Sought – Paragraphs 1 to 4 in their entirety; and,

(h) Part 3: Legal Basis – Paragraphs 1 to 8 in their entirety;

2. An order dismissing the Notice of Civil Claim as against the Municipality; and,

3. Costs of this application and the Action.

Part 2: FACTUAL BASIS

1. This Action concerns a dispute in relation to the use by the Defendants 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit (together, the "Owner/Operator") of certain lands (the "Lands") located within the territorial jurisdiction of the Defendant Municipality of North Cowichan (the "Municipality").

2. In the Notice of Civil Claim, the Plaintiffs allege that the Owner/Operator's use of the Lands constitutes an actionable nuisance for which the Owner/Operator is liable to the Plaintiffs (the "Nuisance Claim"). In relation to the Nuisance Claim, the Plaintiffs seek general damages, special damages, and injunctive relief against the Owner/Operator.

3. The allegations and relief sought in relation to the Nuisance Claim in the Notice of Civil Claim are not the subject matter of the Notice of Application of the Owner/Operator filed May 24, 2018.

4. In the Notice of Civil Claim, the Plaintiffs allege that the Owner/Operator's use of the Lands is in contravention of bylaws enacted by the Municipality (the "Bylaw Contravention Claim"). In particular, the Plaintiffs allege that the Owner/Operator's use of the Lands is in contravention of the Municipality's zoning regulations, as enacted under the Zoning Bylaw 1997, No. 2950, as amended (the "Zoning Bylaw") and the Municipality's noise control regulations, as enacted under the Noise Bylaw 1995, 2857, as amended (the "Noise Control Bylaw"). In relation to the Bylaw Contravention Claim, the Plaintiffs seek declaratory and injunctive relief against the Owner/Operator.

5. The allegations and relief sought in relation to the Bylaw Contravention Claim in the Notice of Civil Claim are the subject matter of the Notice of Application of the Owner/Operator filed May 24, 2018.

6. For ease of reference, the relevant portions of the Notice of Civil Claim in relation to the Bylaw Contravention Claim are as set out below:

> "Part 1: Statement of Facts
>
> ...
>
> 5. The Defendant, the Municipality of North Cowichan is a municipal corporation incorporated under the *Local Government Act* and governed by that Act and the *Community Charter*, S.B.C. 2003, c. 26 and has a business address at 7030 Trans Canada Highway, Duncan, British Columbia V9L 3X4.
>
> ...
>
> 11. The Lands are located in the Municipality of North Cowichan and subject to North Cowichan Zoning Bylaw 1997 No. 2950 (the "Zoning Bylaw").
>
> 12. The Zoning Bylaw was amended on May 4, 2011 by Zoning Amendment 3374 to zone 9.88 acres of the Lands from I-2 (Industrial – Heavy) to C-8 (Commercial Rural Recreation). The C-8 zoning was created to permit the use of land as a "Race Track" as the Zoning Bylaw and more particularly, the I-2 zone did not permit such use.
>
> 13. Pursuant to the Zoning Bylaw, a portion of the Lands are now municipally zoned as C-8 (Commercial Rural Recreation) and the remaining portion is zoned I-2 (Industrial – Heavy).
>
> 14. In 2014, the Municipality of North Cowichan sold the Lands to the Defendant, 1909988 Ontario Limited and a part of the sale warranted to the Defendant, 1909988 Ontario Limited that the entirety of the Lands could be used for "driving training" in addition to "vehicle testing".
>
> 15. In 2016, the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit, or any one of them, began using (or permitted the use of) the Lands (C-8 and I-2 zoned portions) as a motorcar racetrack and/or driving training track.

16. Specifically, the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit make the following, inter alia, advertisements with respect to the "racing" use of the Lands:

    (a) "...offer a Tilke GmbH designed road track, driving dynamic area...";

    (b) "Generally speaking, any car that is deemed safe with the appropriate driver will be allowed, including street, vintage and racecars"

    (c) "Both vehicles and drivers will be sorted and allowed to drive in groups based on their lap times. We allow vintage sports cars, racecars, track cars, sports cars and performance cars";

    (d) "All of the major facilities are served exclusively for Vancouver Island Motorsport Circuit members and guests. However, there will be days where the facilities open their door to the public, for example to the Vancouver Island Motor Gathering in August of each year"; and

    (d) "High-octane fuels are available".

17. The Zoning Bylaw does not permit use as motorcar racetrack and/or driving training track on the I-2 zoned portion of the Lands.

18. The Plaintiff, Sahtlam Neighbourhood Association, on behalf of concerned residents, has requested that the Municipality of North Cowichan take enforcement action to stop the unauthorized use of the Lands; however, the Municipality of North Cowichan has refused to or neglected to do so.

19. The Municipality of North Cowichan has taken the position that the use for which the Defendants are putting the Lands is permitted by the Zoning Bylaw.

20. The Municipality of North Cowichan, Bylaw No. 2857 (the "Noise Control Bylaw") specifically prohibits "using an engine or motor vehicle without a muffler or other device

which would prevent excessive noise there from, or so out of repair, or equipped in such a way as to disturb the quiet, peace, rest, enjoyment, comfort, or convenience of any person or persons in the neighbourhood or vicinity."

21. Vehicles without mufflers have been permitted to use the Property, specifically operating on the track in contravention of the Noise Control Bylaw.

...

Part 2: Relief Sought

1. A declaration that the use of the portion of the Lands zoned I-2 (Industrial – Heavy) as a motorcar racetrack and/or driving training track or otherwise for recreational or "race" driving motor vehicles at high speeds is a contravention of the Land Use Bylaw;

2. An order requiring the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit to cease using the portion of the Lands zoned I-2 (Industrial – Heavy) as a motorcar racetrack and/or driving training track or otherwise for driving motor vehicles at high speeds contrary to the Land Use Bylaw;

3. A declaration that using an engine or motor vehicle without a muffler or other noise preventing device on the Lands is a contravention of the Noise Control Bylaw;

4. An order requiring the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motor Sport Circuit, to cease using or permitting the use of the Lands contrary to the Noise Control Bylaw;

...

Part 3: Legal Basis

Not a Permitted Use of the Lands:

1. Pursuant to the Zoning Bylaw 9.88 acres of the Lands are zoned C-8 (Commercial Rural Recreation) and the remainder of the Lands is zoned I-2 (Industrial – Heavy).

2. The operation of a "Race Track" is permitted in the portion of the Lands zoned C-8 (Commercial Rural Recreation). A "Race Track" is defined by the Zoning Bylaw as the "use of land for the purpose of holding motor vehicle, motorcycle, or go-cart races.

3. A "Race Track" is not a permitted use in the I-2 (Industrial – Heavy) zone.

4. The Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit, are using or permitted the use of the I-2 (Industrial – Heavy) zoned portion of the Lands for the operation of a "Race Track" and/or motorcar racetrack and/or driving training track contrary to the Zoning Bylaw.

5. The Noise Control Bylaw specifically prohibits "using an engine or motor vehicle without a muffler or other device which would prevent excessive noise therefrom, or so out of repair, or equipped in such a way as to disturb the quiet, rest, enjoyment, comfort, or convenience of any person or persons in the neighbourhood or vicinity." The Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit are using the Lands for the operation of motor vehicles without mufflers or similar noise control devices.

Declaratory Relief:

6. The Defendant, the Municipality of North Cowichan, has publicly stated and upheld to the Plaintiffs that the use of the Lands is permitted and the Plaintiffs legal interest in seeking compliance with the Zoning Bylaw is in issue between the parties.

7. Declaratory relief is allowable where there is a cognizable threat to a legal interest.

8. Whether or not the court should order enforcement of a bylaw, a declaration serves a useful purpose, on the basis that the court will assume the government agents will follow the law.

..."

Part 3: LEGAL BASIS

1. In paragraphs 1 to 4 of the relief sought in Part 2 of the Notice of Civil Claim, the Plaintiffs seek both declaratory and injunctive relief to enforce provisions of the Zoning Bylaw and the Noise Control Bylaw against the Owner/Operator.

2. It has long been settled law that private persons cannot maintain an action for the violation of a municipal bylaw unless the right to do so has been expressly conferred on them.

3. In *Orpen v. Roberts*, [1925] S.C.R. 364, the Court was called upon to consider an action by a private person to restrain the erection of an apartment house where the same was alleged to be in contravention of a bylaw of the City of Toronto.

4. In dismissing the appeal, Duff, J., held that the Appellant lacked standing to seek relief enforcing the City's bylaw. In this regard, His Lordship stated the following:

> "But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty. *Atkinson v. Newcastle Waterworks Company* [2 Ex. D. 441, at pages 446 and 447].
>
> In substance, the proposition advanced by the appellant is that any proprietor, whose property might suffer in value by reason of the failure of some other proprietor to observe the building restrictions established by a by-law promulgated under the authority of this enactment, has a right to invoke the jurisdiction of the courts to prevent by injunction the obnoxious act and to recover damages in respect of any loss actually suffered in consequence of it if wholly or partly completed. In effect, if this contention be sound, such a by-law creates in favour of any proprietor who may be prejudicially affected in his property by an infringement of any of the prohibitions of such a by-law, a negative easement (enforceable in the same manner as a restrictive covenant) over the property within the area where the by-law operates.
>
> It is legitimate to observe that this construction if it were to prevail, would be an unfortunate construction. As Meredith C.J. said, in *Tomkins v. The Brockville Rink Company* [[1899] 31 O.R. 124], when

> one considers the different kinds of acts and conduct which municipal councils in Ontario are by statute permitted to prohibit or to regulate, and the multiplicity of duties they have authority to impose upon property owners and others within their jurisdiction, one is rather startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the non-performance of it; and it seems highly unlikely, as Farewell J., said in *Mullis v. Hubbard* [[1903] 2 Ch. 431], that the legislature contemplated as the result of this legislation that "the numerous individuals" in the vicinity of a residential area, should be entitled to bring their private actions against a man who had built a few feet in front of the line allowed, even though the municipal authorities themselves should not consider it a proper case for interference."

5. Duff, J. found support for the foregoing in legislative amendments which had removed an express right granted to ratepayers by statute to bring an action to enforce municipal regulations enacted under analogous legislative authority. As a result of those legislative amendments, the authority to bring such an action was expressly limited to the affected municipal corporation.

6. This Honourable Court has applied the principles from *Orpen*, supra, in *Scholton v. Chemainus Health Care Centre*, (1995) 29 M.P.L.R. (2d) 249 (B.C.S.C.).

7. In *Scholton*, supra, this Honourable Court stated the following:

> "26 The decision in *Orpen v. Roberts*, supra, was applied in *Singer v. Town n' Country Holding Co.* (1966), 56 D.L.R. (2d) 339 (Man. Q.B.) and in *Caldwell v. Saskatoon (City)* (1969), 71 W.W.R. 152 (Sask. Q.B.). It was also applied in *Emil Becze v. Edmonton (City)* (1993), 17 M.P.L.R. (2d) 109 (Alta. Q.B.) wherein Nash J. at p. 118 concluded:
>
> > The foregoing cases confirm that unless a statute or by-law expressly confers a right, a private citizen has no status to bring injunction proceedings against an offender to restrain a breach of planning rules. ...
> >
> > Thus, the matters complained of by the plaintiff in the present case can only be redressed, if at all, through statutory remedies or by establishing the common law tort of nuisance.

27 These cases clearly enunciate the law with respect to a citizen bringing an action against an "offender". If it is suggested that the "offender" in this case is the hospital, and if it is suggested that the right of action nevertheless still lies against the Corporation, the Corporation disagrees. It contends that the cases go so far as to hold that, "an individual has no right to bring injunctive proceedings in respect of a bylaw violation, unless that right is specifically conferred by an enactment."

28 I agree. That was clearly the view of this Court in *Tchaperoff v. City of Victoria* [1948] 2 W.W.R. 722. At page 726 Macfarlane J said:

> The question here is whether any right of property is given in any sense personal to the plaintiff by such a by-law at all. I can read the case of *Orpen v. Roberts*, supra, only as rejecting that contention. ... In the circumstances here I do not think that the by-law creates any right personal to the plaintiff upon which a cause of action is conferred upon him."

8. In British Columbia, section 274 of the *Community Charter*, S.B.C. 2003, c. 26, is the sole statutory authority authorizing the enforcement of municipal bylaws by civil injunctive proceedings. Section 274 provides as follows:

> "274 (1) A municipality may, by a proceeding brought in Supreme Court, enforce, or prevent or restrain the contravention of,
>
> (a) a bylaw or resolution of the council under this Act or any other Act, or
>
> (b) a provision of this Act or the *Local Government Act* or a regulation under those Acts.
>
> (2) For a civil proceeding referred to in subsection (1), or relating to any damage to or interference with a highway in the municipality,
>
> (a) the proceeding may be brought by the municipality in its own name,

(b) it is not necessary that the Provincial government, the Attorney General or an officer of the Provincial government be a plaintiff in the proceeding, and

(c) the municipality must serve a copy of the originating documents on the Attorney General

(i) before the end of the period prescribed by the Supreme Court Civil Rules for filing a response to civil claim by the defendant, or

(ii) within a further time that may be allowed by the court.

(3) The authority under subsection (1) is in addition to any other remedy or penalty provided under this Act or the Local Government Act and may be exercised whether or not a penalty has been imposed for the contravention."

9. Section 274 of the *Community Charter*, supra, is to be contrasted with section 334 of the *Vancouver Charter*, S.B.C. 1953, c. 55, which provides as follows:

334 (1) A by-law of the Council or of the Board of Parks and Recreation may be enforced, and the contravention of such a by-law may be restrained, by the Supreme Court in a proceeding brought by the city or by the Board of Parks and Recreation, as the case may be.

(2) In addition,

(a) a by-law referred to in subsection (1) may be enforced, and the contravention of such a by-law may be restrained, by the Supreme Court in an action brought by a registered owner of real property in the city, and

(b) a zoning by-law within the meaning of Part XXVII may be enforced, and the contravention of such a by-law may be restrained, by the Supreme Court in an action brought by an incorporated society that represents registered owners of real property in the city who are affected by such a by-law.

(3) It is not necessary for the Provincial government, the Attorney General or an officer of the Provincial government to be party to an action or other proceeding under this section.

> (4) This section applies without limiting the right to enforce any proprietary, contractual or other rights, and in addition to any other remedy provided or penalty that has been or may be imposed."

10. Section 334 of the *Vancouver Charter*, supra, expressly confers authority on City of Vancouver residents to enforce City bylaws.

11. Section 274 of the *Community Charter*, supra, does not confer any authority on the residents of other municipalities to enforce their municipality's bylaws.

12. In light of the foregoing legal principles, the Plaintiffs do not have the authority to seek the relief set out in paragraphs 1 to 4 of Part 2 of the Notice of Civil Claim. Simply put, the Plaintiffs do not have standing to seek declaratory and injunctive relief enforcing the Zoning Bylaw or the Noise Control Bylaw.

13. The rationale for the foregoing legal principles likely arises from the significant discretion afforded to municipalities in the enforcement of their bylaws. In *City of Toronto v. Polai*, [1970] 1 O.R. 483, the Ontario Court of Appeal described that discretion as follows:

> "As members of the city corporation the inhabitants are entitled to look to the duly elected representatives who comprise the municipal council for enforcement of the provisions of by-laws passed for their protection, and in enforcing those by-laws the corporation, whether by means of a prosecution or in a suit for injunctive relief, acts on behalf of all the inhabitants. The municipality, acting through its council and duly appointed officials, occupies in a more restricted sense the same position as does the Attorney-General who represents the Crown in its capacity as parens partriae charged with the responsibility of enforcing the rights of the public when they are violated. The decision whether or not the Attorney-General should prosecute or sue is a matter for him, and the Courts have no power to question his right to do so or to refrain from doing so as distinct from his right to relief.
>
> The Attorney-General is in a different position from the ordinary litigant, for he represents the public interest in the community at large; when he intervenes to ask for relief the Courts should pay great heed to his intervention and only refuse relief in the most exceptional circumstances: *Atty-Gen'l v. Harris*, [1961] 1 Q.B. 75.
>
> In my opinion the city, acting in a more restricted sphere in the enforcement of its own bylaws, is likewise in a different position from the ordinary litigant. The inhabitants of the municipality are

sufficiently interested in the dispute to warrant intervention by the corporation for the purpose of asserting public rights, and the dispute is not one between individuals. Rather it is one between the public and a small section of the public refusing to comply with the by-law. In suits in which the Court's equitable jurisdiction is invoked and the clean hands doctrine is pleaded regard must be had to the nature of the relief sought and the character in which the plaintiff is suing. It would be a most extraordinary result if in a suit brought by an individual taxpayer, a course sanctioned by s. 486 of the *Municipal Act*, the relief were to be granted, but in a suit brought by the city, representing the general body of ratepayers, the suit should fail. The result appears even more incongruous when it is considered that the mere passing of a bylaw by a municipal corporation does not cast any legal duty on the municipality to see to its enforcement: *Brown v. City of Hamilton* (1902), 4 O.L.R. 249 (per Chancellor Boyd).

Counsel for the respondent relied upon a judgment of the Supreme Court of Louisiana in support of his proposition: *City of New Orleans v. Levy* (1957), 98 So. 2d 210. In two other American decisions cited by appellant's counsel the Courts declined to give effect to an equitable defence based on the fact that other citizens were suffered to violate the municipal ordinance restricting the use of property: *City of St. Louis v. Friedman* (1949), 216 S.W. 2d 475, and *Kovach v. Maddux* (1965), 238 F. Supp. 835, where it was held that the doctrine of unclean hands should not be applied where the result would be refusal to enforce a claim in which the public had a direct and substantial interest. The latter two authorities are in harmony with the trend of authority in this Province: *Re Cosentino and City of Toronto*, [1934] O.W.N. 343; *Re Rex v. Roulet*, [1937] O.R. 912, [1937] 4 DL.R. 459; *Re Joy Oil Co. Ltd. and City of Toronto*, [1934] O.R. 243, [1937] 1 DL.R. 541, 67 C.C.C. 325. It was made plain in the cases lastly cited that the Court had no right to interfere with the discretion of the City Council in the carrying out of the by-law and that unless the by-law was invalid on its face by reason of discrimination the Court should not intervene. The by-laws under consideration were valid and the discrimination occurred only in their administration by the city authorities, a matter which was held not to constitute a ground for interference by the Court. The correctness of those decisions has never been challenged in our Courts and in the light of the principle which they lay down, interference by the Court with the exercise of discretion on the part of the members of the Committee would be wholly unwarranted.

> If, then, the Court has no power to control directly the exercise of Council's discretion in the manner of administration of the by-law under review, can it do so indirectly by refusing to grant injunctive relief to the city except upon the condition that it exercise its powers in a manner agreeable to the Court's view? To ask this question is to answer it. There can be little doubt that this was in the mind of the learned Judge when one reads in his reasons that had he granted the injunction sought he would have done so on condition that that "deferred list" practice should be discontinued. Whether the method pursued by the city was to place names on a deferred list or to put files pertaining to the properties in question in a drawer of a filing cabinet marked "inactive" or "deferred", or whether it adopted some other method of segregation can make little difference. The placing of names on the "deferred list" was the system which the Committee chose to follow in recording its decision in cases in which, in its judgment, enforcement of the by-law should be postponed.
>
> No doubt, to persons who are obliged to comply with the by-law this practice may present the appearance of political favouritism or it may smack of discrimination. It is one of the difficult problems of administration to decide what acts are harmless in themselves in particular circumstances or, in isolated instances, must be forbidden in the public interest, or what acts may be tolerated without doing injury to the public interest. Without embarking on a wide-ranging inquiry into all these other cases which are, in reality, res inter alios acta, the Court cannot determine whether the decision of the Committee was right or wrong, fair or unfair, in the particular circumstances. Be that as it may, that course is not open to us in these proceedings and the Court has neither the right nor the power to control the exercise of Council's discretion by either direct or indirect means, except, possibly, in a case where Council lays down a general policy not to enforce its restrictive zoning by-laws: *Vide R. v. Commissioner of Police, Ex. p. Blackburn*, [1968] 2 W.L.R. 893."

14. This significant discretion afforded to municipalities in the enforcement of their bylaws is also the foundation of the settled body of caselaw that, absent bad faith, a private person cannot sustain an action to compel a municipality to enforce its bylaws.

15. In *Dusevic v. Columbia Shuswap (Regional District)*, (1989) 44 M.P.L.R. 160 (B.C.S.C.), the Petitioner had sought an order of mandamus requiring the Regional District in that case to enforce its zoning bylaw in circumstances where there was an alleged violation of the bylaw, and the Regional District had decided to not enforce the bylaw while there was an outstanding application to amend the bylaw in a manner that would remove the violation.

16. This Honourable Court first considered the duty of a municipality to enforce its bylaws. Noting that there is no statutory duty on a municipality to enforce, the Court then considered whether there was a common law duty to enforce, and held that there was not. In this regard, the Court stated:

> "Much like the Attorney General's prosecutorial discretion, the exercise of a municipality's discretion is not a matter that is judicially reviewable unless it is exercised in bad faith.
>
> ... In this statutory vacuum the existence of a duty to enforce must be determined according to the common law, which seems to dictate that the responsibility for by-law enforcement is in fact no more than a "power" and is therefore discretionary."

17. This Honourable Court then considered whether the Regional District's decision to not enforce pending the consideration of an application to amend the zoning bylaw to remove the alleged violation was a decision made in bad faith, and determined that it was not. The Court held that the Regional District had bona fide policy reasons for its decision, and the Regional District had acted with the public interest in mind.

18. In this Action, we note the following:

    (i) Bad faith is a serious allegation to make and must be supported by cogent evidence; and,

    (ii) In the absence of such cogent evidence, bona fides are to be assumed;

19. In light of the foregoing circumstances, this Honourable Court cannot conclude that the Plaintiffs have standing to seek the declaratory and injunctive relief they seek in paragraphs 1 to 4 of Part 2 of the Notice of Civil Claim, or for declarations and an order that the Municipality enforce the Zoning Bylaw and the Noise Control Bylaw.

20. Moreover, in light of the Rezoning Application, any judicial review proceedings of the Municipality's original decision to not enforce the Zoning Bylaw and the Noise Control Bylaw is premature.

21. Furthermore, even if the Plaintiffs could prove bad faith on the part of the Municipality in its original decision to not enforce the Zoning Bylaw and the Noise Control Bylaw, the remedy would not be for this Honourable Court to compel compliance with the bylaws. Rather, the remedy would be the normal remedy on a successful judicial review; to quash the improper decision and remit the matter of enforcement to the Municipality for reconsideration without regard to the circumstances that the Court held to give rise to the claim of bad faith in the original decision.

22. To the extent that the Plaintiffs assert that the relief sought in paragraphs 1 to 4 of Part 2 of the Notice of Civil Claim is available to them in the context of the Nuisance Claim, the Municipality relies on *Spraggs v. Greater Vernon Services*, 2006 BCSC 1176.

23. In *Spraggs*, supra, the relief sought in paragraphs (e) through (h), was:

> "(e) a declaration that the development of the property must adhere to the bylaws, official community plan, and other regulations that are in effect;
>
> (f) a declaration that the current non-conformance cannot be circumvented by enacting bylaws, variances, and/or legislation;
>
> (g) a declaration that the trees, shrubs and vegetations that were removed within the environmentally sensitive areas, be restored;
>
> (h) a declaration that the lagoon, as shown in the bylaws, must be used as a lagoon, and that a use designation for lagoons and wetlands must be enacted by the defendant Coldstream".

24. In *Spraggs*, supra, the Honourable Mr. Justice Barrow held that, notwithstanding that the Plaintiff may have a cause of action in private nuisance, there was no serious question to be tried in relation to the Plaintiff's claims for the above-noted declaratory relief, stating as follows:

> "15 Unless the plaintiff has standing to seek the relief noted above, there can be no serious issue to be tried. It is, therefore, first necessary to consider the question of standing.
>
> 16 In *Palmer v. Burnaby (City)*, [2006] B.C.J. No. 222, 2006 BCSC 165 ["Palmer"], Josephson J. considered the issue of standing in similar circumstances. In that case the plaintiff resided adjacent to Deer Lake Park in Burnaby. The city had established a program of open air concerts in the park. Some of these concerts created noise

> that exceeded the levels permitted under the city's noise bylaw. This action was framed in nuisance and Josephson J. held that the plaintiff had standing to bring the action, not because the conduct in issue amounted to a breach of a bylaw, which, in and of itself, does not give one standing, but rather because the conduct was alleged to affect his private property rights.
>
> 17 Here, as pointed out above, the plaintiff is not challenging the validity of the bylaws that led to the acquisition of the property. Nor is he challenging the validity of the official community plan or the zoning bylaw. To the contrary, he relies on those bylaws to ground his claims.
>
> 18 As in Palmer, he is seeking an injunction, albeit he has not pleaded that relief in precisely those words, directly against the defendants, and specifically against the District of Coldstream, to prevent it from violating its own bylaws. Neither the plaintiff, nor any other private citizen, has standing to compel a municipal authority to enforce its bylaws. The enforcement of bylaws is a matter within the discretion of the Municipality or the District (see Palmer and the authorities cited therein).
>
> 19 It follows from the foregoing that the relief sought by the plaintiff in paragraphs (e) through (h) is not available to the plaintiff, at least not directly. More accurately, the plaintiff does not have standing to seek that relief. In the result, to the extent this application turns on the question of the relief set out in paragraphs (e) through (h), there is no serious question to be tried."

25. Even if the Plaintiffs are successful in the Nuisance Claim, the relief will be to prevent further nuisance, which will not necessarily be the relief sought in relation to the Bylaw Contravention Claim. The relief sought in relation to the Bylaw Contravention Claim does not raise a serious question to be tried or, in other words, does not disclose a reasonable claim.

26. With respect to paragraphs 12, 17, 18, and 20 of Part 1 of the Notice of Civil Claim, the same plead statements of law and not material facts and, as such, are improper.

27. In light of the applicable legal principles as set out above, the test on an application to strike pleadings under Rule 9-5(1)(a) has been met. It is plain and obvious that the impugned paragraphs of the Notice of Civil Claim (i.e., the Bylaw Contravention Claim) cannot succeed. [See: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) and *Ahmed v. Vancouver (City)*, 2012 BCSC 301 (affirmed 2013 BCCA 26)]

28. In addition, the test on an application to strike pleadings under Rule 9-5(1)(d) has also been met.

Part 4: MATERIAL TO BE RELIED ON

1. Notice of Civil Claim filed on June 5, 2017;

2. Response to Civil Claim filed by the Municipality on August 4, 2017;

3. Response to Civil Claim filed by the Owner/Operator on August 14, 2017;

4. Affidavit #1 of Mark Ruttan made August 10, 2018 and,

5. Such further material as may be required to respond to the application and as permitted by this Honourable Court.

The Municipality estimates that the application, along with the application filed by the Owner/Operator on May 24, 2018, will take two days.

☐ This matter is within the jurisdiction of a Master.

☑ This matter is not within the jurisdiction of a Master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days after service of this Notice of Application,

(a) file an application response in Form 33,

(a) file the original of every affidavit, and of every other document, that

i. you intend to refer to at the hearing of this application, and

ii. has not already been filed in this proceeding, and

(b) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

i. a copy of the filed application response;

ii. a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

iii. if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: 10/Aug/2018

Signature of
☑ lawyer for Application Respondent, North Cowichan
Sukhbir Manhas

Young Anderson
Barristers and Solicitors
1616 - 808 Nelson Street
Box 12147, Nelson Square
Vancouver, BC V6Z 2H2
Telephone: 604.689.7400

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____ of Part 1 of this Notice of Application

☐ with the following variations and additional terms:

_____

_____

_____

Dated: _____.
[dd/mm/yyyy]

_____
Signature of ☐ Judge ☐ Master

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

☐ discovery: comply with demand for documents

☐ discovery: production of additional documents

☐ other matters concerning document discovery

☐ extend oral discovery

☐ other matter concerning oral discovery

☑ amend pleadings

☑ add/change parties

☐ summary judgment

☐ summary trial

☐ service

☐ mediation

☐ adjournments

☐ proceedings at trial

☐ case plan orders: amend

☐ case plan orders: other

☐ expert