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REPORT TO CORE AREA LIQUID WASTE MANAGEMENT COMMITTEE MEETING OF WEDNESDAY, APRIL 9, 2014

SUBJECT **MCLOUGHLIN POINT REZONING OPTIONS**

ISSUE

The Township of Esquimalt rejected the Capital Regional District's (CRD) revised rezoning application at its meeting on April 7, 2014. This report outlines the options available to the CRD to move forward with the McLoughlin Wastewater Treatment Plant.

BACKGROUND

In July 2013 the Township of Esquimalt Council gave first and second reading of the rezoning bylaw proposed by the CRD (Bylaw No. 2805) and adopted its own rezoning bylaw (Bylaw No. 2806) to permit the construction of a sewage treatment facility on the McLoughlin Point site. A revised rezoning application and bylaw was submitted by the CRD on December 20, 2013. On January 20, 2014 Esquimalt Council gave second reading to the revised bylaw and referred the application to public hearing which took place on February 18, 19, March 20 and March 22. On April 7 Esquimalt Council voted against adopting the revised rezoning bylaw (Bylaw No. 2805). Technical and financial submissions for the McLoughlin Point Wastewater Treatment Plant were received from the three proponents on February 28 and March 28 respectively.

Construction of the wastewater treatment plant as contemplated under the approved Core Area Liquid Waste Management Plan (CALWMP) and to meet the Province's requirements in the Contribution Agreement in accordance with the zoning bylaw (Bylaw No. 2806) is not considered achievable. For that reason the CRD has proposed the revised Bylaw No. 2805.

ALTERNATIVES

That the Core Area Liquid Waste Management Committee recommend to the Capital Regional District Board that:

1. The CRD proceed to binding arbitration, with the agreement of Esquimalt; and, failing an agreement with Esquimalt within a week of the Esquimalt Council rejection of the bylaw, an application be made by the CRD to the Provincial Cabinet under section 37(6) of the *Environmental Management Act*.

2. The CRD proceed to binding arbitration, with the agreement of Esquimalt; and failing agreement with Esquimalt within a week of the Esquimalt Council rejection of the bylaw, the CRD approach the Province to prescribe mandatory binding arbitration.

3. That an application be made to the Provincial Cabinet under section 37(6) of the *Environmental Management Act* to declare inoperative those provisions of the Esquimalt Zoning Bylaw and, if necessary, section 37(5) to set aside bylaws and permit

requirements, as determined by the Chief Administrative Officer to be necessary to enable the Capital Regional District to proceed with the approved Core Area Liquid Waste Management Plan.

4. The CRD seek amendments to the current Esquimalt Zoning Bylaw (Bylaw No. 2806) to exclude those conditions considered to be outside of the legislative authority of the Township of Esquimalt, or outside of the present legal authority of the CRD to fulfil.

5. Legal action to challenge zoning bylaw provisions applicable to the McLoughlin Point site.

IMPLICATIONS

INTERGOVERNMENTAL IMPLICATIONS

Esquimalt's rejection of the revised Bylaw No. 2805 leaves three dispute resolution options available to the CRD:

1. The CRD and Esquimalt agree to voluntary binding arbitration.

Under Section 284 of the *Community Charter* (Attachment 1), one or more of the parties may apply to a dispute resolution officer for help resolving the matter under Section 285, if both parties agree to voluntary binding arbitration the dispute resolution officer must direct the dispute resolution to binding arbitration under Section 287 (final proposal arbitration) or 288 (full arbitration). Under "final proposal arbitration" the arbitrator reviews written submissions only and 'must determine each disputed issue by selecting one of the final written proposals for resolving that issue submitted by one of the participating parties'. No written reasons are to be provided by the arbitrator. Under 'full arbitration' the arbitrator 'may conduct proceedings at the times and in the manner he or she determines'. The arbitrator is not restricted in his or her decision to the submissions made by the parties on the disputed issue, but must give written reasons for the decision. The timeframes for dispute resolution are specified in the Dispute Resolution Regulation.

The time line under the final proposal arbitration process is as follows:

- Application to a dispute resolution officer for help in resolving the dispute – two days (the time between Esquimalt Council's rejection of the bylaw and the next Core Area Liquid Waste Management Committee and CRD Board meeting.

- Agreement on the arbitration process – no later than 28 days after the dispute resolution officer directs the dispute to binding arbitration.

- Selection of an arbitrator – no later than 28 days from agreement on the arbitration process.

- Preparation of an agreed statement identifying issues within 28 days of selecting an arbitrator.

- Submit written submissions with the arbitrator – 42 days from selection of the arbitrator.

- Decision of arbitrator – 63 days from the date of his/her selection.

- Time available from the arbitrator's decision for parties to agree on a different settlement – 60 days at which time the arbitrator's decision becomes binding.

- After decision becomes binding, time frame within which bylaw must be adopted – 90 days.

If the bylaw was adopted immediately after the arbitrator's decision and the process takes the time available to the arbitrator, a total of 121 days (four months) would have elapsed from the decision to reject the revised bylaw. If the bylaw is not passed until 90 days after the arbitrator's decision becomes binding a total of 271 days (nine months) would have elapsed.

2. Esquimalt does not agree to binding arbitration.

If Esquimalt does not agree to binding arbitration then the CRD could request mandatory binding arbitration under Section 286(1)(b). This process would require an order by the Lieutenant Governor in Council (Cabinet) to designate the dispute as a "prescribed matter" by regulation. The provincial dispute resolution officer has authority to direct the type of arbitration process to be used which would then follow the procedure outlined for the voluntary arbitration process. However, in addition to the time frames outlined in No. 1 above, additional time will be required for the Cabinet process specifically:

- The Minister of Community, Sport and Cultural Development will need to determine if she is willing to take the matter to Cabinet for such an order.
- If so, the process to get the materials ready for Cabinet is about 3 weeks.

Allowing one and a half months for the Cabinet process, the mandatory binding arbitration process could take from as little as five months to as much as 11 months.

A delay of 11 months would also mean that the Program could not be completed by the end of 2018. This will require another amendment to the CALWMP and renegotiation of funding agreements.

3. The CRD could apply to the Cabinet for an order to suspend the operation of provisions in the Esquimalt zoning bylaw that would prevent the CRD proceeding with the project.

The CRD may apply to the Cabinet under Section 37(6) of the *Environmental Management Act* for an order to suspend the operation of any provisions of the existing rezoning bylaw of the Township of Esquimalt that stand in the way of the CRD proceeding with the project. Enacting a complex density bonusing scheme, with elements that are beyond the legal authority of the municipality and elements that may be impossible for the CRD to fulfill means that Esquimalt has effectively put in place a bylaw that would not allow the land to be used for the purpose allowed under an approved waste management plan respecting the land. This does not oblige Cabinet to make such an order. There is also a possibility that such an order might result in a legal challenge by Esquimalt of the Cabinet's authority to do this.

The following elements of the existing Zoning Bylaw are considered to prevent the CRD from constructing the wastewater treatment plant at McLoughlin Point as approved under the CALWMP:

- Height limitation of 10 metres the height of Principal Building located 20 metres or more from the high water mark;
- Height limitation of 5 metres on any building or structure located within 20 metres of the high water mark;
- No building encroachment into the area within 7.5 metres of the high water mark;
- Limitation on the rate of discharge for effluent;
- Limitation on the capacity of the plant, and
- The existing zoning bylaw does not extend the McLoughlin Point special uses to two small legal parcels recently acquired by the CRD adjacent to the core CRD parcels. This would include the proposed public walkway, constraining site development given the walkway is a stipulated amenity;

4. The CRD could apply to Esquimalt for amendments to the current Esquimalt zoning bylaw (Bylaw No. 2806) to exclude those conditions it considers to be outside of Esquimalt's authority and beyond the current legal or reasonable practical authority of the CRD.

The Township of Esquimalt adopted Bylaw No. 2806 on July 15, 2013 (Attachment 2), which amended the Esquimalt Zoning Bylaw to permit construction of a wastewater treatment plant at McLoughlin Point conditional on an extensive tiered density bonus scheme. The CRD considers many of the requirements to present significant challenges as being outside the practical ability of the CRD to achieve, outside the current jurisdiction of the CRD and potentially outside the jurisdiction of Esquimalt (refer to Attachment 3 for details).

Bylaw No. 2806 could be amended without the need for another public hearing, as the Municipality has the authority to waive a public hearing under section 890(4) of the *Local Government Act*. If this option is selected, CRD should strongly urge Esquimalt to waive any further public hearing process as the proposed amendments would be limited in nature and do not affect the most important elements of the scheme contained in the McLoughlin Special Use zone but would render that scheme more defensible and realistic. Required amendments would not affect site use or density. However, assuming those parts of the bylaw that the CRD considers to be outside the authority or jurisdiction of the CRD or Esquimalt were amended, the submitted designs would not meet the height and setback criteria included in Bylaw No. 2806. The elevation of the plant above ground would have to be reduced, resulting in deeper excavation into contaminated soils and elimination of gravity flow through the plant to the outfall. The deeper excavation would increase construction risk due to the proximity to the waterfront and increase both the capital and operating costs of the plant. Compliance would entail redesign of the plant by each of the proponents, to which the proponents are unlikely to agree without compensation. Complying with an amended Bylaw No. 2806 is not considered to be a viable option because of the limitations it imposes on the use of the site, height and setback

limitations), the restrictions on the plant capacity and discharge rate and the inclusions of conditions that are outside the jurisdiction of the CRD.

In order to complete a wastewater treatment project that meets Provincial requirements as set out in the Contribution Agreement, the CRD considers that relief from current setback and height limitations are required.

5. Legal Action

The CRD could commence a legal action to challenge the zoning bylaw. This option has potential to be lengthy, costly and of uncertain outcome; and would do little to build a relationship between the CRD and Esquimalt or public confidence in the Seaterra Program. A declaration that Bylaw No. 2806 in its entirety is invalid would restore the previous zoning for McLoughlin Point, leaving the CRD in essentially the same position it finds itself in now: faced with a zoning impediment preventing proper implementation of the CALWMP in accordance with the Province's stated objectives of fiscal responsibility for the project. Legal action is not considered to be a viable option.

ECONOMIC IMPLICATIONS

The technical submissions, received on February 28, have been reviewed by the CRD's evaluation teams. The financial submissions were received on March 28, 2014. The potential delay of up to 11 months will impact the financial submissions as the proponents do not contemplate a delay in being able to proceed with construction. The proponents will be requested to resubmit their financial submissions when the rezoning is finalized with Esquimalt. Any delay will result in increased costs to the proponents due to inflation which will be passed on to the CRD.

PROCUREMENT IMPLICATIONS

The three proponents have provided information on key personnel as part of the RFP submission. The qualifications and experience of the designated team members were part of the criteria for shortlisting the proponents. If there is a significant delay in awarding a contract it will likely be very difficult for the proponents to indefinitely commit the designated personnel to the project due to the cost. This could mean that lesser qualified staff are assigned to this project.

At this stage of the program any delays in awarding a contract will result in deferring the current completion date, potentially by the length of the delay. Depending on the length of the delay this may have implications for the current funding agreements with senior governments.

CONCLUSION

Option 1 would potentially delay the project by up to nine months; Option 2 by up to eleven months; Option 3 would delay the project by three to four months if Cabinet was willing to issue an order and under Option 4, Bylaw No. 2806 could be amended within a month, given willingness by Esquimalt to waive the public hearing requirement although it would require significant amendments and still leave the CRD with unworkable height and setback limitations

that would add materially to the cost of the project. All of the options have implications for the funding agreements due to the delays in moving to the construction phase.

RECOMMENDATION

That the Core Area Liquid Waste Management Committee recommend to the Capital Regional District Board:

That an application be made to the Provincial Cabinet under section 37(6) of the *Environmental Management Act* to declare inoperative those provisions of the Esquimalt Zoning Bylaw and, if necessary, section 37(5) to set aside bylaws and permit requirements, as determined by the Chief Administrative Officer to be necessary to enable the Capital Regional District to proceed with the approved Core Area Liquid Waste Management Plan.

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Attachments: 3

(c) make different provisions, including exceptions, for different bylaws, different municipalities, different parts of municipalities and different circumstances and other matters.

Division 3 — Dispute Resolution

Request for assistance in relation to intergovernmental dispute

284 (1) If a dispute arises between a municipality and

(a) another local government, or

(b) the Provincial government or a Provincial government corporation,

and the parties cannot resolve the dispute, one or more of the parties may apply to a dispute resolution officer for help in resolving the dispute.

(2) If an application is made under subsection (1), the dispute resolution officer

(a) must review the matter,

(b) may attempt to help the parties to resolve the dispute by any process the officer considers appropriate, including by using or referring the matter to mediation or another non-binding resolution process, and

(c) may assist the parties in determining how costs of the process are to be apportioned.

(3) This Division applies to the City of Vancouver.

Voluntary binding arbitration

285 If the parties to a dispute agree, a dispute resolution officer must direct the dispute to resolution by binding arbitration under section 287 *[final proposal arbitration]* or 288 *[full arbitration]*.

Mandatory binding arbitration

286 (1) This section applies to disputes between local governments respecting

(a) an intermunicipal boundary highway, an intermunicipal transecting highway, an intermunicipal bridge or an intermunicipal watercourse, or

(b) a prescribed matter.

(2) If a party to the dispute applies to a dispute resolution officer then, subject to subsection (3), the officer must direct the dispute to binding arbitration under section 287 *[final proposal arbitration]* or 288 *[full arbitration]*.

(3) Before directing a dispute to binding arbitration under this section, the dispute resolution officer may direct the dispute to mediation or another non-binding resolution process.

(4) The choice of arbitration process under this section is to be determined by agreement between the parties but, if the dispute resolution officer considers that the parties will not be able to reach agreement, the officer may direct which process is to be used.

(5) If more than one local government is involved in a matter that has been directed to binding arbitration under this section, the arbitrator may direct that the matter is to be settled for all local governments in the same arbitration.

(6) If a local government does not adopt the bylaws required under section 290 *[implementation of arbitrator's decision]* in relation to an arbitration under this section, the Lieutenant Governor in Council may, on the recommendation of the minister, implement the terms and conditions of the arbitrator's decision.

(7) An order under subsection (6) is deemed to be a bylaw of the local government.

Final proposal arbitration

287 The following apply to a dispute referred to in section 285 or 286 that is to be resolved by final proposal arbitration:

(a) the dispute is to be resolved by a single arbitrator;

(b) the arbitrator is to be selected, from the list prepared under section 289 (1) *[arbitrator list]*, by agreement among the parties to the dispute or, if the dispute resolution officer considers that these parties will not be able to reach agreement, by the officer;

(c) subject to any applicable regulations, the arbitrator must conduct the proceedings on the basis of a review of written documents and written submissions only, and must determine each disputed issue by selecting one of the final written proposals for resolving that issue submitted by one of the participating parties;

(d) the matter in dispute will be as settled by the arbitrator after incorporation of the final proposals selected by the arbitrator under paragraph (c);

(e) no written reasons are to be provided by the arbitrator.

Full arbitration

288 The following apply to a dispute referred to in section 285 or 286 that is to be resolved by full arbitration:

(a) the dispute is to be resolved by a single arbitrator, who is to be selected in accordance with section 287 (b) *[final proposal arbitration]*;

(b) subject to any applicable regulations, the arbitrator may conduct the proceedings at the times and in the manner he or she determines;

(c) the matter will be as settled by the arbitrator, who is not restricted in his or her decision to submissions made by the parties on the disputed issues;

(d) the arbitrator must give written reasons for the decision.

General provisions regarding arbitration process

289 (1) The minister must, after consultation with representatives of the Union of British Columbia Municipalities, prepare a list of persons who may be arbitrators under this Division.

(2) If a dispute between local governments is referred to arbitration under this Division, subject to a direction by the arbitrator or to an agreement between the parties,

(a) the fees and reasonable and necessary expenses of the arbitrator, and

(b) the administrative costs of the process, other than the costs incurred by the parties participating in the process,

are to be shared proportionately between the parties participating in the process on the basis of the converted value of land and improvements in their jurisdiction.

(3) The time limit for bringing any judicial review of a decision of an arbitrator under this Division is the end of the period for agreement under section 290 (1).

Implementation of arbitrator's decision

290 (1) During the 60 days after a matter is settled under section 287 *[final proposal arbitration]* or 288 *[full arbitration]*, the parties may agree on a settlement that differs from the decision of the arbitrator.

(2) At the end of the period referred to in subsection (1), unless agreement is reached as referred to in that subsection, the decision of the arbitrator becomes binding on the parties.

(3) If the decision becomes binding under subsection (2), the parties to the arbitration must adopt the bylaws and take the other actions required to implement the terms and conditions of the arbitrator's decision within 90 days after it becomes binding under that subsection.

(4) Despite any other provision of this Act or any other Act, approval of the electors or assent of the electors is not required for a bylaw referred to in subsection (3).

(5) A dispute resolution officer may extend the time period under subsection (1) before or after it has expired.

Regulations respecting arbitrations

291 The minister may make regulations respecting arbitrations under this Division and, without limiting this, may make regulations respecting one or more of the following:

(a) matters that an arbitrator must or may consider;

(b) the authority of an arbitrator to resolve the terms and conditions for a dispute;

(c) the authority of an arbitrator to require the cooperation of the parties to the arbitration and their officials and representatives in relation to the arbitration.

Commencement

292 This Act comes into force by regulation of the Lieutenant Governor in Council.

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CORPORATION OF THE TOWNSHIP OF ESQUIMALT

BYLAW NO. 2806

A Bylaw to amend Bylaw No. 2050, cited as the
"Zoning Bylaw, 1992, No. 2050"

THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF ESQUIMALT, in open meeting assembled, enacts as follows:

1. This bylaw may be cited as the *"ZONING BYLAW, 1992, NO. 2050, AMENDMENT BYLAW [NO. 209], 2013, NO.2806".*

Marine Zones

2. That Bylaw No. 2050, cited as the "Zoning Bylaw, 1992, No. 2050" be amended by adding at the end of Section 63(1) the following as permitted uses in the Marine Navigation [M-4] Zone:

"(c) Wastewater treatment marine outfalls and related piping and accessory appurtenances under a provincially-approved Liquid Waste Management Plan;
(d) Boat Moorage Facility, abutting Lots A – E, Plan 35322

McLoughlin Point Special Use [I-3] Zone

3. That Bylaw No. 2050, cited as the "Zoning Bylaw, 1992, No. 2050" be amended as follows:

(1) by amending the title of Section 55 from "Bulk Petroleum Storage [I-3]" Zone to "**McLOUGHLIN POINT SPECIAL USE [I-3]**".

(2) by deleting the intent statement under that heading and replacing it with the following:
"The intent of this Zone is to accommodate either the historic bulk petroleum storage facility and related uses, or the Core Area Liquid Wastewater Treatment Plant, including potential accessory or additional commercial, high-tech industrial, recreational and educational uses, or any combination thereof to create a mixed use development. In 2013, the types of commercial uses were altered so as to promote a mixed-use development serving a clientele of all ages. Non-industrial uses are contingent on satisfaction of environmental and contaminated site requirements."

(3) by deleting Sections 55(1)(d), (e) and (f) so that the Adult Entertainment Use, Adult Motion Picture Studio and Adult Video Store uses are no longer permitted in this Zone.

(4) by adding to Section 55(1) **Permitted Uses**, the following uses:

"(d) Wastewater Treatment Plant, which may include any or all of the following additional uses:

(i) Commercial Instruction and Education
(ii) Educational Interpretive Centre
(iii) Research Establishment
(iv) Business and Professional Office
(v) Marine Outfall
(vi) Accessory uses

(e) Business and Professional Office
(f) High technology uses
(g) Accessory Retail
(h) Hotel
(i) Entertainment and Theatre
(j) Boat Moorage Facility
(k) Park."

(5) by deleting the existing Section 55(2) **Conditions of Use** and inserting a new Section 55(2) entitled "**Density – Wastewater Treatment Plant**" with the following:

"(2) **Density – Wastewater Treatment Plant**

In this section:

"**Immediate Community**" means the upland area travelling from the subject property, west along the marine boundary to and including Macauley Point Park, north along Clifton Terrace and Lampson Street to Esquimalt Road, then east along Esquimalt Road to the Township's municipal boundary, south along the municipal boundary then along the marine boundary back to the subject property;

"**Nearby Community**" means the area, upland and marine, within a 1.5 km radius of the subject property, including the Immediate Community; and

"**Extended Community**" means the upland areas within a 2.5 km radius of the subject property, and including the Nearby Community.

In accordance with the provisions of section 904 of the *Local Government Act*, density for the wastewater treatment plant is established by way of base density, for which no conditions apply, and bonus density on the provision or satisfaction of conditions identified below. For greater certainty, the regulations of this section do not apply to other uses in this Zone.

(a) **Base Density:**

(i) The Floor Area Ratio shall not exceed 0.05;
(ii) The Floor Area shall not exceed 675 m^2, excluding processing tanks and generators completely enclosed within a Building;
(iii) Lot Coverage shall not exceed 15%;
(iv) The authorized rate of discharge for effluent shall not exceed 57,000 m^3/d;
(v) Plant capacity not to exceed 15 ML/day ADWF.

(b) **Bonus Density – Level 1:**

(i) The Floor Area Ratio shall not exceed 0.1;

(ii) The Floor Area shall not exceed 1,350 m^2, excluding processing tanks and generators completely enclosed within a Building;

(iii) Lot Coverage shall not exceed 30%;

(iv) The authorized rate of discharge for effluent shall not exceed 115,000m^3/d;

(v) Plant capacity not to exceed 30 ML/day ADWF,

all on the provision or satisfaction of all of the following conditions:

(1) The provision of materials and supplies for construction and operation of the uses, buildings and structures on the property by boat or barge in part to reduce the impact on the development on the Immediate Community, including through reduced trucking;

(2) Pier, of sufficient size to fulfill previous condition.

(3) Traffic integration amenities, in the form of traffic calming, speed bumps, speed cushions, speed readers with signage, enhanced boulevard curbing and landscaping and bike lanes on streets in the Immediate Community, as follows:

a. Streets within Department of National Defence's Work Point, if and as permitted by Government of Canada,

b. Township's streets adjacent to and within one block radius of all elementary schools, and

c. Township's Lyall Street from Lampson Street to Head Street and Head Street from Lampson Street to Dunsmuir Street,

items (3)(b) and (3)(c) collectively of a value no less than $950,000.

(4) Education and Interpretive Centre: provision of a dedicated conference room on-site for students and the public to learn about wastewater treatment and management, made available at no charge for use by schools, government bodies, non-profit organizations and individuals as requested during normal hours of operation: Minimum 25 m^2 of floor area, either in main lobby or a separate room.

(5) High efficiency air filter systems to improve air quality and odour reduction for schools within the Immediate Community.

(6) Green Building and Design Features, as follows:

a. LEED® Gold standard, certified within one year of construction completion, or such longer period as required to address deficiencies provided initial review and report is within first year.

b. Development consistent with conditions identified in the document entitled "Design Guidelines – McLoughlin Point Wastewater Treatment Plant" prepared by CitySpaces Consulting Ltd. (Revised May 2013), a copy of which is attached to the Official Community Plan, in particular those that are not attainable through normal development permit authority.

(7) Macaulay Point Pump station upgrade to standards of design, materials and quality of construction consistent with recent

Craigflower Pump Station project, with odour mitigation such that odour is not detectable by humans outside of building using industry best practices agreed to by the Township of Esquimalt, or odour detection level no greater than 5 odour units failing agreement on other best practices.

(c) **Bonus Density – Level 2:**

(i) The Floor Area Ratio shall not exceed 0.25;
(ii) The Floor Area shall not exceed 3,000 m^2, excluding processing tanks and generators completely enclosed within a Building;
(iii) Lot Coverage shall not exceed 55%;
(iv) The authorized rate of discharge for effluent shall not exceed 287,500m^3/d;
(v) Plant capacity not to exceed 70 ML/day ADWF,

all on the provision or satisfaction of all of the following conditions:

(1) Each condition as identified in previous Bonus Density levels.
(2) Public open space along waterfront (no less than 1,000 m^2).
(3) Public Art on public open space of a value no less than $100,000, visible and oriented both to passing boats and floatplanes, respecting and exploiting the subject property's prominent position of entrance to the Victoria Harbour.
(4) Education and Interpretive Centre – additional 25 m^2 of floor area for total of 50 m^2.
(5) High efficiency air filter systems to improve air quality and odour reduction for schools within the Nearby Community.
(6) Extension of Green Building and Design Features to additional portions of development.
(7) Upgrade all pump stations within the Nearby Community to standards of design, materials and quality of construction, consistent with recent Craigflower Pump Station project, with odour mitigation such that odour is not detectable by humans outside of building using industry best practices agreed to by the Township of Esquimalt, or odour detection level no greater than 5 odour units failing agreement on other best practices.

(d) **Bonus Density – Level 3:**

(i) The Floor Area Ratio shall not exceed 0.35;
(ii) The Floor Area shall not exceed 4,500 m^2, excluding processing tanks and generators completely enclosed within a Building;
(iii) Lot Coverage shall not exceed 75%;
(iv) The authorized rate of discharge for effluent shall not exceed 379,100m^3/d;
(v) Plant capacity not to exceed 108 ML/day ADWF,

all on the provision or satisfaction of all of the following conditions:

(1) Each condition as identified in previous Bonus Density levels.
(2) The provision of public open space improvements of a value no less than $75,000, including picnic benches and "tot" park playlot with appropriately themed play equipment and safety features given proximity to open water.

(3) Pier or dock, of sufficient size to fulfill previous condition, including with provision of harbour tugboat pedestrian ferry service, either by property owner or through contract with existing operator.
(4) Public Walkway: Design of building and development of site to incorporate public accessible trails, and off-site construction of trail connection to West Bay Neighbourhood.
(5) Additional traffic integration amenities, in the form of additional traffic calming and bike lanes on all remaining streets between Lampson Road and Esquimalt Road and subject property, to standards of design, materials and quality of construction comparable to Bonus Density – Level 1 Condition 3.
(6) Education and Interpretive Centre – additional 25 m^2 of floor area for total of 75 m^2, including portion for a "Center of Excellence" to educate, promote and facilitate energy technology or other industries focussed on utilizing the wind and wave energy at the subject property.
(7) High efficiency air filter systems to improve air quality and odour reduction for schools within the Extended Community.
(8) Extension of Green Building and Design Features to additional portions of development.
(9) Integration of reclaimed water into the design of the buildings, including a rooftop wetland and landscaped feature.
(10) Heritage Interpretative Signage, recognizing the historic uses on the subject property and process to transition to current uses (Minimum 5 signs for stations along a walkway in public open space area).
(11) Consistently designed and themed upgrades to the fire hydrants and support equipment parts in the Immediate Community, to coincide with waterworks upgrades necessary for the treatment facility, such hydrants and other necessary above-ground components being distinct from the rest of the Township, unique to the proponent, including recognition of provision by the proponent further to this bylaw.
(12) Provision of underground conduit and other appurtenances to facilitate undergrounding of all utilities, including electrical infrastructure upgrades, so as to minimize impacts on surrounding community.
(13) Reinstatement of all roads (including but not limited to paved areas, sidewalks, boulevards) affected by establishment of wastewater treatment plant of this density of use, to a condition equal to or better than existed before to construction.
(14) Upgrade all pump stations within the Extended Community to standards of design, materials and quality of construction, consistent with recent Craigflower Pump Station project, with odour mitigation such that odour is not detectable by humans outside of building using industry best practices agreed to by the Township of Esquimalt, or odour detection level no greater than 5 odour units failing agreement on other best practices.
(15) Odour-reducing and noise mitigation measures that are within the top 10 percentile of comparable facilities developed in previous five (5) years in major waterfront cities in North America and

Europe, such that odour is not detectable by humans outside of building using industry best practices agreed to by the Township of Esquimalt, or odour detection level no greater than 5 odour units failing agreement on other best practices.

(16) Facility design to ensure that any products, byproducts, biosolids or other goods and commodities be transported off-site only by means of piping or marine access, thereby reducing negative transportation impacts on the Immediate Community.

(17) That no odour-causing and/or methane-producing (of any level) facilities related to the use of the subject property be located off-site within the Extended Community, except for pipes, outfalls, pumping stations and accessory appurtenances.

(18) Annual contribution of $55,000 to McLoughlin Point Amenity Reserve Fund.

(19) Ongoing liaison committee formed with representatives from Township, local schools, health authority, DND officials community groups and other interested parties (all as available and as interested), along with operators on subject property, with meeting space provided on subject property at no cost at least once/monthly, including to review satisfaction of above conditions and ongoing operations.

(6) by adding to Section 55(4) **Lot Coverage**, the following:

"This section does not apply to uses under Section 55(1)(d) through (k)."

(7) by reformatting the existing sentence Section 55(5) **Building and Structure Height** to be paragraph (a), and adding the following:

"(b) Height of Principal Building may be increased by 5 metres (to 15 m maximum) for uses under Section 55(1)(d) [*wastewater treatment plant*] if combined in a mixed–use development with uses under subsections 55(1)(e) through (j).

(c) Height of Principal Building may be increased by 5 metres (to 15 m maximum) for uses under Section 55(1)(h) [*hotel*] when such hotel includes convention facilities and if combined in a mixed–use development with other uses under subsections 55(1)(e) through (j).

(d) Notwithstanding anything to the contrary in this section, the maximum height of a building or structure located within 20 m of the high water mark is 5.0 m."

(8) by adding to Section 55(6) **Siting Requirements,** the following:

"(d) No Building shall be located within 7.5 metres of the High Water Mark.

(e) For the purposes of this Zone, where there is no abutting highway, the private road from which the property gains access shall be considered the Front Lot Line."

(9) by adding to Section 55(7) **Screening and Landscaping**, the following:

"(c) For the wastewater treatment plant use:

(i) A minimum 4.0 m wide landscaped buffer shall be located within the setback from the High Water Mark. The landscaping shall be of sufficient quality and quantity as to completely obliterate any view of a wastewater treatment plant building and tanks from the marine environment.

(ii) Except for places of entrance and egress to the site, a minimum 2.5 m wide landscaped buffer shall be located in the front and all side setbacks."

(10) by adding to Section 55(8) **Off Street Parking**, the following:

"In addition, the number of spaces required shall include:

Liquid Waste Management Plant 1 space / 132 m^2"

(11) by adding a new Section 55(9) entitled **Severability and Satisfaction**, as follows:

"(9) **Severability and Satisfaction**

(a) In addition to Section 5 of this Bylaw, and for greater certainty for this Zone, should any measure of density, associated condition or amenity be held to be invalid by the decision of any Court of competent jurisdiction, that measure of density, condition or amenity may be severed without affecting the validity of the density-bonusing scheme and other measures of density, conditions or amenities.

(b) Where a condition requires the approval or permission of an authority beyond the control of the property owner, then the condition shall be interpreted as requiring the property owner's best efforts to secure such permission, including identification of this Bylaw requirement with the initial request, satisfaction of conditions imposed by the third party and appeal if the request/application is initially rejected (including by enlisting the support of the Township). For example:

(i) Bonus Density Level 1 Condition 2, and Level 3 Condition 3 each require permission from the Government of Canada given jurisdiction over navigable waters;

(ii) Bonus Density Level 1 Condition 3(a) and Level 3 Condition 4 each require permission of the Government of Canada, Department of National Defence, given the adjacent DND Lands; and

(iii) Bonus Density Level 1 Condition 5, Level 2 Condition 5 and Level 3 Condition 7 each require permission of the affected school(s) and School District No. 61.

(c) Where a condition is severed, or best efforts under this provision have not resulted in the necessary third-party approval, then the condition shall be deemed satisfied on the provision of all of the following:

(i) Court Order of severance or written evidence of third-party rejection, including denial of appeal as applicable;

(ii) independent appraisal estimating the cost of the provision of the amenity or satisfaction of the condition, should the condition may have been satisfied; and

(iii) a cash contribution equivalent to the cost of the provision of the amenity or satisfaction of the condition, from the property owner to the Township for the McLoughlin Point Amenity Reserve Fund, such monies to be used for replacement amenities or conditions that are consistent with governing authority, including further enhancements or additions to remaining amenities or conditions."

READ a first time by the Municipal Council on the 24th day of June, 2013.

READ a second time by the Municipal Council on the 24th day of June, 2013.

A Public Hearing was held pursuant to Sections 890 and 892 of the *Local Government Act* on the ____ day of _____, 2013.

READ a third time by the Municipal Council on the ____ day of _____, 2013.

ADOPTED by the Municipal Council on the ____ day of _____, 2013.

BARBARA DESJARDINS
MAYOR

ANJA NURVO
CORPORATE OFFICER

ATTACHMENT 3

Making a difference...together

Capital Regional District
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July 8, 2013

0400-50

Mayor and Council
Township of Esquimalt
1229 Esquimalt Road
Esquimalt, B.C.
V9A 3P1

Dear Mayor and Council:

Township of Esquimalt Zoning Bylaw 1992, No. 2050, Amendment Bylaw [No. 209], 2013, No. 2806 ("Zoning Amendment Bylaw No. 2806") to rezone the McLoughlin Point lands to permit a wastewater treatment plant

This submission is for the purposes of presenting the views of the Capital Regional District (CRD) with respect to the proposed adoption of Zoning Amendment Bylaw No. 2806.

The CRD is opposed to the adoption of Zoning Amendment Bylaw No. 2806 in its present form. The CRD has a number of procedural, substantive and legal objections to this Bylaw.

With respect to Zoning Amendment Bylaw No. 2806, the CRD has received legal advice that the Bylaw contains certain legal flaws:

1. The application of the concept of "density" in the *Local Government Act*;
2. Inclusion of matters as "amenities" for the purposes of section 904 of the *Local Government Act* in excess of statutory authority;
3. References to amenities in language that is so unclear and ambiguous that it is incapable of being reasonably interpreted;
4. The creation of a density bonusing scheme that requires the provision of amenities that are not under the control of the CRD, or that depend upon approvals of third parties in ways that make it clearly unlikely that the CRD could meet the density bonusing requirements, indicating that the purpose of the Bylaw is not to permit a use of the McLoughlin Point lands but in fact to thwart the establishment of the use on the property;

Inappropriate Definition of Densities

In the McLoughlin Point Special Use Zone created by Zoning Amendment Bylaw No. 2806, in sections 3(5)(a)(iv), 3(5)(b)(iv), 3(5)(c)(iv) and 3(5)(d)(iv) density is referred to as the rate of discharge for effluent. Sections 3(5)(a)(v), 3(5)(b)(v), 3(5)(c)(v) and 3(5)(d)(v) refer to plant capacity in ML per day ADWF (average dry weather flow).

These matters are not matters of density or use but rather relate to the efficiency or productivity of the waste treatment plant.

Amenities

A number of matters that are referred to as "amenities" in Zoning Amendment Bylaw No. 2806 are arguably outside the scope of what would lawfully be considered an amenity under section 904 of the *Local Government Act*.

1. Provision of materials and supplies for construction and operation of the uses, buildings and structures on the property by boat or barge is not properly an amenity, but a manner of constructing the project or of making use of the land. It is not an amenity but rather a condition relating to the conduct of the use. The Township does not have the authority to regulate the means used to carry out a construction project.

2. "Green Building and Design Features" including requirement for a LEED® Gold standard, is a building regulation disguised as an amenity. The Township does not have authority to impose a building regulation that supersedes the requirements of the Building Code without the approval of the provincial Minister responsible for housing. Incorporating a reference to a building standard as an "amenity" in the zoning bylaw is an attempt to do indirectly what the Township cannot do directly.

3. In Bonus Density Level 3, unless the integration of reclaimed water into the design of the buildings and the installation of a rooftop wetland and landscaped features on the roof is intended to be a benefit to the community, it is not an amenity within the meaning of section 904 of the *Local Government Act*.

4. Item 17 would prohibit the installation of odour-causing or methane-producing facilities related to the use of the property off-site within the "extended community", with the exception of pipes, outfalls, pumping stations and accessory appurtenances. This is not the "provision of amenities" but is the prohibition of land use.

5. Item 18 – the annual contribution of $55,000 to the "McLoughlin Point Amenity Reserve Fund" is the imposition of an annual fee or charge on the owner in exchange for the additional density. The *Local Government Act* does not include express authority to impose such a fee or charge or payment condition in connection with authority to use land or a bylaw under section 904, and section 931(5) of the *Local Government Act* prohibits the imposition of fees, charges or taxes as a further condition of zoning bylaw amendments beyond what is authorized as an application fee.

6. Item 19 – A liaison committee is not an "amenity"; its existence and mandate could conflict with the Province's requirement that the Project be managed by a non-political commission as a condition of Provincial funding.

The substitution of a cash–in–lieu of amenities provision does not save the Bylaw from the fact that it is flawed in some of its approach.

There is no express provision to require an owner to provide cash-in-lieu of an amenity that cannot be provided, making this section similarly questionable, and putting elected officials who authorized spending taxpayer money on the "amenities in lieu" at risk.

Vagueness and Uncertainty

A number of the amenity requirements are so vague and uncertain that they make compliance by the CRD virtually impossible. There is no way for the CRD to ever be sure with respect to some of these matters that it would have met the condition of providing the "amenity" described in the Bylaw. This leaves open the possibility for the Township to take the position that the use of the land is not in fact permitted under the Zoning Bylaw because the "amenity" condition has not been met.

Third Party Control over Amenities

Many of the amenities that have been stipulated in the proposed Zoning Amendment Bylaw are not related to the wastewater treatment plant project itself. They are, instead, amenities designed to provide a variety of different facilities and benefits to the community of Esquimalt.

The CRD has established a service through an establishing bylaw to allow for the "collection, conveyance, treatment and disposal of sewage". It is not a service that can tax residents of the municipalities who participate in core area sewage treatment (which includes the taxpayers of the Township of Esquimalt) to raise money to pay for any community benefit of whatever type, unrelated to the purpose for which this service was established by the CRD. Expenditures of public tax money raised for the purpose of the collection, conveyance, treatment and disposal of sewage for other purposes would be unlawful expenditures and would place elected officials of the CRD that authorized such expenditures at risk of personal liability.

Funding contributions from the provincial and federal governments could not be used towards the cost of providing these amenities. These costs would be borne entirely by CRD residents. In order to lawfully spend CRD money on these matters it would be necessary for the CRD Board to either make changes to the existing core area service establishing bylaw (a process that requires the consent of 2/3 of the other municipal Councils and the approval of the Inspector of Municipalities) or to establish a new purpose-specific service (which would require consent of all of the municipal Councils to which the service would apply and the approval of the Inspector of Municipalities).

Even if the provision in Zoning Amendment Bylaw No. 2806 regarding cash-in-lieu of amenities was valid, raising the money would require such bylaw amendments, or put the directors of the CRD at personal risk of liability for an illegal expenditure of public taxpayer funds toward a payment to the Township for community 'amenities'.

Conclusion

Although the CRD has conveyed to the Township the impediments that stand in the way of simply providing money for community "amenities", the Township has nevertheless chosen to include such items in the list of amenities that are conditions to the CRD being able to develop the McLoughlin Point property for wastewater treatment plant purposes.

If an insufficient number of municipalities failed to approve the changes, then the conditions could not be met, the money could not be raised, and the CRD would be left without appropriate zoning authority The Capital Regional District cannot help but be drawn to the conclusion that the number and type of amenities demanded by the Township, as a condition of use of the property, is with full knowledge of the challenges the Capital Regional District would face in trying to meet such conditions, and would limit the ability to implement the provisions of the Liquid Waste Management Plan that has been approved by the Minister of Environment and which reflects stated provincial policy in respect of sewage treatment for the core area of the CRD, which potentially puts the entire Bylaw into conflict with the Liquid Waste Management Plan.

The CRD, accordingly, objects to the adoption of Zoning Amendment Bylaw No. 2806 in its present form on a number of substantive legal grounds. The CRD would urge the Township to reconsider Zoning Amendment Bylaw No. 2806 and to work with representatives of the CRD on the provision of mitigation measures and amenities that the CRD can in fact provide and that will work to mitigate the impact of the sewage treatment plant in a manner that is mutually respectful of the interests of the residents and taxpayers of the Township and the obligations of the CRD in relation to the implementation of the construction of the sewage treatment project.

Sincerely,

CAPITAL REGIONAL DISTRICT

Sonia Santarossa
Corporate Officer

cc: Laurie Hurst, Chief Administrative Officer, Township of Esquimalt
Alastair Bryson, Board Chair, CRD
Robert Lapham, Chief Administrative Officer, CRD
Jack Hull, Interim Program Director, Core Area Wastewater Treatment, CRD
Andy Orr, Senior Manager Corporate Communications