



Making a difference...together

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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