SUPREME COURT OF CANADA

CITATION: Canadian Pacific Railway Co. *v.* Vancouver (City), 2006 SCC 5
[2006] S.C.J. No. 5

DATE: 20060223
DOCKET: 30374

Canadian Pacific Railway Company
Appellant
v.
City of Vancouver
Respondent
- and -
British Columbia Chamber of Commerce, British Columbia Real Estate Association, Business Council of British Columbia, Canadian Home Builders' Association of British Columbia, Council of Tourism Associations of British Columbia, Mining Association of British Columbia, New Car Dealers Association of British Columbia, Retail Council of Canada, Urban Development Institute (Pacific Region) and Urban Development Institute of Canada
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Abella JJ.

REASONS FOR JUDGMENT: (paras. 1 to 64) — McLachlin C.J. (Bastarache, Binnie, LeBel, Deschamps, Fish and Abella JJ. concurring)

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canadian pacific railway *v.* vancouver

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Neutral citation: 2006 SCC 5.

File No.: 30374.

2005: November 9; 2006: February 23.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Abella JJ.

on appeal from the court of appeal for british columbia

Municipal law — By-laws — Validity — Official development plan by-law restricting how designated land earlier granted to railway company may be used — Whether by-law beyond statutory powers of municipality — If not, whether municipality must compensate railway company — Whether by-law should be set aside for procedural irregularities — Vancouver Charter, S.B.C. 1953, c. 55, ss. 2, 561, 562, 563, 569 — City of Vancouver, By-Law No. 8249, Arbutus Corridor Official Development Plan By-Law (25 July 2000).

Over a century ago, the province granted CPR a corridor of land for the construction of a railway line. As the century advanced, rail operations on the corridor declined. CPR therefore put forward proposals to develop the corridor for residential and commercial purposes. The City of Vancouver, however, adopted by by-law an official development plan ("ODP By-law"), which designated the corridor as a public thoroughfare for transportation. The effect of the by-law was to freeze the redevelopment potential of the corridor and to confine CPR to uneconomic uses of the land. The Chambers Judge held the by-law to be *ultra vires* the City. The Court of Appeal set aside the decision. The court found that the by-law was within the City's statutory powers, that the City was not obligated to compensate CPR for the land and that the by-law did not suffer from procedural irregularities.

Held: The appeal should be dismissed.

The ODP By-law is *intra vires* the City. The *Vancouver Charter* grants extensive powers to the City to determine how land within its limits can be used. This includes the power to plan for land development, which allows the City to set a vision

and course for future development. While a by-law may have the effect of restricting how the land designated may be used, such a by-law is not invalid in the absence of a plan to acquire the land. The wording of the *Vancouver Charter* clearly confers a broad power on the City to pass official development plans ("ODPs") for planning purposes without moving to implement those plans, and specifically contemplates that ODPs may adversely affect land and exempts the City from liability for any such effects. Although the City is required under its charter to obtain legal title to all streets, a stipulation in an ODP that a piece of land can be used only as a public thoroughfare does not make it a street. The ODP merely freezes the use of the land with a view to preserving it for future development by precluding present uses that might interfere with that development. [12] [16] [22-23]

The City is not obligated to compensate CPR for the land. The two requirements for a *de facto* taking requiring compensation at common law are not made out in this case. First, the City has not acquired a beneficial interest related to the land. It has gained only some assurance that the land will be used or developed in accordance with its vision. Second, the ODP By-law does not remove all reasonable uses of the property. CPR may still use its land to operate a railway or lease the land for use in conformity with the by-law. Even if the facts of this case could be seen to support an inference of *de facto* taking at common law, that inference has been conclusively negated by s. 569 of the *Vancouver Charter*. By providing in s. 569 that the effects of the by-law cannot amount to a taking, the provincial legislature has rendered inapplicable the common law *de facto* taking remedy. Furthermore, since there is no taking or expropriation, the provincial *Expropriation Act* does not apply as there is no inconsistency between the provisions of that Act and the *Vancouver Charter*. [31-37]

The City's conduct in enacting the ODP By-law complied with the requirements of fair process. Although the *Vancouver Charter* imposes no statutory requirement to hold a public hearing before adopting an ODP, the City sought to fulfil the duty of fairness it owed CPR through such a process. The notices concerning the hearing clearly gave the flavour of the by-law being considered and did not affect the participatory rights of CPR. CPR was also given sufficient disclosure of information to allow it to participate meaningfully in that hearing and present its case. The change made to the by-law after the hearing to exclude a rapid transit system did not amount to an unfair process. While the duty of fairness may require the City to take any legitimate expectations into account, it does not necessarily require the City to fulfil them. The City must exercise its discretionary power in the public interest. Here, the by-law as originally drafted raised no expectation that a rapid transit system would or could be located on the corridor. It was only a mere possibility. Since such a system was never a permitted use of the corridor, as the zoning disallowed it, CPR should have expected that rapid transit might not be allowed on its land. Lastly, the choice of the new route for rapid transit did not prejudice CPR. The relevant time to assess prejudice is the time of the hearing and, at that time, no choice for the rapid transit route had been made. [40] [42] [46-53] [56]

Cases Cited

Applied: *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1999), 177 D.L.R. (4th) 696; *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101; *The Queen in right of British Columbia v. Tener*, [1985] 1 S.C.R. 533; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Pitt Polder Preservation Society v. Pitt Meadows (District)* (2000), 12 M.P.L.R. (3d) 1, 2000 BCCA 415.

Statutes and Regulations Cited

Canada Transportation Act, S.C. 1996, c. 10.

City of Vancouver, By-Law No. 8249, *Arbutus Corridor Official Development Plan By-Law* (25 July 2000), ss. 1.2, 2.1.

Expropriation Act, R.S.B.C. 1996, c. 125, ss. 1 "expropriate", "expropriating authority", 2(1).

Vancouver Charter, S.B.C. 1953, c. 55, ss. 2 "street", 289, 317, 559, 561, 562, 563, 564(1), 566(1), 569.

Vancouver Charter Amendment Act, 1964, S.B.C. 1964, c. 72, ss. 17, 19.

Authors Cited

Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*. Toronto: Canvasback, 1998 (loose-leaf updated July 2005).

APPEAL from a judgment of the British Columbia Court of Appeal (Esson, Southin and Donald JJ.A.) (2004), 237 D.L.R. (4th) 40, 196 B.C.A.C. 49, 26 B.C.L.R. (4th) 220, 14 Admin. L.R. (4th) 60, 45 M.P.L.R. (3d) 161, [2004] B.C.J. No. 653 (QL), 2004 BCCA 192, setting aside a decision of Brown J. (2002), 47 Admin. L.R. (3d) 56,

33 M.P.L.R. (3d) 214, [2002] B.C.J. No. 2451 (QL), 2002 BCSC 1507. Appeal dismissed.

Peter Kenward, for the appellant.

George K. Macintosh, *Q.C.*, and *Susan B. Horne*, for the respondent.

Written submissions only by *Peter G. Voith*, *Q.C.*, and *Gib van Ert*, for the interveners.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

1. Introduction

1 Over a century ago, in 1886, the provincial Crown granted the Canadian Pacific Railway Company ("CPR") a corridor of land for the construction of a railway line from False Creek, in the City of Vancouver ("City"), south to Steveston, on Lulu Island (named after Miss Lulu Sweet, a young actress in the first theatrical company to visit British Columbia). It is this corridor of land, now known as the "Arbutus Corridor", that lies at the heart of this appeal.

2 In 1902, a railway line was built on the corridor. As the century advanced, traffic declined. From time to time, there was talk of using the corridor for an urban transit line,

but nothing came of it and, ultimately, the line was placed elsewhere. In 1999, CPR formally began the process of discontinuing rail operations on the corridor under the *Canada Transportation Act*, S.C. 1996, c. 10.

3 The Arbutus Corridor has for many years been bounded on both sides and for virtually its entire length by extensive urban development. CPR put forward proposals to develop the corridor for residential and commercial purposes. It also indicated that if the City or any other public body wished to acquire the land, it was willing to sell it at whatever price was determined by agreement or expropriation.

4 Nothing happened. With increasing vigor, CPR expressed its view that it was intolerable for the City and other governmental bodies to seek to keep the corridor intact without purchasing it. Spirited public debate ensued. The City, as early as 1986, indicated in planning documents and Council resolutions its preference to preserve the corridor for transportation purposes. In the end, the City made it clear that it would not buy the land and adopted the *Arbutus Corridor Official Development Plan By-law*, City of Vancouver, By-law No. 8249, (25 July 2000) ("ODP By-Law"), that designated the corridor as a public thoroughfare for transportation and "greenways", like heritage walks, nature trails and cyclist paths.

5 The City's powers are derived from the *Vancouver Charter*, S.B.C. 1953, c. 55, an Act of the Legislature of British Columbia, which serves the same purpose as a "municipal act" but applies only to the city of Vancouver (see Appendix A). Development plans under s. 561 of the *Vancouver Charter* are essentially statements of intention which do not directly affect land owners' property rights. However, once

development plans are adopted as "official" ("ODPs") under s. 562, they preclude development contrary to the plans: s. 563.

6 Building on earlier planning documents, the intent of the ODP By-law was "to provide a context for the future of the [corridor]". More particularly, s. 1.2 stated: "The Arbutus Corridor has been used for many years for a rail line and this plan accommodates this use, but also provides for a variety of other uses."

7 The by-law outlined the uses to which the corridor could be put (s. 2.1):

> This plan designates all of the land in the Arbutus Corridor for use only as a public thoroughfare for the purpose only of:
>
> (a) transportation, including without limitations:
>
> (i) rail;
>
> (ii) transit; and
>
> (iii) cyclist paths
>
> but excluding:
>
> (iv) motor vehicles except on City streets crossing the Arbutus Corridor; and
>
> (v) any grade-separated rapid transit system elevated, in whole or in part, above the surface of the ground, of which one type is the rapid transit system known as "SkyTrain" currently in use in the Lower Mainland;
>
> (b) greenways, including without limitation:
>
> (i) pedestrian paths, including without limitation urban walks, environmental demonstration trails, heritage walks and nature trails; and
>
> (ii) cyclist paths.

8 The effect of the by-law was to freeze the redevelopment potential of the corridor and to confine CPR to uneconomic uses of the land. CPR regards this effect as unfair and unreasonable. It does not allege that the City acted in bad faith. However, it argues: (1) that the by-law is *ultra vires* City and should be struck down; (2) that the City is obligated to compensate CPR for the land; and (3) that the by-law suffers from procedural irregularities and should be struck down on that account.

9 The Chambers Judge held the by-law to be *ultra vires* the City, declined a declaration that the City must compensate CPR and found it unnecessary to consider the procedural issues ((2002), 33 M.P.L.R. (3d) 214). The British Columbia Court of Appeal rejected all three arguments and allowed the City's appeal ((2004), 26 B.C.L.R. (4th) 220). CPR now appeals to this Court. Despite considerable sympathy for CPR's position, I conclude that under the *Vancouver Charter*, the City was entitled to refuse compensation and to pass the by-law, and that the courts have no option but to uphold it. I would therefore dismiss the appeal.

2. Issues

10 1. Was the ODP By-law beyond the statutory powers of the City?

2. If not, must the City compensate CPR for the land?

3. Should the by-law be set aside for procedural irregularities?

3. Analysis

3.1 *Was the By-law Beyond the Statutory Powers of the City?*

11 The powers of the City are derived from the *Vancouver Charter*. CPR argues that the ODP By-law exceeds these powers. For the reasons that follow, I cannot accept this argument.

12 Part XXVII of the *Vancouver Charter* grants extensive powers to the City to determine how land within the city can be used. The three main powers are the power to zone land, the power to plan for land development and the power to issue development permits. (The latter power is of no concern here.) The power to zone land allows the City to establish permissible uses for particular zones, or areas of the City, and is exercised by passing zoning by-laws. The power to plan for development allows the City to set a vision and course for future development, and is exercised by preparing and revising "development plans" and by adopting by by-law development plans as ODPs. Zoning by-laws designate actual permitted uses, while ODPs are directed to preserving land for future non-actualized uses. Both, however, may have the effect of restricting how the designated land may be used. And in the case of both, the *Vancouver Charter* provides that the City is not liable to compensate landowners for loss as a result of these restrictions: s. 569.

13 CPR makes a number of arguments to support its contention that the ODP By-law in this case was beyond the powers granted the City by the *Vancouver Charter*.

14 CPR's main argument is that the by-law exceeds the purpose of an ODP. That purpose, CPR suggests, is to set out policy for future land development. To the extent that the ODP goes further and affects land use, it must provide for the City's acquisition

of the land. This ODP, CPR says, is not "zoning" and has none of the protections associated with zoning. Nor is it "planning" because the effect on the landowner is binding. An ODP, in the submission of CPR, is simply a policy directive that has the effect of freezing development in order to prevent changes and improvements on the land while the City is engaged in the steps necessary to acquire the land. The contention is that the City misused the ODP power in this case since it never had any intention of purchasing the land and never took steps to do so. In short, CPR contends, to pass a valid ODP under ss. 561 and 562 of the *Vancouver Charter*, the City must have a plan to acquire the land. Since the City had no such plan, the ODP By-law is invalid.

15 CPR buttresses this submission with the argument that the Legislature could not have intended the *Vancouver Charter* to permit the City to effectively expropriate land by use limitations without taking formal title. It points out that this is the first time in 40 years that the City has used its ODP power to effectively designate private land public without acquiring it. This, it says, is a new interpretation of the *Vancouver Charter* that the City has "dreamed up" to achieve its aim of using or freezing the corridor without legally acquiring it.

16 CPR's contention that the ODP By-law is invalid in the absence of a plan to acquire the land is not supported by the wording of the *Vancouver Charter*, which (1) confers a broad power on the City to pass ODPs for planning purposes without moving to implement those plans; and (2) specifically contemplates that ODPs may adversely affect land and exempts the City from liability for any such effects.

17 First, the *Vancouver Charter* confers a broad power on the City to pass ODPs for planning purposes without requiring the City to implement those plans. The *Vancouver Charter* confers power on the City to plan for future development of "land", "areas" and "sites", which is precisely what the ODP By-law is intended to do: s. 561(2). An ODP is just what its name suggests – a plan to guide future development, not a fully actualized scheme. Thus, in defining "development plan", s. 559 states that a plan for the future physical development of any part of the city does not need to be "complete". It may be a "partial" plan. The steps necessary to bring the plan to fruition do not need to be worked out. This negates the suggestion that passing an ODP requires the City to acquire affected land.

18 This is confirmed by s. 563(1) of the *Vancouver Charter*, which provides that "[t]he adoption by [City] Council of a development plan shall not commit the Council to undertake any of the developments shown on the plan" (emphasis added). More specifically, s. 564(1) states that "[w]here a project is shown upon an ODP, the Council may acquire any real property it considers essential to the carrying-out of the project" (emphasis added). In other words, the City may acquire property subject to the ODP, but is not obliged to acquire it.

19 Second, the *Vancouver Charter* expressly contemplates the possibility that an ODP may adversely affect land and exempts the City from liability for such effects. This negates the argument that ODPs are simply statements of policy and, to the extent that they may affect land use and values, must be accompanied by plans to acquire the affected land. Section 569 deems that the exercise of the City's power does not constitute a "tak[ing] or injuriou[s] affect[ion]" and that "no compensation shall be payable by the

[c]ity or any inspector or official thereof". The Legislature clearly contemplated that ODPs could have effects like those found in this case, and went on to hold that the City was not liable for the consequences.

20 The effect of the ODP By-law in this case is to designate the Arbutus Corridor a public thoroughfare. The power to designate public thoroughfares was formerly a zoning power. In 1964, it was transferred to the ODP power. At the same time, s. 569 was expanded from protecting the exercise of zoning power to protecting the exercise of "any of the powers contained in this Part": see *Vancouver Charter Amendment Act, 1964*, S.B.C. 1964, c. 72, ss. 17 and 19. This indicates that the Legislature contemplated that the exercise of the power to create a public thoroughfare under an ODP could adversely affect landowners, and deliberately dealt with that possibility by providing that the City would not be liable for such adverse affects. This is inconsistent with the argument that the Legislature intended the City to acquire any lands affected by an ODP.

21 I conclude that the provisions of the *Vancouver Charter* do not require the City to either acquire or have a plan to acquire land that is subject to an ODP. The by-law is not invalidated on this ground.

22 CPR also argues that the by-law is invalid because designation of the corridor for use only as a public thoroughfare effectively designates the corridor as a street. Section 2 of the *Vancouver Charter* defines "street" as including "any ... way normally open to the use of the public". Section 289 of the *Vancouver Charter* requires a street to be vested in the City. CPR argues that this requires the City to obtain legal title to all land used for

streets. Since it has not acquired title to the corridor, its designation for use as a public thoroughfare is invalid, CPR argues.

23 I cannot accept this argument. Stipulating that a piece of land can be used only as a public thoroughfare in an ODP does not make it a street. It merely freezes the use of the land with a view to preserving it for future development by precluding present uses that might interfere with that development. In this case, for example, residential and commercial development cannot take place on the corridor because that might interfere with it being developed in the future for purposes of public passage. For the time being, however, the corridor remains private land in the hands of CPR. CPR's argument rests on the premise that City Council must treat the corridor like a street, simply because the by-law allows use of the land for public passage. However, the City points out that the *Vancouver Charter*'s definition of "street" expressly excludes "a private right-of-way on private property", which describes the corridor precisely.

24 In a variation on this argument, CPR argues that the by-law purports to regulate motor vehicle traffic on the corridor, which can only be done on streets: s. 317. However, the by-law does not regulate traffic. It simply designates the corridor for use as a public thoroughfare that excludes motor vehicles. Motor vehicles are regulated only on street crossings, which are either vested in the City or for which the City holds an easement: s. 289.

25 Finally, CPR argues that the by-law is invalid because its effect is not to designate land but to regulate it. Regulation, it argues, is not appropriate for an ODP. Again, there is no merit in this argument. The by-law does not regulate the use of land, but merely

designates the corridor for use as a public thoroughfare. That designation makes applicable s. 563(3) of the *Vancouver Charter*, which limits the use that can be made of the corridor so designated. The limit arises from powers the Legislature gave to the City and the provisions of the *Vancouver Charter* enacted by the Legislature. Its effects cannot be said to be contrary to what the Legislature intended.

26 I conclude that CPR's contention that the by-law is invalid because it goes beyond the City's powers under the *Vancouver Charter* cannot be accepted.

3.2 *Compensation*

27 CPR argues there is a presumption that the Legislature intended any taking of property to be compensated. It argues that the ODP By-law, by limiting its use, constitutes an effective taking of its land. It cannot use the land for any economically viable purpose. It cannot, it says, even run a railway because the by-law precludes maintenance of its track. In these circumstances, the City has effectively "taken" its land and must compensate it, CPR urges.

28 Like the Court of Appeal, I am not satisfied that the by-law prevents track maintenance or the operation of a railway on the corridor. Indeed, CPR has no desire to operate a railway there. Its real complaint is that the by-law prevents it from developing or using the corridor for economically profitable purposes. This amounts, it argues, to a *de facto* taking of its land, requiring compensation.

29 CPR argues that at common law, a government act that deprives a landowner of all reasonable use of its land constitutes a *de facto* taking and imposes an obligation on the government to compensate the landowner.

30 For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property (see *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1999), 177 D.L.R. (4th) 696 (N.S.C.A.), at p. 716; *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101; and *The Queen in right of British Columbia v. Tener*, [1985] 1 S.C.R. 533.

31 In my view, neither requirement of this test is made out here.

32 First, CPR has not succeeded in showing that the City has acquired a beneficial interest related to the land. To satisfy this branch of the test, it is not necessary to establish a forced transfer of property. Acquisition of beneficial interest related to the property suffices. Thus, in *Manitoba Fisheries*, the government was required to compensate a landowner for loss of good will. See also *Tener*.

33 CPR argues that, by passing the ODP By-law, the City acquired a *de facto* park, relying on the observation of Southin J.A. that "the by-law in issue now can have no purpose but to enable the inhabitants to use the corridor for walking and cycling, which some do (trespassers all), without paying for that use" (para. 117). Southin J.A. went on to say: "The shareholders of ... CPR ought not to be expected to make a charitable gift to the inhabitants" (para. 118). Yet, as Southin J.A. acknowledged, those who now casually

use the corridor are trespassers. The City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land. This is not the sort of benefit that can be construed as a "tak[ing]".

34 Second, the by-law does not remove all reasonable uses of the property. This requirement must be assessed "not only in relation to the land's potential highest and best use, but having regard to the nature of the land and the range of reasonable uses to which it has actually been put": see *Mariner Real Estate*, at p. 717. The by-law does not prevent CPR from using its land to operate a railway, the only use to which the land has ever been put during the history of the City. Nor, contrary to CPR's contention, does the by-law prevent maintenance of the railway track. Section 559's definition of "development" is modified by the words "unless the context otherwise requires". Finally, the by-law does not preclude CPR from leasing the land for use in conformity with the by-law and from developing public/private partnerships. The by-law acknowledges the special nature of the land as the only such intact corridor existing in Vancouver, and expands upon the only use the land has known in recent history.

35 CPR also argues that the British Columbia *Expropriation Act*, R.S.B.C. 1996, c. 125, requires the City to compensate CPR (Appendix B). Section 1 of the Act defines "expropria[tion]" as "the taking of land by an expropriating authority under an enactment without the consent of the owner", and goes on to define "expropriating authority" as "a person ... empowered under an enactment to expropriate land". Section 2(1) of the Act provides that "[i]f an expropriating authority proposes to expropriate land, th[e] Act applies to the expropriation, and, if there is an inconsistency between any of the

provisions of th[e] Act and any other enactment respecting the expropriation, the provisions of [the *Expropriation Act*] apply". The *Expropriation Act* requires compensation for land expropriated, while the *Vancouver Charter* states the City is not obliged to compensate for adverse effects to land caused by an ODP. CPR argues that this constitutes an inconsistency and that, under s. 2 of the *Expropriation Act*, the requirement of compensation in that Act must prevail.

36 This argument rests on the premise that there is an inconsistency between the *Expropriation Act* and the *Vancouver Charter* as applied to the facts in this case. It assumes that the land is "expropriate[d]" or "taken" and that the two statutes impose different obligations in this event – compensation in one case, no compensation in the other. In fact, however, the provisions of the *Vancouver Charter* prevent a conflict from ever arising. Section 569 of the *Vancouver Charter* provides that property affected by a by-law "shall be deemed as against the city not to have been taken". The *Expropriation Act* applies only where there has been a "tak[ing]" or "expropriat[ion]". Since by statute there is no taking or expropriation here, there is no inconsistency with the *Expropriation Act* and s. 2(1) cannot apply.

37 I add this. Even if the facts of this case could be seen to support an inference of *de facto* taking at common law, that inference has been conclusively negated by s. 569 of the *Vancouver Charter*. The Province has the power to alter the common law. Here, by providing that the effects of the ODP By-law cannot amount to a "tak[ing]", it has rendered inapplicable the common law *de facto* taking remedy upon which CPR relies.

3.3 *Should the By-Law Be Set Aside for Procedural Irregularities?*

38 In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, this Court affirmed a duty of procedural fairness in making administrative decisions. Such decisions must be made "using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context" (para. 22 *per* L'Heureux-Dubé J.). Moreover, those affected by the decision must be given the opportunity to put forward their views and evidence, and have them considered by the decision-maker.

39 The content of the duty of procedural fairness depends on a number of factors, including: the "nature of the decision being made and the process followed in making it"; the "nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'"; the "importance of the decision to the individual or individuals affected"; the "legitimate expectations of the person challenging the decision"; and the requirement to "respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances": *Baker*, at paras. 22-27.

40 The *Vancouver Charter* imposes no statutory requirement to hold a public hearing before adopting an ODP. However, given the potential impact of the ODP By-law on CPR in this case, there can be little doubt that the City owed it a duty of fairness. The City sought to fulfil this duty through the public hearing process, which it is required to conduct prior to zoning by-laws: see *Vancouver Charter*, s. 566(1). The issue here is

whether the City's conduct in relation to CPR meets the standard of fairness with reference to the factors set out in *Baker*.

41 CPR makes three specific complaints about the hearing process:

1. The failure of the hearing notices to state that the proposed by-law "designates private land public";

2. The change made to the by-law after the hearing, in contravention of alleged representations to CPR and the general public that no decisions would be made on specific transit uses or routing; and

3. The non-disclosure of relevant documents including:
   a. written submissions made to City Council, and
   b. city documents, including a letter written by Councillor Puil to two Vancouver residents, and reports concerning the City's railway and an investigation by the BC Building Corporation into a possible purchase of CPR's land.

42 For the reasons that follow, I conclude that the City's conduct did not violate the duty of fairness it owed CPR.

3.3.1 Flawed Hearing Notices

43 The public was notified of the hearing in two ways. First, the City placed an advertisement in the *Vancouver Sun* and the *Courier* newspapers. The ads, in part, read:

> If adopted, the Arbutus Corridor Official Development Plan (ODP) will designate the Arbutus Corridor for the purposes only of transportation, including rail, transit and cycle and pedestrian paths, but excluding the movement of motor vehicles except on City streets crossing the Arbutus Corridor.

The advertisements provided contact numbers and addresses for more information.

44 Second, a letter was delivered to 11,000 people in the immediate neighbourhood of the corridor. That letter read, in part:

> While the Arbutus Corridor is presently used as a rail line, the existing zoning is generally the same as that of the adjacent lands. If adopted, the Arbutus Corridor ODP will designate the Arbutus Corridor for the purposes only of transportation, including rail, transit and cycle and pedestrian paths but excluding the movement of motor vehicles except on City streets crossing the Arbutus Corridor. These uses would be the only ones allowed.
>
> Please note that the purpose of the Public Hearing is for Council to hear from the public on the range of proposed uses permissible under the Arbutus Corridor ODP. Council will not make any decision about specific transit uses along the Arbutus Corridor as a result of this Public Hearing.

45 The notices expressly said the by-law would designate the corridor "for the purposes only of transportation, including rail, transit and cycle and pedestrian paths". CPR complains that these notices were not specific enough. It says the notices avoided

stating that the by-law was "designating private land public" and thus avoided public discussion and debate over the appropriateness of doing so.

46 In my view, the notice clearly gave the flavour of the by-law being considered. Although it is always possible that an alternative wording might have attracted more people, what is required is fairness, not perfection. The notice listed the public uses proposed for the Arbutus Corridor. Moreover, it is difficult to see how a different notice would have affected the participatory rights of CPR. CPR was fully aware of the nature of the by-law the City was proposing and did not suffer any prejudice from the notice being written as it did. "[W]here it can be readily inferred from the surrounding circumstances, such as active participation in the proceeding, that a party was aware of the nature and subject-matter of the hearing, then an otherwise insufficiently specific notice may be excused": D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at § 9:5110, p. 9-34.

3.3.2 Change to the By-law After Hearing

47 The relevant part of the ODP By-law as proposed prior to the hearing designated the Arbutus Corridor as a public thoroughfare for the purpose of transportation by rail, transit and cycling, but excluded the movement of "motor vehicles except on City streets crossing the [corridor]" (s. 2.1). After the hearing, the by-law was revised to exclude not only motor vehicles, but also a type of rapid transit system known as "SkyTrain". The revised by-law was adopted without further hearing. CPR argues that the addition of the exclusion of SkyTrain after the hearing violated the legitimate expectation of it and the public at the time of the hearing could have expected that SkyTrain remained a possible

use for the corridor. In fact, the SkyTrain has since been designated for another route, the Cambie Street route.

48 Whether the City acted contrary to legitimate expectations must be decided in the context of the nature of the City's decision-making power, the statutory scheme and the City's role in arriving at a decision that is in the interest of the whole city. The statutory scheme empowers the City to prepare and revise development plans (s. 561(1)), adopt development plans as ODPs (s. 562(1)(a)) and revise or amend ODPs, or any part thereof, (s. 562(1)(b)), all without any requirement of a formal hearing. The decision-making process is not judicial, but legislative. The City Council exercises discretionary power in the public interest. CPR had a special interest because of its ownership of the land affected, but the impact of the by-law was much broader, potentially affecting many other private and public citizens. The City is called on to exercise its power in a *responsive* way, responding to relevant information, and in a *responsible* way, ultimately making a decision that it concludes is in the public interest. These considerations may attenuate any duty that might otherwise exist to meet the expectations of interested parties. While the duty of fairness may require the City to take any legitimate expectations into account, it does not necessarily require the City to fulfil them.

49 Viewing the process in this light, I am satisfied that the procedure followed was sufficient to meet the requisites of fair process. The possibility of using the Arbutus Corridor for rapid transit had been discussed over the years. However, this was never a permitted use of the corridor; indeed, the zoning disallowed it. This meant that SkyTrain in the corridor was not an expectation, but a mere possibility. The ODP By-law, in its final form, proposed preserving the corridor for transit uses, but excluded the specific

type of above-ground transit known as SkyTrain. Thus, the by-law in its final form merely preserved the *status quo*. CPR may have expected that City Council would not decide what particular transit use would be made of the corridor. However, it should also have expected that SkyTrain might not be allowed on its land. In these circumstances, it is difficult to see how the exclusion of SkyTrain after the hearing amounted to an unfair process, particularly when it is bore in mind that the City had a duty to deal with a complex situation where different interests were at play and the City's ultimate obligation was to act in the interest of the entire public.

50 CPR relies on the City's pre-hearing letter to Arbutus area residents which stated: "Council will not make any decision about specific transit uses along the [corridor] as a result of this Public Hearing". Clearly, this was the City's intention going into the meeting. But matters changed as the process moved forward. At the hearing, many residents expressed concerns about the impact of an elevated train such as SkyTrain on the corridor and on the character of their neighbourhoods. In balancing these concerns with other visions for the future of the corridor, the City ultimately decided to exclude this use. In order to exercise its discretionary powers in a responsive and responsible manner, the City must have the flexibility to respond to developments as the process evolves and new aspects of the problem come to light.

51 CPR suggests that the City's representation may have discouraged attendance at the meeting of Cambie area residents who wanted SkyTrain on the Arbutus Corridor rather than the proposed alternative Cambie Street route. However, as discussed, the ODP By-law as originally drafted raised no expectation that SkyTrain would or could be located on the Arbutus Corridor. It merely provided that the corridor could be used for

transportation, including “transit”. SkyTrain was but a possibility. Persons interested in having SkyTrain routed down the corridor and wishing to promote that result might logically be expected to attend the hearing to insist that this possibility become a reality.

52 Finally, CPR says that it was prejudiced because, with the choice of the Cambie Street route for SkyTrain, any hopes it had of using its property for rapid transit were dashed for the foreseeable future, even though the ODP By-law technically permits that use: see Southin J.A., at para. 117.

53 It is difficult to see how the subsequent decision of the City to choose the Cambie Street route for SkyTrain shows that the City’s process with respect to the ODP By-law was unfair. The relevant time to assess prejudice is the time of the hearing. At that time, no choice for the rapid transit route or system had been made. The Arbutus Corridor was still very much a viable route. While the by-law excluded the SkyTrain, other rapid transit methods could have been pursued in the corridor. The subsequent decision to choose SkyTrain and locate it on the Cambie Street route may have ended that possibility for the foreseeable future. But it does not establish that the City breached its duty to treat CPR fairly.

3.3.3 Non-disclosure Prior to the Public Hearing

54 CPR complains that the City failed to disclose information to it, violating the City’s duty to treat CPR fairly.

55 A municipality must provide the proposed by-law and "reports and other documents that are material to the approval, amendment or rejection of the [by-law] by local government" prior to the public hearing (*Pitt Polder Preservation Society v. Pitt Meadows (District)* (2000), 12 M.P.L.R. (3d) 1, 2000 BCCA 415, at para. 54).

56 For the reasons that follow, I conclude that the City's disclosure met this standard. It was entirely consistent with the goal of planning for the future development of the city. The *Vancouver Charter* conferred broad planning powers on the City without procedural requirements. Nevertheless, the City chose to hold a public hearing on the issue of planning for the corridor, and CPR was given sufficient disclosure to allow it to participate meaningfully in that hearing and present its case.

57 CPR complains that written submissions to City Council from the public were not made available to it, nor to those people who attended the public hearing. However, the City made these documents available to the public through the City Clerk's office prior to, and during, the hearing. This is standard practice for public hearings. The documents were also assembled in a binder on a table at the front of the hearing room for review and were summarized by Dr. McAfee at the hearing. This constituted sufficient disclosure.

58 CPR also complains about a letter from Councillor Puil to two citizens which stated: "We are ... doing extensive research as to how we can acquire the [Arbutus] Corridor without paying 'an arm and a leg' for it". CPR infers from the letter that the City Council wished to put it into a position whereby it would "eventually transfer title to the state at little or no cost". CPR also says it could have used the letter to make inquiries of City staff and as support for its concerns. At best, however, the letter from Councillor

Puil represents his views, not those of City Council, the views, moreover, of a councillor who did not even vote on the ODP By-law. The evidence shows that no "research" was undertaken by the City and no "report" prepared, contrary to what the letter suggested. CPR no longer alleges bad faith. It cannot now resurrect such arguments in the guise of fair process.

59 CPR also complains that the City failed to disclose a May 23, 2000, report to City Council concerning the City's railway and its impact on the Arbutus Corridor. While the City's desired expansion of its railway would have entailed crossing the northerly portion of CPR's land, no conflict was established between this project and the City's planning for the corridor, which, since at least 1986, had indicated a preference to preserve the corridor for transportation purposes.

60 Finally, CPR complains the City failed to disclose documents related to an investigation by the BC Building Corporation ("BCBC") into the prospects of it acquiring the CPR's land for the development of a "guided busway". CPR says that had it been told the facts regarding the BCBC proposal, it would have been able to make a more powerful argument that the ODP By-law was foreclosing options that had drawn provincial interest.

61 The relevance of these documents was tenuous. Against CPR's contention that had it known of the "guided busway" option it might have argued that this particular use be included in the ODP By-law, must be weighed the potential for the City's work to be stymied by information requests because the documents at issue were not held by the City and because it was reasonable for the City to infer that CPR already had the BCBC

proposal since the proposal itself referred to discussions with CPR. On balance, the procedure followed by the City was appropriately fair and open.

62 In summary, CPR has not made out a case for declaring the ODP By-law invalid on procedural grounds.

4. Conclusion

63 While one may sympathize with CPR's position, none of its arguments withstand scrutiny. The City did not exceed the powers granted it by the *Vancouver Charter*. Neither the *Vancouver Charter* nor principles of common law require it to compensate CPR for the ODP By-law's effects on its land. Finally, the City's conduct in enacting the by-law complied with the requirements of fair process.

64 I would therefore dismiss the appeal with costs.

Appendix A

Vancouver Charter, S.B.C. 1953, c. 55 (updated to 31 December 1996)

Interpretation

2. In this Act, and in any by-law passed pursuant to this Act, unless the context otherwise requires,

. . .

"**street**" includes public road, highway, bridge, viaduct, lane, and sidewalk, and any other way normally open to the use of the public, but does not include a private right-of-way on private property.

Part VIII – Public Works

Streets and parks vested in city

289. (1) Unless otherwise expressly provided, the real property comprised in every street, park, or public square in the city shall be absolutely vested in fee-simple in the city subject only to section 291A of this Act: Provided that section 5 of the *Highway Act* shall not apply to any street, park, or public square aforesaid; provided further, however, that it shall be lawful for the city to acquire from any person rights or easements for street, park, or public square purposes less than the fee-simple, whether on, above, or below the surface of any real property owned by such person.

. . .

Part XII – Street Traffic

By-laws for —

317. (1) The Council may make by-laws

Regulating traffic

(a) for regulating pedestrian, vehicular, and other traffic and the stopping and parking of vehicles upon any street or part thereof;

. . .

Part XXVII – Planning and Development

Interpretation

559. In this Part, or in any by-law made thereunder, unless the context otherwise requires,

. . .

"**development**" means a change in the use of any land or building, or the carrying-out of any construction, engineering or other operations in, on, over, or under land or land covered by water;

"**development plan**" means a plan or plans for the future physical development of the city or any part thereof, whether expressed in drawings, reports, or otherwise, and whether complete or partial;

. . .

"**official development plan**" means any development plan, whether complete or partial, which has been adopted under this Part;

. . .

Development plans

561. (1) The Council may have development plans prepared or revised from time to time.

(2) A development plan under this section may

(a) relate to the whole city, or to any particular area of the city, or to a specific project or projects within the city;

(b) be altered, added to, or extended;

(c) designate

(i) land for streets, lanes and other public thoroughfares, and for the widening of streets, lanes and other public thoroughfares,

(ii) sites for parks, schools and public buildings, and

(iii) areas for special projects, including projects that require development or redevelopment as a whole.

(3) A development plan under this section must include housing policies of the Council respecting affordable housing, rental housing and special needs housing.

(4) A development plan under this section may include

(a) policies of the Council relating to social needs, social well-being and social development, and

(b) a regional context statement, consistent with the rest of the development plan, of how matters referred to in section 942.12 (2) (a) to (c) of the *Municipal Act*, and other matters dealt with in the development plan, apply in a regional context.

(5) To the extent that a development plan under this section deals with these matters, it should work towards the purpose and goals referred to in section 942.11 of the *Municipal Act*.

Council powers respecting official development plan

562. (1) The Council may, by by-law,

(a) adopt as the official development plan, or as a part of the official development plan, any development plan prepared under section 561, or

(b) revise or amend the official development plan or any part of the official development plan.

. . .

Undertakings, official development plan

563. (1) The adoption by Council of a development plan shall not commit the Council to undertake any of the developments shown on the plan.

(2) The Council shall not authorize, permit, or undertake any development contrary to or at variance with the official development plan.

(3) It shall be unlawful for any person to commence or undertake any development contrary to or at variance with the official development plan.

Power to acquire lands in addition to those essential to project

564. (1) Where a project is shown upon an official development plan, the Council may acquire any real property it considers essential to the carrying-out of the project, and in addition acquire other adjacent or neighbouring real property.

. . .

Amendment or repeal of zoning by-law

566. (1) The Council shall not make, amend, or repeal a zoning by-law until it has held a public hearing thereon, and an application for rezoning shall be treated as an application to amend a zoning by-law.

. . .

Property injuriously affected

569. (1) Where a zoning by-law is or has been passed, amended, or repealed under this Part, or where Council or any inspector or official of the city or any board constituted under this Act exercises any of the powers contained in this Part, any property thereby affected shall be deemed as against the city not to have been taken or injuriously affected by reason of the exercise of any such powers or by reason of such zoning and no compensation shall be payable by the city or any inspector or official thereof.

. . .

Appendix B

***Expropriation Act*, R.S.B.C. 1996, c. 125**

Definitions

1 In this Act:

. . .

"**expropriate**" means the taking of land by an expropriating authority under an enactment without the consent of the owner, but does not include the exercise by the government of any interest, right, privilege or title referred to in section 50 of the *Land Act*;

"**expropriating authority**" means a person, including the government, empowered under an enactment to expropriate land;

. . .

Application

2 (1) If an expropriating authority proposes to expropriate land, this Act applies to the expropriation, and, if there is an inconsistency between any of the provisions of this Act and any other enactment respecting the expropriation, the provisions of this Act apply.

. . .

Appeal dismissed with costs.

Solicitors for the appellant: McCarthy Tétrault, Vancouver.

Solicitors for the respondent: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the interveners: Hunter Voith, Vancouver.