

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

APR 10 2019



IN THE SUPREME COURT OF BRITISH COLUMBIA

S-194344

No. _____
Vancouver Registry

Re: In the matter of the Judicial Review Procedure Act, RSBC 1996 Ch. 241

BETWEEN:

G.S.R. CAPITAL GROUP INC.

PETITIONER

AND:

THE CITY OF WHITE ROCK and JAMES NYHUS
IN HIS CAPACITY AS CHIEF BUILDING OFFICIAL

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

The City of White Rock and
James Nyhus
15322 Buena Vista Avenue
White Rock, BC
V4B 1Y6

11APR19 1906663 RISM
21422 5194344

200.00

AND TO:

The Attorney General for the
Province of British Columbia
PO Box 9290
Victoria, B.C.
V8W 9J7

This proceeding is brought for the relief set out in Part 1 below, by G.S.R. Capital Group Inc., the person named as petitioner in the style of proceedings above. If you intend to respond to this petition, you or your lawyer must:

- a) file a response to petition in Form 67 in the above-named registry of this

- court within the time for response to petition described below, and
- b) serve on the petitioner(s)
 - i. 2 copies of the filed response to petition, and
 - ii. 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

TIME FOR RESPONSE TO PETITION

A response to petition must be filed and served on the petitioner,

- a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- c) if you were served with the petition anywhere else, within 49 days after that service, or
- d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: The Law Courts 800 Smithe Street Vancouver, B.C. V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioner is: Eyford Partners LLP 3000-650 W. Georgia Street Vancouver, B.C . V6B 4N7 Attention: N. Baker
(3)	The name and office address of the petitioner's lawyer is: Same as above

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. A declaration that the Petitioner is entitled to proceed with the 12-storey development at 1310 Johnston Road as authorized by the City of White Rock pursuant to Development Permit No. 401 (“**DP No. 401**”);
2. An order quashing Resolutions Nos. 2018-373, 2018-375 and 2018-376 adopted by White Rock City Council at the November 7, 2018 Special Council meeting;
3. An order quashing Official Community Plan Bylaw, 2017, No. 2210, Amendment No. 1 (1300 Block Johnston Road), 2019, No. 2289 (“**Bylaw No. 2289**”) adopted by White Rock City Council on March 13, 2019;
4. An order quashing White Rock Zoning Bylaw, 202, No. 2000, Amendment (CD-61 Amendment – 1310 Johnston Road) Bylaw, 2019, No. 2290 (“**Bylaw No. 2290**”) adopted by White Rock City Council on March 13, 2019;
5. In the alternative, a declaration that the use of 1310 Johnston Road for a 12-storey building as approved under DP No. 401 is lawfully non-conforming;
6. An order of mandamus compelling the issuance of the building permit submitted by the Petitioner on January 21, 2019;
7. Costs; and
8. Such further and other relief that this Honourable Court deems just.

Part 2: FACTUAL BASIS

A. THE PARTIES

1. The Petitioner, G.S.R. Capital Group Inc. (“**GSR**”), is an extra-provincial company incorporated pursuant to the laws of Alberta and registered in British Columbia with an office at 810 – 519 17th Avenue SW, Calgary, Alberta T2S 0A9.
2. The Respondent, the City of White Rock (the “**City**”), is a municipal corporation incorporated pursuant to the *Community Charter*, S.B.C. 2003, c. 26, and *Local Government Act*, R.S.B.C. 2015 c. 1, and having a business office at 15322 Buena Vista Avenue, White Rock, British Columbia V4B 1Y6.
3. The Respondent, James Nyhus, is the chief building official for the City.

B. THE PROPERTY

4. The Petitioner is the registered owner of property with a civic address of 1310 Johnston Road, White Rock, legally known and described as:

Lot 1 Except: West 7 Feet, Block 17 section 11 Township 1
New Westminster District Plan 2793
PID: 004-601-017

and

Lot 2 Except: West 7 Feet, Block 17 section 11 Township 1
New Westminster District Plan 2793
PID: 004-601-050

(the “**Property**”)

5. The Property has a site area of approximately 1,540 m². There is an existing two-storey multi-unit commercial building and parking lot on the Property.
6. GSR purchased the Property in or about 2016 when it purchased the shares in the then registered owner, 420910 BC Ltd.
7. GSR became the registered owner of the Property in September 2017.

C. 2017 OCP AND ZONING AMENDMENTS

8. In July 2017, City Council gave first and second reading to: (a) Official Community Plan Bylaw, 2008, No. 1837, Amendments No. 29 (1310 Johnston Road), 2017, No. 2210 ("**OCP Amendment Bylaw 2210**"); and (b) White Rock Zoning Bylaw, 2012, No. 2000, Amendment (CD-60 – 1310 Johnston Road) Bylaw, 2017, No. 2211 (the "**Zoning Amendment Bylaw No. 2211**").

9. At the July 24, 2017 Regular Council meeting, Council also adopted the following resolution:

THAT Council directs staff to confirm the registration of Section 219 covenants for community amenities, servicing, and life safety systems prior to issuance of Development Permit No. 401 for 1310 Johnston Road.

("Resolution 2017-356")

10. The public hearings for OCP Amendment Bylaw 2210 and Zoning Amendment Bylaw No. 2211 were held on September 12, 2017. On September 18, 2017 City Council adopted both bylaws.

11. OCP Amendment Bylaw 2210 created a new land use designation: Lower Town Centre Mixed Use. This new designation contemplated developments with greater density and height than permitted under the previous land use designation.

12. Following the adoption of OCP Amendment Bylaw 2210, the Property was and remains located in the new Lower Town Centre Mixed Use area. It is also located in the Lower Town Centre Development Permit Area.

13. Zoning Bylaw No. 2211 rezoned the Property to CD-60 Comprehensive Development Zone. The new zoning increased the permitted density to 30 units and the maximum geodetic height to 140.2 metres (approximately 12 storeys).

14. Before the adoption of Zoning Amendment Bylaw No. 2211, the Property was zoned CR-2 Lower Town Centre Area Commercial/Residential Zone under the City's Zoning Bylaw. Under the CR-2 Zoning the maximum height of principal buildings is 35 feet.

D. RESTRICTIVE COVENANTS REGISTERED ON TITLE TO PROPERTY

15. On or about January 2018, as required under Resolution 2017-356, GSR submitted for filing in the Land Title Office:

- a) a Community Amenity Covenant;
- b) a Development Services Covenant; and
- c) an Enhanced Life Safety Covenant.

(The "**Restrictive Covenants**")

16. The Restrictive Covenants are registered under section 219 of the *Land Title Act*, R.S.B.C. 1996, c. 250, in favour of the City.

17. Section 2.2 of the Community Amenity Covenant provides that GSR will not apply for a building permit or take any action to compel the issuance of a building permit and the City may withhold or suspend a building permit unless and until GSR completes the installation and construction of the required amenities or pays the City \$1,590,000 in lieu.

18. Section 3.1 of the Development Services Covenant provides that GSR will not apply for a building permit except in compliance with that covenant and that the City is not obliged to issue a building permit until GSR has built the "required infrastructure" or the City has sufficient security.

E. THE DEVELOPMENT PERMIT APPLICATION

19. In May 2018, GSR applied to the City for a development permit to construct a 12-storey building on the Property as permitted under the Zoning Bylaw (the "Project").

20. According to the minutes of the June 11, 2018 Council meeting, Councillor Chesney submitted the following motion for consideration:

That Council direct staff to obtain a legal opinion in regard to the following proposed motion:

WHEREAS the current council has approved 15 high-rises in the past three (3) years.

THEREFORE IT BE RESOLVED THAT White Rock Council endorse a moratorium on all development and building permits

pertaining to all and any multiple residence applications that require zoning changes and or Official Community Plan amendments until after the upcoming civic election October 20, 2018.

21. The minutes of the June 11, 2018 Council meeting further note that:

Council does not have the authority to impose the moratorium as noted for either development or building permits, using the rationale of the upcoming civic election would be an improper basis for a City Council to impose such a moratorium. Accordingly, it would be illegal and the City would be responsible for any damages arising from withholding the permit.

22. The proposed motion to endorse a moratorium on all development until after the election was defeated.

23. On June 25, 2018 City Council passed a resolution to issue a development permit to GSR. According to the minutes of the council meeting, Councillors Chesney and Fathers voted against the issuance of the permit.

24. On June 26, 2018 City staff emailed Paul Randhawa (also known as Ammanpaul Randhawa) of GSR to congratulate the GSR team on the issuance of the DP No. 401. The email further states that the City looks forward to working with them as the project progresses through the building permit stage and construction and notes that prior to building permit issuance, GSR will be required to meet the requirements of the Restrictive Covenants and provide landscape securities identified in the permit.

25. On July 13, 2018 representatives of GSR, including Tony Casola and Ian Kermack, met with City staff to review the preliminary plans for the Project's ground floor, parkade access, and loading areas.

26. On or about July 20, 2018 City executed and issued DP No. 401, which includes the following terms and conditions:

5. All buildings and structures to be constructed, repaired, renovated, or sited on the Lands shall be in substantial compliance with the Plans, attached hereto in accordance with the provisions of Section 491 of the Local Government Act as Schedules B to E: (...)

...

8. If the holder of this Permit does not obtain the required building permits and commence construction of the development by excavating the subject

land and constructing foundations of the buildings shown on the Plans as outlined in this Development Permit within two years after the date this Permit was authorized by Council, the Permit shall lapse, unless the Council, prior to the date the Permit is scheduled to lapse, has authorized further time extension of the Permit.

27. The City placed a notice on title to the Property regarding the issuance of DP No. 401.

28. Between September 2017 and June 2018, in reliance on the new zoning, GSR spent approximately \$2,000,000 on the Project and development permit application, including the preparation of architectural plans, engineering consultants, restrictive covenants, and financing costs.

F. STEPS TAKEN BY GSR TOWARDS BUILDING PERMIT APPLICATION

29. Following the issuance of DP No. 401, GSR and its agents and representatives began preparing full architectural and engineering plans in respect of the Project. Specifically, and among other things, GSR:

- (a) hired a new architect to take over the completion of the project. GSR worked with staff to finalize and improve the overall design of the building;
- (b) hired sub-consultants including an arborists, civil engineer, geotechnical engineer, structural engineer, mechanical engineer and electrical engineer;
- (c) prepared building permit plans for the parkade;
- (d) hired the interior designers to complete plans for the interior of the building;
- (e) began preparing the disclosure statements and marketing materials; and
- (f) worked towards satisfying the requirements of DP No. 401 and the Restrictive Covenants, a precondition to the application and issuance of the building permit.

30. GSR also refinanced the Property and secured additional equity and debt financing to complete the Project.

G. THE NOVEMBER 7, 2018 SPECIAL MEETING OF COUNCIL

31. During October 2018, GSR continued to work with City staff. On or about October 26th Paul Randhawa, Ian Kermack, and Tony Casola attended a meeting at City hall to discuss the Project.

32. The 2018 General Local elections were held on October 20, 2018 and a new City Council was elected.

33. According to records obtained by Freedom of Information and Protection of Privacy Request ("FOI Request"), City staff, including Mr. Johannsen, and the new Mayor immediately began looking at the status of various developments including GSRs.

34. On November 2, 2018 Mr. Randhawa emailed City staff, including Carl Johannsen, regarding their October 26th meeting. Mr. Johannsen responded on November 6, 2018 and advised that they would get back to him shortly.

35. The inaugural meeting of the newly elected Council was held on November 5, 2018.

36. On the afternoon of November 8, 2018, the City sent GSR a letter putting it "on notice" that on November 7, 2018 Council had adopted a series of resolutions that might impact the redevelopment of the Property.

37. According to the City's website, the original agenda for the November 7, 2018 Special Meeting of Council was posted the afternoon of November 6, 2018 and stated:

3. OFFICIAL COMMUNITY PLAN AND ZONING BYLAW DISCUSSION

The Director of Planning and Development Services to present a power point presentation regarding:

- The City's Official Community Plan;
- The City's Zoning Bylaw; and

- Outline of Major Development Projects.

38. According to the minutes of the November 7, 2018 Special Council Meeting various resolutions were adopted by Council including:

- a) THAT Council directs staff to prepare amendments, for Council's consideration under section 463(2) of the Local Government Act, to:
- the Official Community Plan, 2017, Bylaw No. 2220, as amended, that if enacted would have the legal effect of an official plan policy to limit the height of buildings on properties in the 'Lower Town Centre' land use designation, that are located adjacent to Johnston Road and between Thrift Avenue and Roper Avenue, to a maximum range of 4 to 6 storeys (with the higher end being closer to Thrift Avenue).

("Resolution 2018-373")

- b) THAT Council directs the White Rock Zoning Bylaw, 2012, No. 2000, as amended, that if enacted would have the following legal effect:
- to reduce the permitted maximum height of any building located at 1310 Johnston Road, from 12 storeys to 6 storeys.

("Resolution 2018-375")

- c) THAT Council directs the White Rock Zoning Bylaw, 2012, No. 2000, as amended, that if enacted would have the following legal effect:
- to reduce the permitted maximum density of any building located at 1310 Johnston Road from 4.8 FAR to 3.5 FAR, in the CD-60 Zone and despite sections of the current Zoning Bylaw.

("Resolution 2018-376")

(the "November 7th Resolutions")

39. Similar resolutions to consider reducing the permitted height and density at 1350 Johnston Road were also adopted.

40. According to records obtained by FOI request, City staff had drafted the

November 7th Resolutions, including the resolutions specific to GSRs Property, prior to the Special Council meeting.

41. The City did not notify GSR of the November 7, 2018 Special Meeting of Council even though GSR and City staff had been in communication on November 6, 2018. GSR did not attend the meeting.

42. According to the City's website, the agenda for the November 7, 2018 Special Council meeting was revised on November 8, 2018 to include the power point presentation referred to in the Agenda. The power point presentation sets out the status of various development applications and includes a summary of Council's power to withhold building permits where there is a "bylaw under preparation". The presentation further notes that the Property is one of three properties that has a development permit but a building permit application has not been submitted.

43. At the opening of the November 7, 2018 Council meeting, the Mayor noted that it was the first meeting of the new Council and that it was a special meeting called for a "somewhat specific reason".

44. During the November 7, 2018 Special Council meeting, Council discussed using section 463 of the *Local Government Act* to try to block GSR's development of the Property.

45. Because of the amount of work required to complete a building permit application for a complex building, the terms and conditions of DP No. 401, and the Restrictive Covenants, GSR was unable to assemble and submit its completed building permit application within 7 days of the November 7th Resolutions.

46. As a result of the uncertainty created by the November 7th Resolutions, on or about November 15, 2018 some of the financing secured by GSR after the issuance of DP No. 401 fell through and GSR was forced to restructure and secure additional equity and debt financing on much less favourable terms.

H. CITY MOVES FORWARD WITH PLANS TO DOWNZONE THE PROPERTY

47. The City moved forward with the proposed downzoning of 1310 Johnston Road but ultimately did not proceed with the downzoning of 1350 Johnston Road.

48. On November 19, 2018 the Land Use and Planning Committee ("**LUP Committee**") considered a staff report dated November 19, 2018 titled "Official Community Plan Review: Scope and Process Considerations".

49. On December 10, 2018 the LUP Committee considered a staff report titled "Process for Official Community Plan and Zoning Amendments for the Lower Town Centre and 1310 Johnston Road". According to the unofficial minutes of the December 10, 2018 LUP Committee meeting, the committee passed a resolution recommending that Council direct staff to proceed with the public consultation process for the proposed bylaw amendments outlined in the December 10, 2018 corporate report titled "Process for Official Community Plan and Zoning Amendments for the Lower Town Centre and 1310 Johnston Road".

50. On December 10, 2018 Council passed a resolution (1) inviting landowners affected by the proposed bylaw amendments, including those in the 1300-block of Johnston Road, to meet with Council or submit written correspondence regarding the proposed amendments, or both; and (2) to proceed with the public consultation process for the proposed amendments outlined in the City's report (Resolution 2018-439) as recommended by the LUP Committee. Council also passed a resolution directing staff to commence an OCP review (Resolution 2018-439).

51. A December 8, 2018 Staff Report regarding the OCP Process states:

While the Council resolutions related to the Zoning Bylaw amendments were for two proposed developments in the 1300-block of Johnston Road, since Council's November 7, 2018 resolution one of the property owners (1350 Johnston Road) has submitted a complete Building Permit application in the applicable CD-58 zone, is entitled to the current zoning provisions which allow a development of a 12-storey residential and commercial building with an approximate density of 4.8 FAR. This submission occurred during the seven (7) day period between section 463 being enacted by Council and when it comes into effect. Therefore, the Zoning Bylaw amendment in this report only relates to the development

application at 1310 Johnston Road and the applicable CD-60 zone. 1310 Johnston Road has a valid Development Permit but has not applied for a Building Permit.

52. The City held a public information meeting on January 17, 2019 regarding the proposed bylaws. Paul Randhawa and Ian Kermack attended the information meeting. City staff, including Carl Isaac and Carl Johannsen, were also in attendance.

I. BUILDING PERMIT APPLICATION

53. On January 21, 2018 GSR submitted a building permit application for the new below-grade foundation, underground parkade and elevator/stair core (the "**BP Application**"). The BP Application included the following:

- Building Code Analysis (indicating a 12 storey building with a total area of 7,282 m²)
- Geotechnical Report
- 2 Sealed Copies of the Geotechnical Engineer's Excavation/Shoring Plans
- 2 Sealed Copies of Civil Engineer's Drawings
- 2 Sealed Copies of the Structural Engineer's Drawings up to grade and the ground floor
- 2 Sealed Copies of the Plumbing Drawings up to Grade
- 2 Sealed Copies of the Architectural Drawings up to the First Floor
- Original Copies of the Letters of Assurance for the respective professionals including the CRP (Coordinating Registered Professional)
- Completed Form Bs with a copy of the professionals Liability Insurance
- A recent survey
- A Recent Title Search
- Owner Authorization
- A completed Form A (Owners Acknowledgement of Responsibility and Undertakings)
- Application for a Tree Management Permit
- Application for a Demolition Permit

54. GSR also submitted the required building permit fee in the amount of \$39,133.00. The City accepted the BP Application and cashed the cheque for the fee.

55. On January 21, 2019 Council held a special council meeting to "consider the

proposed bylaws with respect to Official Community Plan and Zoning Amendments for the Lower Town Centre (1300 Block) and 1310 Johnston Road”.

56. GSR representatives, including Paul Randhawa, spoke at the meeting and opposed the proposed downzoning of the Property.

J. ADOPTION OF BYLAW 2289 AND 2290

57. On February 11, 2019 Council gave first and second reading to Bylaws No. 2289 and 2290. Council also adopted a resolution directing that GSR’s BP Application submitted on January 21, 2019 be withheld for a period of 30 days beginning on January 21, 2019.

58. On February 14, 2019 Council held a special council meeting and carried a motion to grant a further 60-day extension to withhold GSR’s building permit. A February 14, 2019 Staff Report prepared in support of the resolution states that the BP Application and architectural drawings submitted for the building foundation “are consistent with the architectural drawings for foundation of the 12-storey building that were submitted and approved for a Development Permit of the Property”.

59. The public hearing was set for February 25, 2019. On the afternoon of February 25th, GSR was advised that the public hearing had been postponed to March 11, 2019. According to City staff, the public hearing was postponed because there was a problem with the required public notification.

60. GSR requested that the new March 11, 2019 public hearing date be changed because one of their key team members, who had changed his schedule to attend the February 25th Council meeting, would be out of the country on March 11, 2019. The City refused to change the date of the public hearing.

61. On March 11, 2019 the City held a public hearing regarding proposed bylaws 2289 and 2290.

62. On March 13, 2019 Council held a special council meeting and adopted Bylaws 2289 and 2290.

63. The City has advised GSR that it will not and cannot approve the BP Application or issue the building permit because it does not comply with Bylaw No. 2290.

64. Since the approval of DP No. 401 in June 2018 and in reliance on its issuance in July 2018, GSR has incurred approximately \$1,000,000 on the Project including on architectural design fees and other consultants fees such as engineering, and carrying costs to complete the Project.

Part 3: LEGAL BASIS

1. This is an application brought under section 623 of the *Local Government Act*, R.S.B.C. 2015, c. 1 (the "**LGA**") and the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (the "**JRPA**") to review the City's decision to adopt Bylaws No. 2289 and No. 2290 and the City's decision to deny the Petitioner's Building Permit submitted to the City on January 21, 2019.

2. Under section 623 of the *LGA*, an application may be made to the Supreme Court to set aside a municipal bylaw by (a) an elector of the municipality or (b) a person interested in a bylaw. Section 623(2) provides:

- (2) On an application under subsection (1), the Supreme Court may
 - (a) set aside all or part of the municipal instrument for illegality, and
 - (b) award costs for or against the municipality according to the result of the application.

3. Section 2(2) of the *JRPA* provides:

- (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
 - (a) relief in the nature of mandamus, prohibition or certiorari;
 - (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

A. LEGISLATIVE SCHEME

4. Part 14 of the *LGA* sets out the legislative authority of local governments in relation to planning and land use management, including the powers and duties of a local government relating to Official Community Plans (“**OCP**”), zoning bylaws, development permits, and building permits.

1. Official Community Plans

5. An OCP is a “statement of objectives and policies to guide decisions on planning and land use management, within the area covered by the plan, respecting the purposes of local government”.

LGA, s. 471(1)

6. A local government may adopt an OCP by bylaw. All bylaws enacted or works undertaken by the local government after the OCP has been adopted “must be consistent with the relevant plan”. However, an OCP does not commit or authorize a local government to proceed with any project specified in the plan.

LGA, ss. 472, 478

7. The process leading to the adoption of an OCP triggers a number of mandatory opportunities for public engagement:

(a) during the development, amendment, or repeal of an OCP, the local government must provide one or more opportunities for consultation with persons, organizations and authorities it considers will be affected; and

(b) before the OCP bylaw is adopted, the local government must provide notice of, and hold a public hearing on, the bylaw for the purpose of allowing the public to make representations respecting matters contained in the proposed bylaw.

LGA, ss. 464, 466, 475, 477(3)(c).

8. When a local government adopts an OCP it must define the procedures under which a land owner may apply for a permit relating to planning and land use management.

LGA, s. 460(1)(b)

2. Zoning Bylaws

9. Division 5 of Part 14 deals with zoning bylaws. Among other things, it authorizes local governments to adopt bylaws regulating the use and density of land and buildings as well as the siting, size and dimensions of buildings and uses.

LGA, s. 479

10. Before adopting a zoning bylaw, a local government must provide notice of, and hold a public hearing on, the bylaw.

LGA, ss. 464, 466

3. Land Use Permits

11. Division 10 of Part 14 deals with land use permits, among other things.

12. A land use permit “means a development permit, temporary use permit, a development variance permit or a permit under Division 10...”.

LGA, s. 455, sub verbo “land use permit” [underlining added]

13. A local government may issue more than one land use permit (and, by extension, a development permit) for an area of land. However, once issued, both the local government and the holder of the development permit are bound by the permit, and the land must be developed “strictly in accordance with” it.

LGA, s. 501(1)-(3)

14. Further, once the permit is issued, the local government must file in the land title office a notice that the described land “is subject to the permit”. And once filed, the permit terms are binding on all persons who acquire an interest in the land.

LGA, s. 503(1)(a), and 503(4)

15. The holder of the development permit then has two years to start any construction with respect to which the local government issued it, otherwise the permit lapses.

LGA, s. 504(1)

4. Development Permits

16. Division 7 of Part 14 deals with development permits, in particular.

17. A “development permit” means a permit under section 490.

LGA, s. 455, sub verbo “development permit”

18. A local government may designate “development permit areas” for various purposes including:

- (a) protection of the natural environment, its ecosystems and biological diversity;
- (b) protection of development from hazardous conditions;
- (c) protection of farming;
- (d) revitalization of an area in which commercial use is permitted;
- (e) establishment of objectives for the form and character of intensive residential development;
- (f) establishment of objectives for the form and character of commercial, industrial or multi-family residential development;
- (g) in relation to an area in a resort region, establishment of objectives for the form and character of development in the resort region...[.]

LGA, s. 488(1)(a)-(g)

19. Under its specific authority, a local government may include a number of requirements:

- (a) for land within a development permit area designated under s.-s. 488(1)(d)-(g), respecting the character of the development, including landscaping, and the siting, form, exterior design and finish of buildings and other structures in designated permit areas: *LGA, s. 491(7)*; and
- (b) for land within a development permit area designated under s.-s. 488(1)(f), requirements respecting the character of the development...but only in relation to the general character of the development and not to particulars of the landscaping or of the exterior design and finish of buildings and other structures: *LGA, s. 491(8)*.

20. Under its general authority, a local government, by resolution, may issue a development permit in accordance with an OCP or zoning bylaw that does one or more of the following:

- (a) varies or supplements a land use regulation bylaw or a bylaw under Division 11 [*Subdivision and Development: Requirements and Related Matters*];
- (b) includes requirements and conditions or sets standards under section 491 [*development permits: specific authorities*];
- (c) imposes conditions respecting the sequence and timing of construction.

LGA, s. 490(1)-(2)

21. However, a development permit must not vary the use or density of the land permitted in the bylaw other than for the health safety or protection of property.

LGA, s. 490(3)

22. If an OCP designates development permit areas, then the owner is prohibited from starting construction of, addition to or alteration of a building or structure without a development permit.

LGA, s. 489(b)

5. Building Permits

23. Section 8 of the *Community Charter* sets out a local government's fundamental powers, including the power to adopt bylaws in relation to buildings and structures.

Community Charter, s. 8(3)(l)

24. Part 3, Division 8 of the *Community Charter* sets out a local government's powers in relation to Building Regulation.

See also the *Building Act*, S.B.C. 2015, c. 2

25. Where there is a conflict between, on the one hand, a "development proposed in an application for a building permit" and, on the other either (a) an OCP "under preparation" or (b) a zoning bylaw "under preparation", a local government may direct

that the building permit be withheld for 30 days from the day the application for the building permit was made. Upon considering the building permit, the local government may direct the permit to be withheld for an additional 60 days.

LGA, ss. 463(1)(a)-(b), 463(3)

26. However, where the local government receives an application for a building permit within 7 days of its resolution to begin to prepare the OCP or zoning bylaw, the local government has no statutory authority to withhold a building permit.

LGA, s. 463(2)

B. NO STATUTORY AUTHORITY TO WITHHOLD BUILDING PERMIT FOR 12-STOREY BUILDING APPROVED UNDER DP No. 401

27. In the 1970s, British Columbia repealed the land-use contracts system and replaced it with a more limited development permit scheme.

Pacific National Investments v. Victoria, [2000] 2 S.C.R. 919, at paras. 46-47, 49, 72, per LeBel J. (for the majority), and at para. 96, per Bastarache J. (dissenting)
Cressey Development Corp. v. Richmond (Township)(1982), 35 B.C.L.R. 170 (C.A.), at para. 9

28. The development permit scheme binds the local government and the developer once the city has issued the permit. The developer has two years from when the permit is issued to undertake construction otherwise it lapses. This system of binding local governments and developers to the development permit is logical and provides certainty with respect to modern-day municipal administration and development projects. In our system of land-holding, registered plans provide notice to the world of the state of title of property.

Pacific National Investments v. Victoria, [2000] 2 S.C.R. 919, at para. 41, per LeBel J. (for the majority) and at paras. 101-103, 105, per Bastarache J. (dissenting)
Sierra Club of Canada v. Comox Valley Regional District, 2010 BCSC 74, at paras. 51, 53, aff'd 2010 BCCA 343
LGA, ss. 489(b), 501(3), 504

29. What would not be logical is for a local government to approve a project by issuing a development permit and then pass a bylaw that would prohibit the project from going forward.

Sierra Club of Canada v. Comox Valley Regional District, 2010 BCCA 343, at para. 38
Pacific National Investments v. Victoria, [2000] 2 S.C.R. 919, at para. 70, per LeBel J. (for the majority)

30. Approval or rejection of a development permit cannot be based on the likes and dislikes of council members elected from time to time. An OCP provides guidelines councilors must apply when considering whether to approve a development permit. A permit that complies with OCP guidelines must be issued.

Yearsley v. White Rock (City of), 2009 BCSC 719, at paras. 28, 42-43

31. While a local government may exercise its legislative powers to amend a zoning bylaw and is not prohibited from changing the zoning, once it has issued a development permit to a property owner it is bound by the terms of the development permit and any changes in zoning do not apply to the property. The issuance of a development permit creates a binding statutory obligation between a local government and a developer to proceed with an approved development strictly in accordance with the terms of the permit.

LGA, s. 501(2)

32. In July 2018, Council adopted a resolution to issue DP No. 401 for the construction of a 12-storey building and placed a notice on title as required under the *LGA*. Once issued, the City and GSR became bound by DP No. 401. The Property had to be developed strictly in accordance with the permit and the Restrictive Covenants, which required the Petitioner to complete the installation and construction of required amenities, among other things.

33. At that stage, Bylaw No. 2290 could not be invoked to deprive GSR of the statutory rights conferred by sections 504(2)-(3) of the *LGA*.

34. Section 463 should not be interpreted to permit the revocation of vested rights under a binding development permit. It must be interpreted as applying only when a development permit is not required or has yet to be issued.

35. Furthermore, this section is only triggered when council identifies a conflict between a “development proposed in the application for a building permit” and an OCP or a zoning bylaw “under preparation”. When originally “proposed” by GSR in May 2018, the development did not “conflict” with OCP Amendment Bylaw 2210, Zoning Bylaw 2211, and Resolution 2017-356. The City accepted GSR’s development proposal (*i.e.*,

the development permit application) because it complied with the existing legislative framework. When GSR applied for the building permit, it was no longer a “proposed” development but rather an approved development.

36. The agreement and statutory rights and obligations between the City and GSR crystallized in June 2018, well before Council prepared amendments to the OCP and adopted Bylaw 2290. Those proposed amendments reflected the vision of a new council that had yet to take shape. Neither the amended OCP nor Bylaw 2290 were “under preparation” within the meaning of section 463(1) before the proposed development was approved as DP-401.

Deep Six Developments Inc. v. Richmond (City), 2003 BCCA 518, at paras. 18-19, 25
Windset v. Delta, 2002 BCCA 70, at paras. 16-18

37. The City’s use and interpretation of section 463 creates at least two problems. First, the landowner must seek a new approval for a completely different development even though a 12-storey building has already been approved by Council at significant expense to the landowner. Second, the owner can’t apply for a 12-storey building because it would be inconsistent with the new zoning, but it can’t apply for a 6-storey building either because it would contravene the development permit by which both the City and the landowner are bound.

38. These consequences are avoided if section 463 is properly interpreted as applying to situations where a development permit is not required or where a development permit is required but has not yet been issued.

39. The Petitioner seeks:

- (a) a declaration that it is entitled to proceed with the 12-storey development approved under DP No. 401; and
- (b) an order of mandamus compelling James Nyhus to issue the building permit submitted on January 21, 2019.

C. FURTHER, AND ALTERNATIVELY, NO COMPLIANCE WITH STATUTORY REQUIREMENTS FOR WITHHOLDING BUILDING PERMIT

40. In the alternative, the City did not comply with the requirements of section 463.

41. "Under preparation" means "currently being prepared". A local government can only rely on section 463 if it has, by a resolution passed at least seven days before receipt of the application, "begun the preparation of a ... bylaw that is in conflict with the application." A bylaw that is "in conflict" with an application is one that has specific form and content, not a bylaw that will be in conflict when it has, at some further date, taken shape. "Under preparation" does not reach back to the state where an inchoate bylaw is under consideration.

Windset v. Delta, 2002 BCCA 70, at paras. 16-18
Morin v. Surrey (Dist.)(1988), 26 B.C.L.R. (2d) 91, at paras. 99-100

42. None of the November 7th Resolutions can be characterized as a resolution under section 463(2). On November 7, 2018 there was no bylaw "under preparation".

43. It was not until December 10, 2018 that Council considered the proposed scope and process for a potential OCP review and directed staff to send an invitation to property owners to meet with Council regarding potential amendments to the bylaws.

44. On January 17, 2019 the City held a public information meeting and on January 21, 2019 Council held a special council meeting to give property owners an opportunity to speak to the potential amendments to the OCP and Zoning Bylaw. However, Council did not give first reading to the Bylaws until February 11, 2019.

45. Since the Petitioner submitted its building permit application on January 21, 2019 and Council did not adopt the required resolution under section 463(2) 7 days before the submission of the application, GSR is entitled to its building permit.

46. Accordingly, the Petitioner seeks:

- (a) a declaration that the resolutions adopted November 7, 2018 do not constitute resolutions pursuant to section 463(2); and
- (b) an order of mandamus to compel the issuance of the building permit

unlawfully refused by the City.

D. FURTHER, AND ALTERNATIVELY, CITY BREACHED RULES OF PROCEDURAL FAIRNESS IN FAILING TO GIVE PETITIONER ADEQUATE NOTICE

47. In the further alternative, if the November 7, 2018 Resolutions meet the requirements of section 463(2), the City breached the rules of procedural fairness and the resolutions must be quashed.

48. The concept of procedural fairness is variable; its content is decided in the specific context of each case, after a consideration of all the circumstances. A variety of factors must be considered to determine the extent to which a person affected by a decision is entitled to participate in the decision-making process.

Baker v. Canada (Minister of Citizenship & Immigration), [1999] 2 S.C.R. 817, paras. 22-28
Calgary (City) v. Properties Plus Ltd., *Calgary (City) v Properties Plus Limited*, 2013 ABQB 246
at paras. 23-24

49. Notice is fundamental to the legitimacy of the decision-making process in land use and zoning cases. Failure to comply with the notice requirement generally results in the bylaw being quashed.

Pitt Polder Preservation Society v. Pitt Meadows (District), 2000 BCCA 415, at para. 44
667895 BC Ltd. v. Corporation of Delta, 2016 BCSC 2356, at paras. 79-92, rev'd on other grounds 2018 BCCA 38

50. The new Council was inaugurated on November 5, 2018. On November 7, 2018 it held a special council meeting to “review the status of major development projects with a view to discuss and determine the potential to amend the building height and/or density of these major projects and/or potential future projects, through amendments to the Official Community Plan (OCP) and Zoning Bylaw, should Council resolve to do so”. According to documents obtained via FOI request, the November 7, 2018 special meeting was called by the Mayor on November 6th.

51. The November 7, 2018 special council meeting dealt specifically with GSR’s Property, seeking to stop the development that council had already approved through the issuance of DP-401. The City did not notify GSR of the special meeting even though GSR and City staff had been communicating about the Project the week before the

meeting, including on November 6th, and notwithstanding that the purpose of the resolutions was to prevent GSR from proceeding with its approved development.

52. Given the potentially draconian effect of the November 7th Resolutions, the City should have notified GSR that a resolution under section 463 of the *LGA* would be considered at the Council meeting. At the very least, there should have been sufficient public notice. The agenda for the special council meeting does not appear to have been made public until late in the afternoon the day of before the meeting and it does not indicate the specific purpose of the meeting even though the Mayor noted at the outset of the meeting that it had been called for “somewhat specific” reasons.

53. The right to notice should have been extant even if GSR would not have an opportunity to be heard at the special council meeting. At the very least, GSR and the public generally had a right to be provided with a fair, open and transparent process. This is particularly true given that the purpose of the resolutions was to start the clock on a very short window of opportunity to submit a building permit application (7 days).

London (City) v. RSJ Holdings Inc., 2007 SCC 29, at para. 42

54. The City also breached the rules of procedural fairness at the public hearing. The public hearing was originally set for February 25, 2019. GSR and its representatives and consultants were all prepared to attend the meeting and speak in opposition to the proposed bylaws.

55. On the afternoon of February 25th, shortly before the public hearing was set to begin, GSR was advised that the meeting was postponed to March 11, 2019. GSR specifically requested that the date of the public hearing be changed because key members of its team were not available on the new date. The City refused to change the date of the public hearing even though Bylaw 2290 targeted GSR’s Property.

56. The Petitioner seeks:

- (a) an order quashing the November 7, 2018 Resolutions.
- (b) an order quashing Bylaws No. 2289 and No. 2290.

E. FURTHER, AND ALTERNATIVELY, BYLAWS NO. 2289 AND 2290 VOID FOR ILLEGALITY, UNREASONABLE, AND PASSED IN BAD FAITH

57. Bad faith covers a wide range of conduct in the exercise of local government authority. It includes unreasonable conduct and conduct based on an improper motive or undertaken for an improper, indirect or ulterior purpose. Bad faith describes the exercise of delegated authority that is illegal, and which renders the consequential act void.

Rocky Point Metalcraft Ltd. v. Cowichan Valley Regional District, 2012 BCSC 756, at para. 82
338186 B.C. Limited v. City of Vancouver, 2011 BCSC 336, at paras. 78-85
Macmillan Bloedel Ltd. v. Galiano Island Trust Committee (1995), 10 B.C.L.R. (3d) 121 (C.A.), at paras. 153-154

58. Where a local government adopts a bylaw for the sole purpose of repudiating and cancelling an agreement it has entered into with another, and the other party to the agreement has changed its position and acted on the agreement, it constitutes bad faith. For this reason, it “smacks of bad faith” for a local government to approve a permit for development which statutorily binds the parties and then pass a bylaw that would prohibit the project from going forward.

Sierra Club of Canada v. Comox Valley Regional District, 2010 BCCA 343, at para. 38
Ladysmith (Town of) v. Diamond Improvement District, [1991] BCJ No. 620 (S.C.), at p. 6

59. The City adopted Bylaw 2290 to thwart GSR’s approved development. This is evidenced by comments made by council members during the various council meetings and the staff reports.

60. Council’s decision not to proceed with the proposed downzoning of 1350 Johnston Road once the owner of that Property submitted its building permit within 7 days of the November 7th Resolutions further supports the conclusion that the only reason the City amended the zoning bylaw and adopted Bylaw 2290 was to try and stop the development approved under DP No. 401.

61. The Petitioner seeks an order quashing Bylaws 2289 and 2290.

F. FURTHER, AND ALTERNATIVELY, USE OF PROPERTY FOR 12-STOREY DEVELOPMENT LAWFULLY NON-CONFORMING

62. Division 14 of Part 14 of the *LGA* governs “non-conforming uses and other continuations”. When a local government adopts a “land use regulation bylaw” (which, by definition, includes a zoning bylaw), and land or a building or other structure is lawfully used and does not conform to the bylaw, the use may be continued as a non-conforming use. For greater certainty, section 528(4) deems a building or other structure lawfully under construction at the time the bylaw is adopted to be a building or structure existing at that time and used for its intended purpose.

LGA, s. 455, *sub verbo* “land use regulation bylaw”, s. 528

63. The concept of fairness supplies the underlying rationale for the statutory non-conforming use exemption, for its liberal interpretation by our courts through the development of the “*commitment to use*” doctrine, and for the proposition that any doubt as to prior use ought to be resolved in favour of the owner. Council’s prohibition on completion of a land development project to which an owner has evidenced unequivocal commitment (*e.g.*, through significant physical alteration to the site) – as opposed to “mere intention” to use land, buildings, or structures for a particular purpose – smacks of unfairness because it is tantamount to giving the zoning bylaw retroactive effect, to the prejudice of the owner.

Sunshine Coast (Regional District) v. Bailey (1995), 15 B.C.L.R. (3d) 16 (S.C.), at paras. 24, 29-31, *aff’d* (1996) 22 B.C.L.R. (3d) 116 (C.A.)

64. However, “commitment to use” is not always synonymous with physical alteration of the land, particularly where the owner is prevented from building until certain steps are taken. The crucial step that moves a project from a concept at the planning stage to a “use” is an unequivocal commitment of the lands.

Sierra Club of Canada v. Comox Valley Regional District, 2010 BCSC 74, at paras. 65-, *aff’d* on other grounds, 2010 BCCA 343, at paras. 46-48
Linton v. Comox-Atrathcona (District of) (1991), 8 M.P.L.R. (2d) 157 (B.C.S.C.), at para. 14

65. Further, consistent with the notion of basic fairness, a building or structure is “lawfully under construction” when the evidence supports an owner’s irrevocable (ongoing) commitment to use the land in a certain way.

LGA, s. 528(4)

Nanaimo (Regional District) v. Salapura (1994), 94 B.C.L.R. (2d) 213 (S.C.), at para. 115
3252 Holdings Ltd. v. Sunshine Coast Regional District, 2004 BCSC 699, at paras. 58-75

66. GSR never wavered in its commitment to the approved development. It bound itself statutorily – as did the City – to proceed with the development of the subject lands in accordance with the DP No. 401. That commitment moved the project from a “mere intention” of one party to a settled agreement between the City and GSR that caused GSR to expend substantial financial resources consistent with that mutual understanding—a *de facto* use.

67. GSR applied for and obtained DP No. 401. That constituted an unequivocal commitment to use. However, it could not apply for and obtain a building permit from the City until it had satisfied all of the requirements of the Restrictive Covenants required by the City as a condition to the issuance of the permit.

68. GSR is entitled to proceed with the development approved under DP No. 401 pursuant to section 528.

69. The Petitioner seeks a declaration that the use of the Property for a 12-storey building as approved under DP No. 401 is lawfully non-conforming, such that the Petitioner is entitled to continue the development strictly in accordance with the terms of the permit.

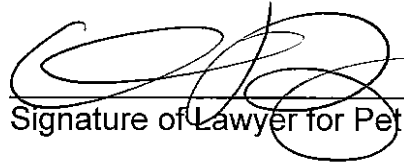
Part 4: MATERIAL TO BE RELIED ON

1. *Community Charter*, S.B.C. 2003, c. 26;
2. *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;
3. *Local Government Act*, R.S.B.C. 2015, c. 1;
4. Rules 2(1)-(2), 14-1, and 21-3(1) of the Supreme Court Civil Rules;
5. The inherent jurisdiction of the court;
6. Affidavit #1 of M. Dionne affirmed on April 10, 2019;
7. Affidavit #1 of P. Randhawa affirmed on April 10, 2019; and

8. Affidavit #1 of B. Toderian affirmed on April 10, 2019.

The petitioner estimates that the hearing of the petition will take 2 days.

Dated: April 10, 2019



Signature of Lawyer for Petitioner, Nathalie Baker

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of Part 1 of this notice of application

with the following variations and additional terms:

◆

Date: _____
Signature of Judge Master

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION FOR
SERVICE OUTSIDE BRITISH COLUMBIA**

The plaintiff(s) claim(s) to serve this pleading/petition on the defendant(s), ◆, outside British Columbia on the ground that: ◆