

**COURT OF APPEAL FOR BRITISH COLUMBIA**

Citation: ***Hastings Park Conservancy v. Vancouver  
(City),***  
2008 BCCA 117

Date: 20080320  
Docket: CA034437

Between:

**The Hastings Park Conservancy**

Appellant  
(Petitioner)

And

**City of Vancouver**

Respondent  
(Respondent)

Before: The Honourable Madam Justice Kirkpatrick  
The Honourable Mr. Justice Chiasson  
The Honourable Mr. Justice Tysoe

D.C. Creighton and J.T. Rohrick

Counsel for the Appellant

B.S. Parkin

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia  
January 29, 30 and 31, 2008

Place and Date of Judgment:

Vancouver, British Columbia  
March 20, 2008

**Written Reasons by:**

The Honourable Mr. Justice Tysoe

**Concurred in by:**

The Honourable Madam Justice Kirkpatrick  
The Honourable Mr. Justice Chiasson

**Reasons for Judgment of the Honourable Mr. Justice Tysoe:**

**Introduction**

[1] In 1889, the Province of British Columbia (the “Province”) granted approximately 162 acres of land known as Hastings Park to the City of Vancouver (the “City”) upon a trust for the use, recreation and enjoyment of the public. Hastings Park became the site of, among other things, an annual fair called the Pacific National Exhibition (the “PNE”) and a horserace track known as Hastings Racetrack or Hastings Racecourse (the “Racetrack”).

[2] In 1957, the City enacted CD-1 (Comprehensive Development) zoning in relation to Hastings Park. On October 4, 2005, the City’s council (the “Council”) enacted by-law 9119 to amend the CD-1 zoning to permit the use of slot machines at Hastings Park (the “Zoning By-law”). In this litigation, the appellant challenges the validity of the Zoning By-law and the ability of the City to enter into a related agreement.

## **Background**

[3] The Racetrack has been operating at Hastings Park for over 100 years. It is presently operated by Hastings Entertainment Inc. (the “Racetrack Operator”) pursuant to permission given by the City under a contractual arrangement that the parties call an operating agreement.

[4] When the CD-1 zoning for Hastings Park was enacted in 1957, the Council approved a very general form of development on the lands. In 1986, the Council approved an updated form of development for Hastings Park as outlined on a drawing showing the existing buildings constructed on the lands and showing the location of the Racetrack. A revised form of development, which reflected the demolition of a building, was approved by the Council in 1998.

[5] Although Hastings Park had been granted by the Province to the City, the Province had a continuing interest in the PNE. In particular, a Crown corporation began operating the PNE in 1973. In 1994, the Province made a decision to relocate the PNE to another site. This caused the City to consider the future of Hastings Park.

[6] In March 1997, following a two-year consultation, the City and the Board of Parks and Recreation (the “Park Board”) adopted a Restoration Plan based on “The Greening of Hastings Park Restoration Program”. The Restoration Plan called for numerous changes to Hastings Park, including construction of Italian gardens, a skateboard bowl and a sanctuary. It was contemplated in the Restoration Plan that the Racetrack would continue operating at Hastings Park.

[7] Ultimately, the Province did not move the PNE to another site. Instead, it decided to end its involvement as the operator of the PNE. In March 2003, the Province entered into an agreement with the City providing for the transfer of the PNE to the City at the beginning of 2004. In conjunction with the transfer, the Legislature enacted the ***Pacific National Exhibition Enabling and Validating Act***, S.B.C. 2003, c. 7, which retroactively deemed the trust condition contained in the original grant to include authorization to the City to itself carry on, and allow others to carry on, certain specified uses at Hastings Park. One of the specified uses was to conduct and manage gaming events within the meaning of the ***Gaming Control Act***, S.B.C. 2002, c. 14. Slot machines fall within the definition of “gaming events” contained in that Act.

[8] In July 2003, the Racetrack Operator and British Columbia Lottery Corporation made an application to the City for an amendment of the CD-1 zoning to permit the use of slot machines at Hastings Park. Council considered a staff report in respect of the application and directed staff to report back on various issues.

[9] In January 2004, a public consultation process was developed by the Park Board and the City for the purpose of again considering the future of Hastings Park and developing a plan that was referred to as the “New Concept”. Following the consultation process, Council considered four options at a meeting on June 22, 2004 and passed a motion that Council explore a modified approach combining two of the options and that requested staff to report back on numerous issues. All four options provided for the continuation of the Racetrack at Hastings Park.

[10] The City’s staff determined that the CD-1 zoning for Hastings Park would have to be amended in order to allow the use of slot machines, and the matter was referred by the Council to a public hearing. Prior to the holding of the public hearing, the City had an opinion survey conducted and held an open house on July 7, 2004 for the purpose of providing information to interested parties.

[11] The public hearing was scheduled for July 15, 2004. Legal notice of the hearing was published in the *Vancouver Sun*, with “courtesy advertisements” placed in three other papers. Additional notice was given in the form of a letter sent to all registered property owners in the vicinity of Hastings Park.

[12] The public hearing began on the scheduled date of July 15, 2004. An agenda package was made available to the members of the public who attended the hearing. The agenda package included four items of relevance to this proceeding; namely: (i) a summary of recommendations made by the City’s staff to Council; (ii) a draft form of the Zoning By-law; (iii) a copy of a policy report to Council dated November 17, 2003 prepared by the City’s staff; and (iv) a copy of a memorandum dated May 31, 2004 from the City’s Directors of Current Planning and Social Planning to the Mayor and Council.

[13] The summary of recommendations was taken from the policy report and was in the form of a draft resolution to be considered by Council. The draft read as follows:

THAT the application by Hastings Entertainment Inc. and British Columbia Lottery Corporation, to amend CD-1 By-law No. 3656 for 2901 East Hastings Street (Hastings Park) to permit slot machines at Hastings Racecourse, generally as outlined in Appendix A of the Policy Report dated November 17, 2003 entitled “CD-1 Text Amendment – 2901 East Hastings Street (Hastings Park)” be approved, subject to the following conditions:

- (a) That, prior to the enactment of the CD-1 amending by-law, the proponents shall make arrangements to the satisfaction of the Director of Planning and the Director of Legal Services to ensure that the proponents will not initiate the submission of a development application for slot machines at Hastings Racecourse until a new concept plan for the PNE in

Hastings Park, scheduled for completion in July, 2004, has been approved by Council.

(b) That, prior to approval by Council of an amended form of development for Hastings Park to accommodate slot machines at Hastings Racecourse, the applicant shall obtain approval of a development application by the Development Permit Board, which shall have particular regard for the following:

- (i) initial approval to be given to no more than 600 slot machines if parking can be satisfactorily accommodated and traffic circulation issues can be resolved.
- (ii) arrangements to the satisfaction of the Director of Planning in consultation with the General Manager of Engineering Services having due regard to neighbourhood considerations including:
  - the provision of improvements to McGill Street and Renfrew Street adjacent or in proximity to the site and new or modified signalization as required;
  - the location and design of access to/from, and circulation routes within, the site;
  - the number and arrangements of parking spaces;
  - the design of all parking areas, and passenger and goods loading facilities;
  - traffic management, curb zone and trip reduction measures; and
  - improvements to support pedestrians, bicyclists and transit riders.
- (iii) arrangements for the costs of any mitigation of community impacts identified through the site concept plan, which may include traffic, parking, noise, or policing to be paid by the proponents.
- (iv) arrangements to the satisfaction of the Director of Planning for signage to be compatible with the Sign By-law.
- (v) special consideration to be given to a high standard of architecture, landscaping and finishes.
- (vi) public benefits to the satisfaction of City Council.

[14] The draft form of the Zoning By-law included in the agenda package read as follows:

THE COUNCIL OF THE CITY OF VANCOUVER, in public meeting, enacts as follows:

1. Council repeals section 1 of By-law No. 3656, and substitutes:

### **“Zoning District Plan Amendment**

1. This By-law amends the Zoning District Plan attached as Schedule D to By-law No. 3575, and amends or substitutes the boundaries and districts shown on it, according to the amendments, substitutions, explanatory legends, notations, and references shown on the plan marginally numbered Z-556 attached as Schedule A to this By-law, and incorporates Schedule A into Schedule D to By-law No. 3575.

### **Uses**

2.1 The description of the area shown within the heavy black outline on Schedule A is CD-1 (3B).

2.2 The only uses permitted within CD-1 (3B), subject to such conditions as Council may by resolution prescribe, and to the conditions set out in this By-law, and the only uses for which the Director of Planning or Development Permit Board will issue development permits are:

(a) lawful uses existing as of the date of enactment of this By-law;

(b) in the racetrack facility, slot machine use to no more than 900 slot machines and a maximum floor area of 4 800 m<sup>2</sup> for slot machines and circulation customarily related to slot machines;

(c) lawful Accessory Uses existing as of the date of enactment of this By-law and customarily ancillary to any of the lawful uses referred to in section 2.2(a); and

(d) Accessory Uses customarily ancillary to the slot machine use referred to in section 2.2(b) except that such accessory uses do not include Casino – Class 1 or Casino – Class 2 or any other games of chance or mixed chance and skill.

### **Severability**

3. A decision by a court that any part of this By-law is illegal, void, or unenforceable is not to affect the balance of the By-law.”

2. Council repeals Schedule A attached to By-law No. 3893, and substitutes Schedule A attached to this By-law which is to be Schedule A to By-law No. 3656.

3. This By-law is to come into force and take effect on the date of its enactment.

[15] The policy report dated November 17, 2003 included in the agenda package contained the

following paragraph:

**Form of Development:** Council is being asked at this time, only to approve the change to the CD-1 By-law to permit 600-900 slot machines in the racetrack. All of the details pertaining to building form, access, parking, mitigation measures, signage and community amenity issues will be dealt with at the development permit stage, after which Council will be required to approve an amendment to the approved form of development that currently applies to Hastings Park. All of the identified issues will then have been resolved to the satisfaction of Council.

[16] The memorandum dated May 31, 2004 included in the agenda package contained the following paragraph:

**8. Form of Development and Neighbourhood Impacts**

As noted in the November 17, 2003, rezoning report, all details pertaining to building form, access, parking, mitigation measures, signage and community amenity issues will be dealt with at the Development Permit stage. Depending on the extent of proposed on-site changes, Council may be asked to approve an amendment to the approved form of development that applies to Hastings Park. All of the identified issues would then have been resolved to the satisfaction of Council.

[17] The public hearing did not conclude on July 15, 2004. It continued on July 19, 20 and 21. At its regular meeting held on July 22, 2004, the Council considered the rezoning application. It passed a resolution approving the application; this approval has been referred to as an approval “in principle” because the enactment of the by-law itself was deferred to a future council meeting. The resolution was in the same form as the draft resolution contained in the agenda package, with three exceptions.

[18] The first change was that the resolution as passed did not include clause (a) of the draft resolution requiring approval of the New Concept prior to the enactment of the Zoning By-law. A senior planner with the City deposed that clause (a) was not included in the finalized resolution because it was no longer required. The City’s Managing Director of Cultural Services deposed that Council was satisfied that it had adopted the New Concept when it asked staff to explore the modified approach between two of the four options considered by it.

[19] The second change was that the following items were added to clause (b) of the draft resolution (which became clause (a) of the finalized resolution):

(ii) ...

- minimize all destination and truck traffic from Renfrew in order to mitigate traffic problems on the street.

\* \* \*

(vii) design development to ensure strong mitigation measures for any light or

noise pollution created at the Racetrack.

and the words “identified through the site concept plan” were removed from draft clause (b) (iii).

[20] The third change was that the following clauses, which had not been part of the draft resolution, were included in the finalized resolution:

b. THAT in pursuance of rezoning condition a(vi) [public benefits to the satisfaction of City Council], the following be secured:

- resources to be invested in the Hastings Park greening process;
- resources to improve the community outside Hastings Park through consultation between the Racetrack operator, staff and community representatives;
- commitment to local hiring, childcare, creating a grooming school and expansion of the learning centre.

c. THAT staff report back as part of the report on the Operating Agreement (lease) for the Racetrack, achieving the following:

- securing horse racing and the related jobs to the existence of slots on the site;
- ensuring the Racetrack stays within its current footprint;
- ensuring there are no alcoholic drinks allowed on the slots floor; and
- confirming there are no gaming tables allowed on the site.

d. THAT staff report back to Council on circumstances after one year of slots operation.

e. THAT through the Development Application or Operating Agreement or Condition a(vi), commitments be confirmed for the Racetrack operator to provide \$40 Million in capital improvements at the Racetrack and/or on Hastings Park.

[21] On December 16, 2004, the Council approved in principle an implementation plan for the New Concept. The three-year implementation plan called for the development of a Master Plan, involving the integration of existing and future capital improvements, to be realized over a 10 to 15 year period.

[22] In the spring of 2005, the Council approved the preparation of an operating agreement between the City and the Racetrack Operator in connection with the operation of the Racetrack (the “Operating Agreement”). Its finalization was to be approved by the City Manager and the Director of Legal Services. The Operating Agreement had not been finalized at the time of the hearing before the chambers judge in the spring of 2006, but counsel for the City advises that it has now been finalized.

[23] In July 2005, the architects for the Racetrack Operator submitted to the City an application for a development permit. A senior planner for the City deposed that clause (a) of the resolution passed on July 22, 2004 (clause (b) of the draft resolution) referred to approval by Council of an amended form of development because it was anticipated at the time that installation of the slot machines would involve a change in the form of development at Hastings Park in the sense that the “massing or siting” of the building used by the Racetrack Operator would be altered (i.e., either the shape of the building or its footprint would be changed). However, the development permit application submitted by the Racetrack Operator only involved the construction of an internal mezzanine area. The application did not contemplate any significant physical changes to the outside of the grandstand building and, in the City’s view, it was not necessary for Council to approve an amended form of development.

[24] In August 2005, the Racetrack Operator submitted a list of the public benefits it was prepared to offer in connection with its proposed development. The offered public benefits were considered by Council at a meeting on September 22, 2005 when 32 speakers provided their views on the topic of the public benefits package.

[25] At its regular meeting two weeks later, on October 4, 2005, the Council did three things in connection with Hastings Park. First, it approved and accepted the public benefits offering made by the Racetrack Operator. Second, it adjusted its resolution passed on July 22, 2004 “to reflect the fact that the [Racetrack Operator’s] proposed development no longer requires Council’s approval of an amended form of development”. The minutes of the meeting set out the adjusted resolution, which deleted the phrase “prior to approval by Council of an amended form of development for Hastings Park to accommodate slot machines at Hastings Racecourse” from clause (a) of the July 22, 2004 resolution. The remainder of clause (a), which referred to the applicant obtaining approval of a development application by the Development Permit Board, was retained. Third, Council enacted the Zoning By-law. It was identical to the draft by-law included in the agenda package made available to the members of the public who attended the public hearing in July 2004 except that the number of the by-law (9119) was included in the heading.

[26] On October 24, 2005, the Racetrack Operator’s development permit application was conditionally approved by the Development Permit Board. As the approval required the Racetrack Operator to deal with a number of conditions, the development permit itself had not been issued by the time of the hearing before the chambers judge.

### **Decision of the Chambers Judge**

[27] Following a five-day hearing, the chambers judge issued written reasons on August 16, 2006 (2006 BCSC 1261, 27 M.P.L.R. (4th) 235). She upheld the validity of the Zoning By-law and the ability of the City to enter into the Operating Agreement; the appellant’s petition was dismissed.

[28] The chambers judge held that: (i) the Council had the ability to make zoning by-laws in respect of park land; (ii) there had been no breach by the City of obligations of procedural fairness; (iii) the enactment of the Zoning By-law was not subject to any unfulfilled conditions precedent; (iv)

the Council did not improperly delegate its decision-making authority; and (v) the Council did not improperly fetter its discretion in approving the rezoning application in principle.

### **Fresh Evidence Application**

[29] Counsel for the appellant filed a book entitled “Book of Materials for Judicial Notice” and made reference to it at the beginning of his submissions at the hearing of the appeal. The book contains the following five documents:

- (a) an article entitled “Aristotle’s Metaphysics”;
- (b) copies of pages from the City’s Internet website;
- (c) an article entitled “The First 100 Years: An Illustrated Celebration” (Vancouver Board of Parks and Recreation);
- (d) a copy of “The Greening of Hastings Park Restoration Program” (February 1996); and
- (e) a colour copy of a map included in “The Greening of Hastings Park Restoration Program”.

[30] We advised counsel that these documents contain facts of which we could not take judicial notice. We said that the matter would be treated as an application for fresh evidence and that, as is our usual practice, we would rule on the admissibility of the documents in our reasons for judgment. Counsel did not take us to any of these documents during oral submissions.

[31] In my opinion, the documents in question do not satisfy the test for the admission of fresh evidence set out in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 at 775, 50 C.C.C. (2d) 193. All of the documents could have been obtained with due diligence at the time of the hearing before the chambers judge and none of them, when taken with the other evidence, is likely to affect the outcome of this appeal. I would not admit the documents as fresh evidence on this appeal.

### **Issues on Appeal**

[32] The issues on appeal, as set out in the notice of appeal and as supplemented by the appellant’s factum, are as follows:

- (a) Is the Zoning By-law void or invalid as constituting an improper delegation by the Council of its statutory zoning authority under the *Vancouver Charter*, S.B. C. 1953, c. 55, or as failing to meet the requirement for certainty?
- (b) Is the Zoning By-law void or invalid on the basis that the Council fettered its discretion when it passed the July 22, 2004 resolution?
- (c) Is the Zoning By-law void or invalid for being enacted in violation of the requirements of natural justice or the *Vancouver Charter*?
- (d) Is the Zoning By-law void on the basis that Hastings Park is a permanent

public park and zoning in relation to such parks falls exclusively within the jurisdiction of the Park Board?

(e) Does the power to enter into the Operating Agreement fall exclusively within the jurisdiction of the Park Board?

## Standard of Review

[33] The chambers judge reviewed the topic of standard of review at paragraphs 48 through 57 of her reasons for judgment. As no issue was taken on this appeal with respect to the standards of review to be applied by the chambers judge and by this Court, I will simply state the propositions of law without discussing them.

[34] The standard of review with respect to the Council's jurisdiction to make by-laws is correctness: **United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)**, 2004 SCC 19, [2004] 1 S.C.R. 485. The standard of review with respect to decisions made by the Council within its jurisdiction is patent unreasonableness: **Nanaimo (City) v. Rascal Trucking Ltd.**, 2000 SCC 13, [2000] 1 S.C.R. 342 (which, as a result of the recent decision in **Dunsmuir v. New Brunswick**, 2008 SCC 9, is now simply to be referred to as "unreasonableness" without the adjective "patent").

[35] The content of the rules of natural justice and procedural fairness is based on a number of factors, including the provisions of the enabling statute, the nature of the function to be performed by the decision-making body and the type of decision to be made by the body: **Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)**, [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385. I will review this decision in more detail later in these reasons.

[36] On appeal, the standard of review on questions of law is correctness. Where the evidence is contained in affidavits, the appellate court will not disturb a finding of fact unless the chambers judge made a finding not reasonably supported by the affidavit evidence: **Orangeville Raceway Ltd. v. Wood Gundy Inc.** (1995), 6 B.C.L.R. (3d) 391 (C.A.).

## Discussion of Issues on Appeal

### (a) Improper Delegation/Uncertainty

[37] I will deal with the appellant's challenges to the Zoning By-law based on improper delegation and uncertainty at the same time because, in my view, both challenges fail for the same reason.

[38] The appellant submits that the conditions contained in clauses (a) through (e) of the resolution passed July 22, 2004 were uncertain and improperly delegated zoning powers to staff. The principal fallacy of this submission is that the provisions of the resolution referred to as "conditions" were not conditions precedent to the enactment of the Zoning By-law and were not made conditions of the Zoning By-law, which was enacted unconditionally on October 4, 2005.

[39] The draft resolution included in the agenda package for the July 2004 public hearing did contain one term that was a condition precedent to the enactment of the Zoning By-law (or, as the City's staff refers to it, a "pre-enactment condition"). That condition precedent was contained in clause (a) of the draft resolution, and it required the applicants to make arrangements, prior to the enactment of the CD-1 amending by-law, to ensure that they would not submit a development application for the slot machines at the Racetrack until Council had approved the New Concept. However, clause (a) of the draft resolution was not included in the July 22, 2004 resolution. At paragraph 85 of her reasons, the chambers judge accepted the City's evidence that the New Concept had been approved before Council passed the resolution on July 22, 2004. As her finding of fact in this regard is reasonably supported by the evidence, this Court cannot interfere with the finding.

[40] As found by the chambers judge at paragraphs 86 and 87 of her reasons, the remaining conditions contained in the July 22, 2004 resolution were not conditions precedent that were intended to be fulfilled prior to the enactment of the Zoning By-law. To the extent that they were true conditions, they were conditions subsequent or, in the staff's terminology, "post-enactment conditions".

[41] Furthermore, none of the conditions were incorporated into the Zoning By-law. Non-fulfillment of any of the conditions would not reverse or otherwise disturb the rezoning effected by the Zoning By-law.

[42] As the conditions were not conditions precedent to the enactment of the Zoning By-law and as they were not incorporated into the Zoning By-law, any defect in the conditions could not affect the validity of the Zoning By-law. In particular, none of the conditions constituted an improper delegation of zoning powers or made the Zoning By-law uncertain.

[43] The appellant also submits that there was an improper delegation because the Council was required to approve all aspects of the development associated with the Zoning By-law. The appellant says that the Council improperly delegated this responsibility to the Development Permit Board.

[44] This submission is based on the appellant's interpretation of paragraph (f) of section 565 (1) of the **Vancouver Charter**, which reads as follows:

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

\* \* \*

(f) designating districts or zones in which there shall be no uniform regulations and in which any person wishing to carry out development must submit such plans and specifications as may be required by the Director of Planning and obtain the approval of Council to the form of development, or in which any person wishing to carry out development must comply with regulations and guidelines set out in a development plan or official development plan;

[45] Paragraph (f) of section 565(1) empowers the Council to enact comprehensive development zoning. The appellant says that the requirement for the Council to approve the form of development means that it must approve all aspects of development within a comprehensive development zone. With respect, I disagree with the appellant's interpretation.

[46] The term "form of development" is not defined in the *Vancouver Charter*. The evidence established that the City regards the term to mean the massing and siting of structures on the lands. Council approved the form of development for Hastings Park in 1986. It approved an amended form of development in 1998 when a building was to be demolished. The July 22, 2004 resolution assumed that Council would have to approve an amended form of development because it was anticipated that the Racetrack Operator would make external changes to the grandstand building in order to accommodate the slot machines. Council removed this requirement when it enacted the Zoning By-law on October 4, 2005 because it had become apparent that the development application made by the Racetrack Operator only involved internal changes to the building.

[47] The term "form of development" is not found in any section of the *Vancouver Charter* other than section 565(1). In addition to paragraph (f) of section 565(1) quoted above, it is also found in paragraph (f.1), which authorizes Council to require a person to provide public amenities and the like as a condition of approving the form of development.

[48] The *Concise Oxford Dictionary of Current English*, 8th ed. (1990), includes the following meanings of the word "form":

n. **1 a** a shape; an arrangement of parts. **b** the outward aspect (esp. apart from colour) or shape of a body.

This definition is consistent with the City's interpretation of the term "form of development". In my opinion, the appellant's interpretation of the term "form of development" as encompassing all details of development within a comprehensive development zone is overly broad.

[49] As the development application of the Racetrack Operator did not involve a change of the form of development at Hastings Park, it was not an improper delegation by the Council to have left the development application within the control of the Development Permit Board subject to the guidelines provided by Council.

[50] In another section of its factum, the appellant argues that the Council must approve the form of development by means of a by-law and that a resolution of Council is not sufficient for this purpose. This argument is without merit in my opinion. Section 565(1)(f) is the provision which requires Council to approve the form of development. It is contained in a section dealing with Council's power to make zoning by-laws. If the Legislature had intended that the form of development be approved only by way of a by-law, one would expect that, in a section dealing with by-laws, it would have specified that the approval was required to be made by by-law. As this was not specified, it follows, in my view, that the Legislature intended that the approval referred to

in section 565(1)(f) can be given by a resolution of Council.

### **(b) Fettering Discretion**

[51] The appellant submits that by approving the use of slot machines “in principle”, without legislating standards in reference to such matters as traffic management, access, parking, signage and noise, the Council unlawfully fettered the discretion of successor councils to approve or not approve the entire development once those matters had been addressed. In support of its submission, the appellant cites *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919 and *Harrison v. Vancouver (City) Director of Planning* (1983), 21 M.P. L.R. 173 (B.C.S.C.).

[52] In *Pacific National Investments*, it was argued that there was an implied term of an agreement between a developer and a city that the city would not rezone certain lands before the expiration of a reasonable period of time. The Supreme Court of Canada held that such a term could not be implied because it would have constituted an illegal fetter on the city’s discretionary legislative powers. In *Harrison*, Macdonald J. stated that the issuance of a preliminary development permit, approving a proposed development “in principle” subject to the fulfillment of specified conditions, could well fetter the future discretion of the director of planning in connection with the issuance of the formal development permit.

[53] The main difficulty with the appellant’s submission is that it is based on the premise that only Council could decide whether the entire development should be approved. I have concluded under the previous section that Council was only required to approve a change in the form of development (if any) and that it properly left other development issues to the Development Permit Board. The discretion of future councils to approve or not approve the entire development could not have been fettered by the July 22, 2004 resolution because future councils were not required to approve all aspects of the development.

[54] In addition, Council did not fetter the discretion of future councils when it passed the July 22, 2004 resolution approving the rezoning application “in principle”. There was no commitment, binding on future councils, that the Zoning By-law would be enacted or that the development to be proposed by the Racetrack Operator would be approved.

[55] Even if the July 22, 2004 resolution could be construed as an unlawful fettering of the discretion of future councils, it would only render the Zoning By-law invalid if there was evidence that, on October 4, 2005 when the Zoning By-law was enacted, the Council considered itself bound to enact it as a result of the July 22, 2004 resolution. There is no such evidence.

### **(c) Procedural Fairness**

[56] The appellant gives the following particulars of its assertion that the City failed to meet the fair hearing requirements of the *Vancouver Charter* and at common law (or, expressed another way, that the City breached duties of procedural fairness and the common-law doctrine of legitimate expectations):

- A. Failure to provide specific details in the Statutory Notice of the [July 15], 2004 meeting to allow for meaningful public debate in relation to a Form of Development which was certain in all Material Aspects;
- B. Additional Terms Added by Council Post-Public Hearing;
- C. Passing a resolution which promised the citizens that the form of development issued be publicly debated at a later date and then breaking that promise;
- D. Altering the substance of by-law on the basis of representations from staff and [the Racetrack Operator] made outside of the hearing.

[57] I will make some introductory comments about the relevant provisions of the **Vancouver Charter** and governing common-law principles before addressing each of these matters.

[58] Subsection (1) of section 566 of the **Vancouver Charter** provides that the Council shall not amend a zoning by-law until it has held a public hearing. Subsection (3) specifies when and how the notice of the public hearing must be published. Subsection (4) gives attendees of the public hearing the right to be heard. Subsection (5) provides that the City may pass the proposed by-law in its original form or as altered to give effect to such representations made at the public hearing as the Council deems fit.

[59] The decision in **Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)**, *supra*, dealt with an allegation of bias on the part of a municipal councillor in connection with a rezoning and sale of municipal lands to a developer. Speaking on behalf of the majority, Sopinka J. confirmed that the content of the rules of natural justice and duty of fairness is no longer to be determined by classifying the tribunal as judicial, quasi-judicial, administrative or executive, and that the content of these rules will be based on a number of factors, including the terms of the statute pursuant to which the body operates, the nature of the particular function of which it is seized and the type of decision it is called upon to make (at page 1191). Sopinka J. observed that the rule against bias does not apply to municipal councillors with the same force as in the case of other tribunals whose character and functions more closely resemble those of a court because councillors are elected and are often active in either supporting or opposing development applications (at page 1192).

[60] Although the content of the rules of natural justice and duty of fairness are no longer to be determined solely by the type of tribunal making the decision in question, it is still one of the factors to be taken into account and, hence, it is still necessary to decide the capacity in which the tribunal has made the decision. In **Jones v. Delta (District Municipality)** (1992), 92 D.L.R. (4th) 714, 69 B.C.L.R. (2d) 239 (C.A.), leave to appeal to S.C.C. refused, [1993] 2 S.C.R. viii, a case involving a rezoning to allow the construction of a golf course on lands that would result in the loss of wildlife habitat, Southin J.A. linked the standard of natural justice required of a municipal council to the nature of the issue before it. Questions of broad public policy require higher standards than when the council is dealing with matters affecting only one or two people. She wrote at page 735:

... the judicial task is to discover what standard of natural justice or what is now

called procedural fairness the legislature would expect to be observed in the matter before the council. That standard depends in large measure on what the council is really doing on any particular matter ... I do not think that [the judgment in *Old St. Boniface* or the judgment in a companion decision] requires one to consider whether the bylaw in issue is “site specific”, to use the words of counsel for the respondents. I think those judgments require one to look at the real nature of the issue before the council. Was it a matter falling to be decided on a question of broad policy or was it a matter affecting some one or two persons, for instance, adjoining neighbours?

In the present case, the issue of deciding to permit the use of slot machines at Hastings Park was clearly a question of broad policy.

[61] I will now turn to each of the appellant’s specific allegations of breaches of natural justice or procedural fairness by the City.

#### **A. Failure to provide specific details**

[62] Relying on *Pitt Polder Preservation Society v. Pitt Meadows (District)*, 2000 BCCA 415, 77 B.C.L.R. (3d) 54, and *Peterson v. Whistler (Resort Municipality)* (1982), 39 B.C.L.R. 221 (S.C.), the appellant says that the notice of the public hearing should have described the physical consequences of an approval of the use of slot machines and given the details of the Operating Agreement.

[63] This submission is based on a misconception of the purpose of the public hearing. Its purpose was not to consider a change in the form of development at Hastings Park, the issuance of a development permit (the application for which had yet to be made) or the entering into of the Operating Agreement (which had yet to be negotiated). The City was not required to hold a public hearing in connection with those matters.

[64] Rather, the purpose of the public hearing was to consider the proposed change of zoning before Council made its decision whether or not to change it. Section 566(1) of the *Vancouver Charter* required the holding of a public hearing before the Council amended the CD-1 zoning applicable to Hastings Park. The City was required to give the public a reasonable amount of information so that reasonably informed representations could be made at the hearing about the proposed change of zoning to allow the use of slot machines at Hastings Park.

[65] In my opinion, the notice of the meeting and the agenda package available at the meeting were sufficient to give adequate notice of, and information about, the proposed change of zoning.

[66] The chambers judge found, at paragraph 72 of her reasons for judgment, that the notice of the public hearing was not misleading and complied with the statutory requirements. There was no error in her finding.

#### **B. Additional terms**

[67] The appellant complains that after the public hearing Council added an additional term; namely, it resolved on October 4, 2005 that the Operating Agreement should provide for the development of underground parking. This complaint has no merit.

[68] This is not a situation where the proposed by-law considered at a public hearing was revised after the public hearing in a manner which was not discussed and could not have been reasonably contemplated at the public hearing. The Zoning By-law, as enacted, was in identical form to the draft by-law included in the agenda package available to the public at the hearing. Nothing was added to the draft by-law after the public hearing. The conditions contained in the draft resolution were not part of the draft by-law and were not conditions precedent to its enactment.

### **C. Promise of further public debate**

[69] The appellant contends that the conditions contained in the draft of the resolution that was passed on July 22, 2004 would lead a reasonable person to conclude that there would be further public debate at a later hearing to consider the proposed rezoning. The appellant also points to the November 17, 2003 staff report (included in the agenda package available at the public hearing) stating that the Council would be required to approve an amended form of development after all identified issues had been resolved to Council's satisfaction.

[70] The first point to be made about this submission is that there is nothing in the evidence to suggest that the public was led to believe that there would be another public hearing of the type held in July 2004. What the appellant is really saying is that it had a legitimate expectation that there would be a public meeting of Council prior to the enactment of the Zoning By-law for the purpose of considering the development that the Racetrack Operator would undertake in connection with the installation of slot machines. In my opinion, no such legitimate expectation existed.

[71] In ***Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)***, *supra*, Sopinka J. made the following comments, at pages 1203-1204, about the doctrine of legitimate expectations:

It appears, however, that at bottom the appellant's submission is that the conduct of the Committee created a legitimate expectation of consultation. ...

The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.

The planning and zoning process is an elaborate structure designed to enable all those affected not only to be consulted but to be heard. The appellant availed itself of this process by making representations before the Community Committee. Even if the conduct of this Committee raised expectations on the part

of the appellant, I am of the opinion that this would not justify this Court in mounting onto the elaborate statutory scheme yet another process of consultation.

[72] The appellant has not pointed to any evidence of a representation that a further public hearing would occur prior to the enactment of the Zoning By-law. It is true that it was anticipated at the time of the July 2004 public hearing that Council would have to approve an amended form of development for Hastings Park. This is evident from the conditions contained in the draft resolution that was passed on July 22, 2004 and the November 17, 2003 staff report.

[73] However, as I have discussed, the conditions contained in the resolution passed on July 22, 2004 were not conditions precedent to the enactment of the Zoning By-law. Nor did the materials included in the agenda package state that Council would be asked to approve an amended form of development prior to the enactment of the Zoning By-law. To the contrary, the policy report dated November 17, 2003 indicated that all that was being considered by Council was a change to the CD-1 zoning and that all details of the contemplated development would be dealt with at the development permit stage. The memorandum dated May 31, 2004 was equivocal as to whether Council would be required to approve an amended form of development because it stated that the requirement depended on the extent of the proposed on-site changes. The memorandum also repeated the statement in the November 17, 2003 report that the details of the anticipated development would be dealt with at the development permit stage.

[74] I conclude that there was no legitimate expectation that there would be a further public hearing or public meeting of Council before Council considered a motion to enact the Zoning By-law.

#### **D. Alterations requiring further public hearing**

[75] Several things did happen between the end of the public hearing on July 21, 2004 and the enactment of the Zoning By-law on October 4, 2005. The Racetrack Operator had submitted its application for a development permit, which was being processed, and it had made its offer of a public benefits package, which was considered by the Council at its September 22, 2005 meeting and approved by Council at the same meeting at which the Zoning By-law was enacted. The appellant maintains the “crystallization of these vague ‘arrangements to the satisfaction of...’ into something tangible” constituted a “change of substance” to the July 22, 2004 resolution and necessitated another public hearing.

[76] The appellant relies in this regard on three decisions: ***Bay Village Shopping Centre Ltd. v. Victoria (City)*** (1972), 31 D.L.R. (3d) 570, [1973] 1 W.W.R. 634 (B.C.C.A.); ***Re Bourque*** (1978), 87 D.L.R. (3d) 349, 6 B.C.L.R. 130 (C.A.); and ***Capital Regional District v. Saanich (District)*** (1980), 115 D.L.R. (3d) 596, 24 B.C.L.R. 154 (S.C.). The first two decisions stand for the proposition that where a public hearing has been held in connection with a proposed by-law, the municipal council must not hear further submissions or representations from interested parties in the absence of other interested parties. The third decision involved a consideration of section 720(7) of the ***Municipal Act***, R.S.B.C. 1979, c. 290, which provided that any change to a proposed zoning by-law made after the public hearing is not permitted to alter the substance of the

by-law.

[77] In my opinion, a decision that is much closer to the facts at hand is ***Jones v. Delta***, *supra*. In that case, the municipality attempted to address some of the concerns expressed at the public hearing by opponents of the proposed zoning by-law. After obtaining two covenants from the developer associated with these concerns, the municipal council adopted the by-law. Opponents of the by-law applied to have it quashed on the basis that the municipality had considered new information without giving the public a further opportunity to be heard.

[78] In holding that there had been no breach of the duty of procedural fairness, Southin J.A. said the following at page 734:

To say that there ought to be a further hearing in this kind of process merely to enable someone who has already made his point to repeat his point yet again is to undermine the whole process of deliberation.

[79] She commented that it had been open to the municipal council to have adopted the by-law without obtaining the two covenants from the developer. She was of the view that the changes to the development did not change the substance of the matter and that the municipal council did not have any new information before it on the issue.

[80] Similarly, in the case at bar, the appellant was in total opposition to the use of slot machines at Hastings Park. There was nothing in the affidavit evidence filed on behalf of the appellant to indicate that its representatives would say anything significantly different at a further public hearing. The public benefits package was intended to ameliorate the effects of the proposed development. There is no evidence that the Council considered new information about the effects of slot machine use between the time of the public hearing in July 2004 and the passage of the Zoning By-law on October 4, 2005.

[81] In my opinion, it has not been demonstrated by the appellant that the duty of procedural fairness required the City to hold a further public hearing in the circumstances of this case.

#### **(d) Zoning of Public Parks**

[82] It is the appellant's position that Hastings Park is a "permanent public park" under the ***Vancouver Charter*** and that, as a result, the City does not have the jurisdiction to enact zoning in respect of it.

[83] Part XXIII of the ***Vancouver Charter*** deals with parks located within the City of Vancouver. Section 485 provides for the establishment of the Park Board. Section 488 deals with the care of parks by the Park Board. The portions of section 488 relevant to these proceedings are as follows:

488. (1) The Board shall have exclusive possession of, and exclusive jurisdiction and control of all areas designated as permanent public parks of

the City in a manner prescribed in subsection (5) of this section, and such areas shall remain as permanent public parks, and possession, jurisdiction and control of such areas shall be retained by the Board; ...

\* \* \*

- (5) Real property is designated as a permanent public park by
- (a) a declaration as such by a resolution or by-law of Council;
  - (b) statutory appropriation of specific real property for park purposes;
  - (c) dedication by either a person or by the City by deposit of a subdivision plan in the Vancouver Land Registry Office;
  - (d) gift to the City for permanent public park purposes; ...

It is the appellant's position that Hastings Park has been designated as a permanent public park by means of either paragraph (b) or (d) of subsection (5).

[84] According to the affidavit evidence filed on behalf of the City, the Park Board only maintains the portions of Hastings Park known as Empire Field and Hastings Community Park. The affidavit also stated that the Council has sought advice from the Park Board on matters related to Hastings Park but has not designated Hastings Park as a permanent public park.

[85] At the hearing of the petition, the City took the position that the appellant did not plead, or introduce any evidence on, the issue of the City's alleged inability to enact zoning by-laws in respect of Hastings Park on the basis that the Park Board has jurisdiction over it. This is also the City's position on appeal. The chambers judge agreed with the City's position, but went on to state the following:

[60] In any event, Council has the authority to zone and rezone land pursuant to s. 565 of the **Vancouver Charter**. Nothing in that statute exempts park land from Council's zoning powers. Further, the City has not devolved responsibility for all of Hastings Park to the Park Board.

The chambers judge did not cite any authority in reaching these conclusions.

[86] The jurisdiction of the City to make zoning by-laws in respect of parks was also considered in **Save Our Waterfront Parks Society v. Vancouver (City)**, 2004 BCSC 430, 28 B.C. L.R. (4th) 142, a decision involving the construction of a restaurant in a park. Morrison J. said the following about the City's jurisdiction to zone parks:

[67] The Restaurant Respondents submit that the Park Board has exclusive jurisdiction over park land, and thus is not subject to zoning restrictions. I do not agree with this submission. Parks are subject to zoning by-laws. It is within the purview of the Park Board to determine the uses in parks as set out above; there is

also a role for the Development Permit Board to consider whether the use prescribed by the Park Board is compatible with the applicable zoning by-law regarding the park, given the zone in which the park exists.

In making these comments, it does not appear that Morrison J. was contemplating a zoning by-law, like the one in the present case, that deals solely with the use or uses of park lands.

[87] In my opinion, it is unnecessary to determine whether Hastings Park is a permanent public park within the meaning of section 488 or whether the Council has the jurisdiction to pass zoning by-laws in respect of permanent public parks. In particular, it is not necessary to decide whether the chambers judge in this case and Morrison J. in **Save Our Waterfront Parks Society** were right or wrong in making the above-quoted comments.

[88] It would be particularly inappropriate, in my view, to make rulings with respect to these issues on an alternative basis in the present case for two reasons. First, the two issues were not raised in the petition with respect to the City's ability to pass the Zoning By-law (they were raised in connection with the City's ability to enter into the Operating Agreement). Secondly and more importantly, the Park Board was not made a party to this proceeding and is not represented before the Court. Section 485 of the **Vancouver Charter** gives the Park Board the legal capacity to exercise its powers by actions, and it follows in my view that the Park Board has legal capacity to be joined in actions with respect to its jurisdiction and powers. Although the Park Board is often represented by counsel who is also acting for the City, it would be open to the Park Board to engage independent counsel. It is my opinion that these issues should be left to be properly considered in a case where their determination is essential to the disposition of the proceeding.

[89] I say that it is unnecessary to determine these issues in this proceeding as a result of the provisions of the **Pacific National Exhibition Enabling and Validating Act**. I paraphrased some of its provisions earlier in these reasons at paragraph 7, and I will now set out the portions of section 2 relevant to this proceeding:

2 (1) The trust condition [contained in the original grant from the Province] is deemed to include authorization to the City of Vancouver and its successors to do, or to authorize, instruct or allow others, including, without limitation, the exhibition, to do, any or all of the following:

\* \* \*

(b) to authorize a person holding a gaming event licence issued under the *Gaming Control Act* to conduct and manage gaming events, within the meaning of that Act, that are licensed under that Act and undertaken at Hastings Park;

\* \* \*

(2) The council of the City of Vancouver may, in its absolute discretion, determine the uses or activities that are consistent with the uses and activities referred to in subsection 1 (a) to (f).

[90] Whether Hastings Park is a permanent public park or not and whether or not Council has the jurisdiction to pass zoning by-laws in respect of parks, it is clear from section 2 of the ***Pacific National Exhibition Enabling and Validating Act*** that the Council has the ability to authorize the use of slot machines at Hastings Park because slot machines fall within the definition of gaming events within the meaning of the ***Gaming Control Act***. Accordingly, whether or not the Zoning By-law is valid as a zoning by-law applicable to Hastings Park, it is nevertheless valid as an authorization under section 2(1) of the ***Pacific National Exhibition Enabling and Validating Act*** for the Racetrack Operator to use slot machines at Hastings Park.

[91] The specific provisions of the ***Pacific National Exhibition Enabling and Validating Act*** take precedence over the general provisions of section 488 of the ***Vancouver Charter*** setting out the jurisdiction of the Park Board over permanent public parks. This is as a result of the principle of statutory interpretation described as follows by Professor Sullivan in *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007) at pages 310-311:

In the event of a conflict between a specific provision dealing with a particular matter and a more general provision dealing not only with that matter but with others as well, the specific provision prevails. ... The specific provision is treated as an exception to the rule embodied in the more general provision.

[92] In the result, the Council had the ability to authorize the use of slot machines at Hastings Park irrespective of whether Hastings Park is a permanent public park within the meaning of section 488 of the ***Vancouver Charter*** and irrespective of whether the Council has the jurisdiction to pass zoning by-laws in respect of permanent public parks.

### **(e) Operating Agreement**

[93] The chambers judge held that the relief sought by the appellant in connection with the Operating Agreement was premature because it had yet to be finalized (paragraph 109), but went on to hold that the appellant had not met its onus of showing that the City did not have the jurisdiction to enter into the Operating Agreement (paragraph 112).

[94] As I understand the evidence, the Operating Agreement is not restricted to the use of slot machines but relates to the entire racetrack facility. It permits the Racetrack Operator to operate the Racetrack, including slot machines, on certain terms and conditions. The City is to receive an annual licence fee that represents a proportion of revenues either generated or projected to be generated from the operation of the Racetrack (including slot machines).

[95] This issue is similar to the preceding issue. In light of the provisions of the ***Pacific National Exhibition Enabling and Validating Act***, it is not necessary to decide whether Hastings Park is a permanent public park or whether the City has the ability to enter into leases, operating agreements or similar instruments in respect of lands that constitute a permanent public park.

[96] Section 2 of the ***Pacific National Exhibition Enabling and Validating Act*** explicitly

authorizes the City to permit specified uses at Hastings Park. It is necessarily implicit, in my opinion, that the City can determine or negotiate the terms and conditions applicable to an authorized use. The City may only be prepared to authorize a use if the terms and conditions applicable to the use are satisfactory to it, and it could not have been the Legislature's intention to require the City to unconditionally authorize a use or to leave the negotiation of the terms and conditions to another body such as the Park Board.

[97] Paragraph (f) of section 2(1) of the ***Pacific National Exhibition Enabling and Validating Act*** authorizes the City "to develop, construct and provide facilities for any use or activity authorized under this Act". If the City is authorized to provide a facility (such as the racetrack facility) for an authorized use or activity, it surely must have been the intention of the Legislature that the City would negotiate and enter into the lease, licence or other agreement relating to the provision of the facility. If the negotiation of such a lease, licence or other agreement was left to the Park Board, it would be possible for the Park Board to frustrate the City's authorization of a use by insisting upon unreasonable terms and conditions in relation to the provision of the facility required for the use. This could not have been the intention of the Legislature.

[98] For these reasons, it is my opinion that the City had the authority to enter into the Operating Agreement with the Racetrack Operator.

## **Conclusion**

[99] In summary:

- (a) the Zoning By-law is not void or invalid on any of the bases that:
  - (i) it constituted an improper delegation of statutory zoning authority;
  - (ii) it was uncertain;
  - (iii) the Council improperly fettered its discretion; or
  - (iv) the City breached duties of procedural fairness or the common-law doctrine of legitimate expectations;
- (b) irrespective of whether Hastings Park is a permanent public park within the meaning of section 488 of the ***Vancouver Charter*** and irrespective of whether the Council has the jurisdiction to pass zoning by-laws in respect of permanent public parks, the City had the power to authorize the use of slot machines at Hastings Park and to enter into the Operating Agreement with the Racetrack Operator.

[100] I would dismiss the appeal.

"The Honourable Mr. Justice Tysoe"

**I agree:**

“The Honourable Madam Justice Kirkpatrick”

**I agree:**

“The Honourable Mr. Justice Chiasson”