



No. S1811213  
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

**BETWEEN:**

**3L DEVELOPMENTS INC.**

**PETITIONER**

**AND:**

**COMOX VALLEY REGIONAL DISTRICT**

**RESPONDENT**

**RESPONSE TO PETITION**

**Filed by:** Comox Valley Regional District (the "Petition Respondent")

THIS IS A RESPONSE TO the Petition filed October 17, 2018.

**Part 1: ORDERS CONSENTED TO**

The Petition Respondent consents to the granting of the Orders set out in the following paragraphs of Part 1 of the Petition:

1. None.

**Part 2: ORDERS OPPOSED**

The Petition Respondent opposes the granting of the Orders set out in the following paragraphs of Part 1 of the Petition:

1. Paragraphs 1 to 9.

**Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The Petition Respondent takes no position on the granting of the Orders set out in the following paragraphs of Part 1 of the Petition:

1. None.

**Part 4: FACTUAL BASIS**

1. On March 29, 2011, the Board (the “Regional Board”) of the Respondent, Comox Valley Regional District, (the “Regional District”), adopted the “Comox Valley Regional District Regional Growth Strategy Bylaw No. 120, 2010”, (the “RGS Bylaw”), which bylaw enacted the “Comox Valley Regional Growth Strategy”, (the “RGS”).
2. The Petitioner, 3L Developments Inc., (“3L Developments”), is and has been for some time interested in proceeding with the development of three parcels of land (the “Development Lands”) located within Electoral Area “C” of the Regional District, commonly referred to as the “Puntledge – Black Creek Electoral Area”. The development of the Development Lands is subject to the policies set out in the RGS.
3. Pursuant to the RGS, the majority of the Development Lands are designated Rural Settlement Area (“RSA”) and a portion of the lands are designated Settlement Expansion Area (“SEA”). The portion of the Development Lands designated RSA may be developed for lots having a minimum size between 4 hectares (40,000 square metres) and 20 hectares (200,000 square metres), with a possibility of development for lots 2 hectares (20,000 square metres) in size where the development creates opportunities for small scale, land intensive, and entry level farming. The portion of the Development Lands designated SEA may be developed for lots having a minimum size of 4 hectares (40,000 square metres).
4. On May 22, 2013, 3L Developments made application (the “RGS Amendment Application”) to the Regional District to amend the RGS as a first step to authorizing 3L Developments to proceed with the development of the Development Lands for a large-scale commercial and residential development, commonly referred to as the proposed “Riverwood Development”. The proposed Riverwood Development includes 1.01488 hectares (10,148.8 square metres) of commercial development and 740 residential lots varying in size from 0.035 hectares (350 square metres) to 0.07 hectares (700 square metres).
5. On January 13, 2014, the Regional District became aware that Mr. Kabel Atwall, a representative of 3L Developments, had filed a complaint (the “Human Rights Complaint”) with the British Columbia Human Rights Tribunal against the Regional District, Mr. Edwin Grieve, who was at that time the Chair of the Regional Board, and Ms. Debra Oakman, who was at that time the Chief Administrative Officer of the Regional District.

6. By way of a Settlement Agreement (the "Settlement Agreement") executed on May 5 and 7, 2014, the Regional District, Mr. Grieve, and Ms. Oakman settled the Human Rights Complaint with Mr. Atwall. Mr. David Dutcyvich, a principal of 3L Developments, participated in the discussions leading to the Settlement Agreement, and was a signatory to the Settlement Agreement.
7. The Regional District, Mr. Grieve, and Ms. Oakman agreed to the settlement (the "Settlement") as set out in the Settlement Agreement on the express understanding and condition that the Settlement was made solely as a matter of business efficacy and was not to be construed as an admission of liability. Notwithstanding their agreement to the Settlement, the Regional District, Mr. Grieve, and Ms. Oakman expressly denied any liability to Mr. Atwall. The Settlement Agreement expressly provided for the above in paragraphs 11 and 12. The Regional District, Mr. Grieve, and Ms. Oakman only agreed to the Settlement on the basis that the monetary cost of settling was significantly less than the monetary cost of defending the Human Rights Complaint.
8. Mr. Grieve denies ever making any racially discriminatory statements about Mr. Atwall.
9. Pursuant to section 9 of the Settlement Agreement, the Regional District, Mr. Grieve, Ms. Oakman, Mr. Atwall, and Mr. Dutcyvich agreed to keep the Settlement confidential.
10. As part of the Settlement, the Regional District, Mr. Grieve, and Ms. Oakman agreed that:
  - (a) Mr. Grieve and Ms. Oakman would recuse themselves from further involvement relating to the Development Lands, with the Regional District establishing appropriate safeguards to ensure that Mr. Grieve and Ms. Oakman had no further involvement relating to the Development Lands;
  - (b) Mr. Grieve and Ms. Oakman would not attend or participate in any meetings of the Regional District with respect to any matter relating to the Development Lands;
  - (c) Mr. Grieve would select an alternate director acceptable to Mr. Atwall; and,
  - (d) Mr. Grieve and Ms. Oakman would not discuss the Development Lands or any applications submitted to the Regional District in relation to the lands with any potential alternate director.

11. On May 21, 2014, the Regional District's legal counsel wrote to Mr. Atwall's legal counsel and advised of the internal safeguards (the "Internal Safeguards") implemented by the Regional District to ensure that Mr. Grieve and Ms. Oakman had no further involvement relating to the Development Lands.
12. Since the Regional District entered into the Settlement Agreement, the Regional District has taken appropriate steps to ensure that the Internal Safeguards were implemented by the Regional District. As required by the Settlement Agreement, Mr. Grieve and Ms. Oakman have recused themselves from any involvement in any matters relating to the Development Lands, and have not attended or participated in any meetings of the Regional District with respect to any matter relating to the Development Lands.
13. Mr. Grieve and Ms. Oakman did participate in the process for the adoption of the "Rural Comox Valley Official Community Plan Bylaw No. 337, 2014", (the "OCP Bylaw"). At the time of their participation in that process, neither the Regional District, Mr. Grieve, nor Ms. Oakman believed that the Settlement Agreement precluded their participation in the process. The OCP Bylaw enacted a new Official Community Plan that set out general land use policy for all lands within Electoral Areas "A", "B", and "C" of the Regional District, except for Denman and Hornby Islands, which lands make up approximately 75% of the Regional District's territorial jurisdiction. The Regional District, Mr. Grieve, and Ms. Oakman neither intended that the Settlement Agreement require Mr. Grieve and Ms. Oakman to recuse themselves from participating in relation to such a broad policy matter nor understood it to do so.
14. Upon Mr. Atwall raising the participation of Mr. Grieve and Ms. Oakman in the process for adoption of the OCP Bylaw with the Regional District, the Regional District took steps to make the OCP Bylaw inapplicable to the Development Lands. While the Regional District did not agree with Mr. Atwall that the participation of Mr. Grieve and Ms. Oakman in the process for adoption of the OCP Bylaw was in violation of the Settlement Agreement, the Regional District did not believe it to be in the public interest to engage in a debate of the issue. Rather, the Regional District took steps to resolve the issue by excluding the Development Lands from the application of the OCP Bylaw. The Regional District was of the view that the public interest was better served by having Mr. Grieve and Ms. Oakman involved in the process for the adoption of the OCP Bylaw, with it not applying to the Development Lands, than by excluding Mr. Grieve and Ms. Oakman from involvement in the process for the adoption of the OCP Bylaw, with it applying to the Development Lands. In the end, Mr. Grieve and Ms. Oakman participated in the adoption of the OCP Bylaw, with that bylaw ultimately not applying to the Development Lands.

15. On May 23, 2014, Mr. Atwall's legal counsel wrote to the Regional District's legal counsel and confirmed that it was acceptable to Mr. Atwall that Mr. Curtis Scoville be appointed as Mr. Grieve's alternate director.
16. Mr. Scoville was subsequently appointed as Mr. Grieve's alternate director in accordance with the requirements of the *Local Government Act* and the Regional District's usual practice.
17. On June 2, 2014, Regional District staff prepared a report (the "June 2, 2014, Staff Report") to the Regional District's Committee of the Whole (the "Committee of the Whole") in relation to the RGS Amendment Application. In the June 2, 2014, Staff Report, Regional District staff reviewed the merits of the RGS Amendment Application and recommended against the initiation of an amendment (the "Amendment") to the RGS in furtherance of the RGS Amendment Application.
18. On June 10, 2014, the Committee of the Whole considered the RGS Amendment Application, and the advice from Regional District staff contained in the June 2, 2014, Staff Report, and resolved to defer consideration of the RGS Amendment Application to a later date pending receipt of clarification as to the process and procedures for amendments to the RGS.
19. On June 17, 2014, Regional District staff prepared a report (the "June 17, 2014, Staff Report") to the Committee of the Whole clarifying the process and procedures for amendments to the RGS. In the June 17, 2014, Staff Report, Regional District staff advised the Committee of the Whole that the first step in an amendment of the RGS was for the Regional Board to adopt a resolution to initiate the amendment.
20. On June 24, 2014, the Committee of the Whole considered the RGS Amendment Application, and the advice from Regional District staff contained in the June 2, 2014, Staff Report, and the June 17, 2014, Staff Report, and resolved to recommend to the Regional Board that it not initiate the Amendment.
21. On June 24, 2014, the Regional Board considered the recommendation of the Committee of the Whole that the Regional Board not initiate the Amendment, and resolved to not initiate (the "Non-Initiation Resolution") the Amendment.
22. 3L Developments brought legal proceedings (the "First JR Proceedings") in the British Columbia Supreme Court challenging the validity of the adoption of the Non-Initiation Resolution on the basis that the Regional Board did not first strike a RGS Technical Advisory Committee and a RGS Steering Committee to provide advice to the Regional Board as to whether the RGS Amendment Application met the criteria for proceeding as a minor amendment to the RGS.

23. The Regional District defended the First JR Proceedings on the basis that the *Local Government Act* required that the first step in amending the RGS was the adoption of a resolution to initiate the proposed amendment, with the second step being the consideration of whether the proposed amendment was a minor amendment, which would require the striking of a RGS Technical Advisory Committee and a RGS Steering Committee.
24. In the First JR Proceedings, the British Columbia Supreme Court held in favour of 3L Developments on the basis that the *Local Government Act* did not require the adoption of a resolution to initiate an amendment to the RGS, and ordered that the Non-Initiation Resolution be set aside, that the Regional District strike a RGS Technical Advisory Committee and a RGS Steering Committee to provide advice to the Regional Board as to whether the RGS Amendment Application met the criteria for proceeding as a minor amendment to the RGS, and that the Regional District pay 3L Developments its costs of the First JR Proceedings.
25. The Regional District brought an appeal (the "Appeal") to the British Columbia Court of Appeal from the decision in the First JR Proceedings on the basis that the British Columbia Supreme Court erred in concluding that the *Local Government Act* did not require the adoption of a resolution to initiate an amendment to the RGS. One of the reasons the Regional Board decided to bring the Appeal was that the alleged error of the British Columbia Supreme Court resulted in a precedent that would bind other regional districts in British Columbia, and the Regional Board believed that it had an obligation to seek to have that precedent set aside. To that end, the Regional Board sought and obtained funding from the Union of British Columbia Municipalities, an organization that represents all local governments in British Columbia, in support of the Appeal.
26. In Reasons for Judgment released on April 6, 2016, the British Columbia Court of Appeal agreed with the Regional District that the *Local Government Act* requires the adoption of a resolution to initiate an amendment to the RGS. Notwithstanding this finding, the British Columbia Court of Appeal held that the specific language of the RGS required the Regional District to first strike a RGS Technical Advisory Committee and a RGS Steering Committee to provide advice to the Regional Board as to whether the RGS Amendment Application met the criteria for proceeding as a minor amendment to the RGS before considering whether to initiate the Amendment. In the result, the British Columbia Court of Appeal upheld the decision of the British Columbia Supreme Court in the First JR Proceedings, and dismissed the Appeal, with costs payable to 3L Developments.

27. On April 20, 2016, Regional District staff wrote to 3L Developments and advised 3L Developments that, in accordance with the decision of the British Columbia Court of Appeal, the Regional District would keep 3L Developments apprised of the next steps to move forward with the RGS Amendment Application. In that letter, Regional District staff sought confirmation that 3L Developments wished to proceed with having the Regional Board consider the RGS Amendment Application.
28. On May 17, 2016, Regional District staff met with 3L Developments to discuss the RGS Amendment Application, and advised 3L Developments that, upon 3L Developments confirming that it wished to have the Regional Board proceed with consideration of the RGS Amendment Application, Regional District staff would be providing a detailed overview of the process and likely timing for consideration of the RGS Amendment Application.
29. On several occasions between May 17, 2016 and April 3, 2017, Regional District staff followed up with 3L Developments to seek confirmation that it wished to have the Regional Board proceed with consideration of the RGS Amendment Application.
30. On April 3, 2017, 3L Developments wrote to the Regional District requesting that the proposed Riverwood Development be considered by the Regional District as part of its 5-year review of the RGS.
31. On April 11, 2017, the Regional District wrote to 3L Developments to seek clarification of its request in its letter dated April 3, 2017. Specifically, the Regional District expressed the desire to proceed with consideration of the RGS Amendment Application as directed by the British Columbia Court of Appeal and asked that 3L Developments confirm whether it wished for the Regional District to proceed with consideration of the RGS Amendment Application.
32. On May 8, 2017, Regional District staff met with 3L Developments in relation to the RGS Amendment Application, advised 3L Developments that the Regional District was going to proceed with consideration of the RGS Amendment Application as directed by the British Columbia Court of Appeal, and sought the input of 3L Developments in relation to whether it wished to proceed with the Regional Board considering the RGS Amendment Application and the timing of that consideration.
33. On June 20, 2017, Regional District staff wrote to 3L Developments advising that Regional District staff intended to take forward a report to the Committee of the Whole in relation to the RGS Amendment Application for consideration at the Committee of the Whole meeting to be held on August 15, 2017. In that letter, Regional District staff sought confirmation from 3L Developments as to whether

it wished to proceed with consideration of the RGS Amendment Application on August 15, 2017, or wished to defer consideration of the RGS Amendment Application, or wished to withdraw the RGS Amendment Application.

34. On July 7, 2017, 3L Developments wrote to the Regional District formally requesting that consideration of the RGS Amendment Application be put on hold so that 3L Developments could understand the process for consideration of the RGS Amendment Application and could provide additional information in support of the RGS Amendment Application. In that letter, 3L Developments indicated that it would contact the Regional District when 3L Developments was ready to proceed with the RGS Amendment Application.
35. Between July 7, 2017, and January 9, 2018, Regional District staff and 3L Developments met and exchanged correspondence in relation to consideration of the RGS Amendment Application by the Regional Board. During those meetings and in that correspondence, Regional District staff repeatedly advised 3L Developments that the process for consideration of the RGS Amendment Application, with the requirements under the *Local Government Act* for consultation, would be lengthy.
36. In December 2017, 3L Developments alleged (the "Allegation"), for the first time, that Ms. Ann MacDonald, the Regional District's then General Manager of Planning and Development Services, had stated that "it would be a frosty Friday in hell" before the Regional District approved the proposed Riverwood Development.
37. The Regional District denies the Allegation.
38. On January 9, 2018, 3L Developments, through its legal counsel, advised Regional District staff that 3L Developments did not wish to proceed with the Regional Board considering the RGS Amendment Application at that time as 3L Developments wished to submit additional information in support of the RGS Amendment Application.
39. On May 22, 2018, Regional District staff met with 3L Developments to discuss the RGS Amendment Application. During that meeting, 3L Developments advised Regional District staff that 3L Developments wished to proceed with having the Regional Board consider the RGS Amendment Application, that 3L Developments would submit updated information in support of the RGS Amendment Application by May 25, 2018, and that 3L Developments wished for the RGS Amendment Application to be considered before the upcoming local government election to be held in October 2018.



40. On May 25, 2018, 3L Developments provided further information to the Regional District in support of the RGS Amendment Application and requested that the RGS Amendment Application be moved forward for consideration.
41. The Regional District then struck the RGS Technical Advisory Committee and the RGS Steering Committee to investigate and provide advice to the Regional Board as to whether the RGS Amendment Application met the criteria in the RGS for a minor amendment. The RGS Technical Advisory Committee was and continues to be made up of the senior planning staff of each of the Regional District, the Village of Cumberland, the Town of Comox, and the City of Courtenay. For the Regional District, the Town of Comox, and the City of Courtenay, those individuals respectively are Ms. Alana Mullaly, MCIP, RPP, Mr. Marvin Kamenz, MCIP, RPP, and Mr. Ian Buck, MCIP, RPP. For the Village of Cumberland, that individual was Ms. Judith Walker, MCIP, RPP, until late August/early September, 2018, and since then has been Mr. Ken Rogers, MCIP, RPP. The RGS Steering Committee was and continues to be made up of the chief administrative officers of each of the Regional District, the Village of Cumberland, the Town of Comox, and the City of Courtenay, respectively being Russell Dyson, Sundance Topham, Richard Kanigan, and David Allen.
42. Having reviewed the RGS Amendment Application, both the RGS Technical Advisory Committee and the RGS Steering Committee concluded that the RGS Amendment Application did not meet the criteria in the RGS for a minor amendment and advised the Regional Board that, if it wished to proceed with consideration of the RGS Amendment Application, it should proceed with the same as a standard amendment.
43. On July 5, 2018, Regional District staff prepared a report (the "July 5, 2018, Staff Report") to the Committee of the Whole advising that the RGS Steering Committee recommended that the Regional Board consider the RGS Amendment Application using the standard amendment process, that the Regional Board initiate the Amendment, and that the Regional Board give notice of the initiation of the Amendment to affected local governments and the Minister of Municipal Affairs and Housing. On that same day, Regional District staff provided a copy of the July 5, 2018, Staff Report to 3L Developments.

On July 10, 2018, the Committee of the Whole considered the RGS Amendment Application in light of the July 5, 2018, Staff Report, and resolved to recommend that the Regional Board initiate the Amendment and give notice of the initiation of the Amendment to affected local governments and the Minister of Municipal Affairs and Housing. With respect to the process for the Regional Board to consider the Amendment, a motion (the "Minor Amendment Motion") was put forward at the meeting that the Committee of the Whole recommend that the

Regional Board consider the Amendment using the minor amendment process under the RGS. Representatives of 3L Developments were in attendance at the July 10, 2018, meeting of the Committee of the Whole and spoke in favour of the Amendment being processed as a minor amendment. The minutes of the July 10, 2018, meeting of the Committee of the Whole indicate the Minor Amendment Motion was defeated on the basis of a vote of 4 in favour and 5 opposed.

44. On July 11, 2018, 3L Developments raised with Regional District staff that a reference in the July 5, 2018, Staff Report that approval of the Amendment required a unanimous vote of the Regional Board in order to proceed using the minor amendment process under the RGS (as had been indicated at the meeting as being required) was incorrect and may have affected the Committee of the Whole's voting on the Minor Amendment Motion. After considering the issue, the Regional District accepted that a mistake had been made by it and took steps to correct the mistake.
45. At that time, 3L Developments expressed again that it wished the RGS Amendment Application be processed expeditiously.
46. On July 13, 2018, Regional District staff prepared a report (the "July 13, 2018, Staff Report") to the Committee of the Whole advising that the Chair of the Regional Board required that the Committee of the Whole reconsider the Minor Amendment Motion.
47. The Regional District thereafter reconvened the RGS Technical Advisory Committee and the RGS Steering Committee to reconsider their recommendation that the Regional Board consider the Amendment using a standard amendment process in light of the fact that only a simple majority vote for approval of the Amendment was required for it to be processed by the Regional Board as a minor amendment. On July 13, 2018, the RGS Technical Advisory Committee confirmed its previous recommendation that the Amendment be processed as a standard amendment. On July 16, 2018, the RGS Steering Committee confirmed its previous recommendation that the Amendment be processed as a standard amendment.

48. On July 17, 2018, Regional District staff prepared a report (the "July 17, 2018, Staff Report") to the Committee of the Whole advising that the RGS Steering Committee had reconsidered its recommendation that the Regional Board consider the Amendment using the standard amendment process, and that the RGS Steering Committee had confirmed its recommendation that the Regional Board consider the Amendment using a standard amendment process. On that same day, Regional District staff provided a copy of the July 17, 2018, Staff Report to 3L Developments.
49. On July 17, 2018, the Committee of the Whole reconsidered the Minor Amendment Motion in light of the July 17, 2018, Staff Report, and the vote was 5 in favour and 3 opposed. Representatives of 3L Developments were in attendance at the July 17, 2018, meeting of the Committee of the Whole and spoke in favour of the Amendment being processed as a minor amendment. While it was initially announced that the Minor Amendment Motion was defeated on the basis that a 2/3 majority vote of the Committee of the Whole was required, the minutes of the July 17, 2018, meeting of the Committee of the Whole record that the Minor Amendment Motion was carried on the basis that only a simple majority vote of the Committee of the Whole was required.
50. Regional District Alternate Directory Curtis Scoville had, at this point, made no decision on whether he supported the RGS Amendment Application on its merits.
51. 3L Developments expressed concerns to Regional District staff as to the likelihood that the Regional Board would consider the Amendment on the basis of a standard amendment, and expressed concerns that a standard amendment process would be too lengthy.
52. In response, Regional District staff:
  - (a) Discussed with 3L Developments a number of scenarios for a standard amendment process, fulsome and expedited, as well as a scenario for a minor amendment process;
  - (b) Provided 3L Developments with a schematic that illustrated both what a regular standard amendment process could look like and its timing and what an expedited standard amendment process could look like and its timing;

- (c) Cautioned 3L Developments that, if a minor amendment process was used, the perception that the RGS Amendment Application was being expedited at the expense of public consultation and consultation with the Regional District's member municipalities, might negatively impact the Regional Board's consideration of the RGS Amendment Application.
  - (d) Indicated to 3L Developments that, if the Regional Board was agreeable to adopting an expedited standard amendment process, an expedited standard amendment process might not take much more time than a minor amendment process; and,
  - (e) Advised 3L Developments that whether the Regional Board would consider the Amendment using a minor amendment process (which was the recommendation of the Committee of the Whole, a regular standard amendment process, or an expedited standard amendment process was solely within the discretion of the Regional Board, and was not the decision of Regional District staff.
53. At its July 24, 2018, meeting, the Regional Board considered the Amendment in the context of the Committee of the Whole's recommendations of July 10 and 17, 2018. The Regional Board resolved, as recommended by the Committee of the Whole, to initiate the Amendment and to provide notice of the initiation of the Amendment to affected local governments and to the Minister of Municipal Affairs and Housing. At that meeting, the Regional Board defeated the recommendation of the Committee of the Whole to proceed with the Amendment using a minor amendment process. As a result, the Amendment was to proceed using a standard amendment process.
54. Representatives of 3L Developments were in attendance at the July 24, 2018, meeting of the Regional Board and spoke in favour of the Amendment being processed as a minor amendment.
55. At the July 24, 2018, meeting of the Regional Board:
- (a) The Regional Board was aware of the differences between a minor amendment process and a standard amendment process for the Amendment;
  - (b) Regional District staff addressed the fact that a standard amendment process for the Amendment could require not much longer than the time required for a minor amendment process or could be a significantly lengthier process, at the discretion of the Regional Board; and,

- (c) Regional District staff advised that, if the Regional Board chose to proceed with a standard amendment process, Regional District staff would report back to the Regional Board with options and timing for a standard amendment process.
56. On August 8, 2018, as a result of the Regional Board resolving to initiate the Amendment, the requirement in the *Local Government Act* that the Regional District adopt and follow a consultation plan in relation to the Amendment, and the direction from the Regional Board that consideration of the Amendment proceed through a standard amendment process, Regional District staff prepared a report (the "August 8, 2018, Staff Report") to the Regional Board that provided two options for consultation in relation to the Amendment, with one option being a regular standard amendment process and the other being an expedited standard amendment process. A copy of the August 8, 2018, Staff Report was provided to 3L Developments on August 10, 2018.
57. On July 25, 2018, Regional District staff spoke with representatives of 3L Developments and advised them generally of the expected contents of the August 8, 2018, Staff Report.
58. In the August 8, 2018, Staff Report, Regional District staff recommended that the Regional Board adopt a consultation plan (the "Recommended Consultation Plan") for the Amendment that was consistent with a regular standard amendment process as Regional District staff were of the view that, given the significance of the change to the RGS that would be effected by the adoption of the Amendment, a full opportunity for public consultation was appropriate. Regional District staff were also of the view that the Recommended Consultation Plan was consistent with statements made by 3L Developments at the July 24, 2018, meeting of the Regional Board to the effect that 3L Developments supported a full and meaningful opportunity for the public to be engaged in the consideration of the Amendment.
59. The Recommended Consultation Plan included the following opportunities for consultation with the Regional District in relation to the Amendment prior to the Regional Board considering first reading of a bylaw enacting the Amendment:
- (a) The posting of information and updates related to the Amendment on the Regional District's website;
  - (b) The opportunity for 3L Developments to meet with the RGS Technical Advisory Committee and the RGS Steering Committee to present in relation to the proposed Riverwood Development and to discuss the process for consideration of the Amendment;

- (c) The holding of a public open house, with 3L Developments in attendance and presenting in relation to the proposed Riverwood Development and in support of the Amendment; and,
  - (d) The holding of a further meeting of each of the RGS Technical Advisory Committee and the RGS Steering Committee to provide recommendations to the Regional Board in relation to the Amendment.
60. At its August 14, 2018, meeting, the Regional Board resolved to adopt the Recommended Consultation Plan, subject to certain amendments (the “Board Specified Amendments”) specified by the Regional Board that would result in the possibility of the Amendment being adopted one month earlier. Representatives of 3L Developments were in attendance at the August 14, 2018, meeting of the Regional Board and spoke in favour of the Amendment being processed through an expedited standard amendment process. The Regional Board made the Board Specified Amendments in an effort to accommodate the request of 3L Developments that the RGS Amendment Application be processed in an expedited manner.
61. On August 22, 2018, Regional District staff wrote to 3L Developments to clarify some comments made by it at the August 14, 2018, meeting of the Regional Board.
62. Regional District staff thereafter implemented the Recommended Consultation Plan, including as follows;
- (a) On August 28, 2018, 3L Developments met jointly with the RGS Technical Advisory and Steering Committees to present in relation to the proposed Riverwood Development and to discuss the process for consideration of the Amendment;
  - (b) On September 6, 2018, the Regional District held a public open house in relation to the Amendment, with in excess of 200 members of the public in attendance, and with 3L Developments in attendance and presenting in relation to the proposed Riverwood Development and in support of the Amendment;
  - (c) On September 12, 2018, the RGS Technical Advisory Committee met to review the RGS Amendment Application; and,
  - (d) On September 20, 2018, the RGS Steering Committee met to review the RGS Amendment Application.

63. On September 25, 2018, the RGS Technical Advisory Committee met to consider additional information provided by 3L Developments in relation to the RGS Amendment Application, and to consider and provide to the RGS Steering Committee requested additional detail regarding population estimates and residential unit supply relative to the proposed Riverwood Development.
64. On September 26, 2018, the RGS Technical Advisory Committee prepared a report (the "September 26, 2018, RGS Technical Advisory Committee Report") to the RGS Steering Committee to provide additional detail regarding population estimates and residential unit supply relative to the proposed Riverwood Development.
65. On September 27, 2018, the RGS Steering Committee met to review the September 26, 2018, RGS Technical Advisory Committee Report.
66. On September 28, 2018, the RGS Steering Committee completed a report (the "September 28, 2018, RGS Steering Committee Report") to the Regional Board for consideration at its meeting to be held on October 2, 2018, setting out the recommendations of the RGS Steering Committee that the Amendment be denied. The September 28, 2018, RGS Steering Committee Report, was made available to 3L Developments and the public on that same day.
67. On September 28, 2018, after having reviewed the September 28, 2018, RGS Steering Committee Report, 3L Developments made further written submissions (the "3L Developments Further Written Submissions") to the Regional Board for consideration at its meeting to be held on October 2, 2018, in support of the Amendment.
68. On October 1, 2018, 3L Developments, wrote to Regional District staff asking that consideration of the Amendment by the Regional Board the next day be deferred (extended) to allow 3L Developments to provide further information in support of the Amendment.
69. On October 1, 2018, as the agenda for the October 2, 2018, meeting of the Regional Board had already been published, Regional District staff prepared a report (the "October 1, 2018, Staff Report") advising the Regional Board that 3L Developments had requested a deferral (extension) of consideration of the Amendment, and that the Regional Board now had three options in considering the Amendment. The Regional Board could decide to defer (extend) consideration of the Amendment, to give first reading to a bylaw in furtherance of the Amendment, or to deny the Amendment.

70. When faced with similar circumstances in the past where an applicant has sought to defer (extend) consideration of an application that was set for consideration by the Regional Board on a published agenda, the Regional District has regularly considered such requests to be at the discretion of the Regional Board and to be dealt with at the meeting of the Regional Board.
71. At the October 2, 2018, meeting of the Regional Board, the Regional Board considered both the September 28, 2018, RGS Steering Committee Report and the October 1, 2018, Staff Report.
72. At the October 2, 2018, meeting of the Regional Board, Regional District staff advised the Regional Board of the three options available to it in addressing the Amendment, and 3L Developments made submissions to the Regional Board in relation to the request that consideration of the Amendment be deferred.
73. After hearing from Regional District staff, 3L Developments, and numerous members of the public both in favour and opposed to the proposed Riverwood Development, Regional District Director Price put forward a motion (the "Denial Motion") that the Amendment be denied, which motion was seconded by Regional District Director Sproule.
74. During the debate on the Denial Motion, 3L Developments submitted a letter dated October 2, 2018, to the Regional District requesting to withdraw the RGS Amendment Application, which letter was brought to the attention of the Regional Board.
75. Having become aware of the request from 3L Developments to withdraw the RGS Amendment Application, the Chair of the Regional Board conferred with Regional District staff, and determined that withdrawal of the RGS Amendment Application was at the discretion of the Regional Board as the Denial Motion was on the table and was being debated.
76. As the Denial Motion was on the table for consideration by the Regional Board and was being debated, Regional District staff advised the Regional Board, 3L Developments, and the public that 3L Developments' request to withdraw the RGS Amendment Application was at the discretion of the Regional Board.



77. The Regional Board then continued to consider the Denial Motion. Prior to voting on the Denial Motion, it was open for any of the members of the Regional Board to make a motion either to grant 3L Developments' request that consideration of the Amendment be deferred or to grant 3L Developments' request to withdraw the RGS Amendment Application prior to the vote on the Denial Motion. As no member of the Regional Board did so, the Regional Board voted on the Denial Motion, which was passed, resulting in the Amendment being denied.

## **Part 5: LEGAL BASIS**

### *Introduction*

1. In these legal proceedings, 3L Developments bases its claim to have the Denial Decision set aside and to remit the matter back to the Regional Board for reconsideration on the allegations that the Regional District had breached section 225 of the *Local Government Act* by failing to have in place a procedure bylaw setting out the procedure to be followed when an applicant seeks to withdraw an application to amend the RGS, and had breached its duty of procedural fairness to 3L Developments by:
  - (a) Failing to provide 3L Developments with an opportunity to respond to the recommendations of the RGS Technical Advisory and Steering Committees that the Amendment be denied;
  - (b) Failing to consider the request by 3L Developments that the Regional Board defer consideration of the recommendations of the RGS Technical Advisory and Steering Committees that the Amendment be denied;
  - (c) Failing to consider the request by 3L Developments to withdraw the RGS Amendment Application; and,
  - (d) Making the Denial Decision in circumstances where the Regional District and the Regional Board were biased.

### *The Procedure Bylaw*

2. With respect to the first basis on which 3L Developments seeks to have the Denial Decision set aside, section 225 of the *Local Government Act* requires the Regional District to:
  - (a) Establish the general procedures to be followed by the Regional Board and by Regional Board committees in conducting their business, including the manner by which resolutions may be passed and bylaws adopted;

- (b) Provide for advance public notice respecting the date, time and place of Regional Board and Regional Board committee meetings, and establish the procedures for giving that notice; and,
  - (c) Identify places that are to be public notice posting places for the purposes of the application of section 94 [*requirements for public notice*] of the *Community Charter* to the Regional District.
- 3. The Comox Valley Regional District Procedure Bylaw No. 1, 2008, meets the requirements of section 225 of the *Local Government Act*, including the requirement to establish the “general” procedures to be followed by the Regional Board and by Regional Board committees in conducting their business, including the manner by which resolutions may be passed and bylaws adopted.
- 4. A procedure bylaw under section 225 of the *Local Government Act* is not intended to include procedures in relation to development applications. If it were so intended, the Province would not have included the requirement in section 460 of the *Local Government Act* that a regional district adopt a bylaw that define procedures under which an owner of land may apply for an amendment to an official community plan or zoning bylaw, or for a permit under Part 14 of the *Local Government Act*.
- 5. Of particular note is that section 460 of the *Local Government Act* does not apply to amendments to a regional growth strategy, and there is no comparable provision in the *Local Government Act* that does apply to a regional growth strategy.
- 6. Simply put, there is no statutory obligation placed on the Regional District to adopt a bylaw to establish a procedure to be followed when an applicant seeks to withdraw an application to amend the RGS.
- 7. In the circumstances, the common law principles that local governments have broad discretion in the regulation of their own procedures, that it is not for the courts to dictate the manner in which such bodies shall manage their internal affairs, and that, in the absence of statutory obligation, or misconduct, the internal regulation of the affairs of municipal bodies is a matter for such bodies and for them alone (see: *Houde v. Quebec*, [1978] 1 S.C.R. 937) are directly applicable to the Regional Board’s consideration of the Amendment.
- 8. The Regional District did not violate the requirement to adopt a procedure bylaw under section 225 of the *Local Government Act*, and was permitted to manage its own procedure as it did.

*Procedural Fairness*

9. With respect to the second, third, and fourth bases on which 3L Developments seeks to have the Denial Decision set aside, the Regional District was not required to:
  - (a) Provide 3L Developments with an opportunity to respond to the recommendations of the RGS Technical Advisory and Steering Committees that the Amendment be denied;
  - (b) Consider separately the request by 3L Developments that the Regional Board defer consideration of the recommendations of the RGS Technical Advisory and Steering Committees that the Amendment be denied; or,
  - (c) Consider separately the request by 3L Developments to withdraw the RGS Amendment Application.
10. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada provided guidance on how the duty of procedural fairness may arise and be applicable in various circumstances. The Court held that the duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully, and have them considered by the decision-maker.
11. Several factors are relevant to determining whether a duty of procedural fairness exists and, if it does, the content of the duty:
  - (a) The nature of the decision being made and the process followed in making it;
  - (b) The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
  - (c) The importance of the decision to the individual or individuals affected;
  - (d) The legitimate expectations of the person challenging the decision; and,
  - (e) The choices of procedure made by the decision-maker itself.

12. In the context of the consideration of the RGS Amendment Application, a number of matters must be noted in respect of the above factors.
13. First, through the RGS Amendment Application, 3L Developments is seeking the right to proceed with the Riverwood Development, and the Denial Decision did not take away any rights. A decision not to introduce a bylaw amendment to authorize an activity, or having introduced one to not enact it, is not analogous to a decision to enact a bylaw altering existing legal rights. In the first case, a new privilege or right is sought. In the second case, an existing privilege or right is being affected. The duty of procedural fairness is not triggered where a privilege or right is sought; it is only triggered where a privilege or right is being affected (see: *McInnes v. Onslow-Fane*, [1978] 1 W.L.R. 1520).
14. Second, the consideration of the RGS Amendment Application is a legislative act of the Regional Board, and is wholly within the discretion of the Regional Board. The duty of procedural fairness is not triggered in the context of legislative acts (see: *Smith v. Surrey (City)*, [1998] B.C.J. No. 250; *Maple Ridge (District) v. Thornhill Aggregates Ltd.*, [1998] B.C.J. 1485; *Green Dragon Medicinal Society v. Victoria (City)*, 2018 BCSC 116).
15. Third, the *Local Government Act* is drafted in a manner that recognizes that, at common law, there is no procedural fairness owed in the context of a legislative act. There is no stand alone right in members of the public to be consulted in relation to the exercise of a local government's legislative powers (see: *Smith*, supra). It is for this reason that the Legislature included section 460 in the *Local Government Act*, which requires a regional district to adopt a bylaw that defines procedures under which an owner of land may apply for an amendment to an official community plan or zoning bylaw, or for a permit under Part 14 of the *Local Government Act*, and requires the Regional District to consider the application. Section 460 does not apply to applications to amend a regional growth strategy, and there is no similar statutory provision that does apply to such applications.

16. Fourth, neither the *Local Government Act* nor the RGS (outside of the requirement that the Regional District strike a RGS Technical Advisory Committee and a RGS Steering Committee to advise the Regional Board on whether the RGS Amendment Application meets the criteria for a minor amendment under the RGS) imposes any procedural fairness requirements on the Regional District in favour of 3L Developments. Being a legislative act, where there are no express statutory procedural fairness requirements, no procedural fairness is owed, and where there are express statutory procedural fairness requirements, procedural fairness is limited to complying with those express statutory requirements (see: *1139652 B.C. Ltd. v. Whistler (Resort Municipality)*, 2018 BCSC 1806).
17. Fifth, the RGS is a significantly policy laden document (see: *3L Developments Inc. v. Comox Valley Regional District*, 2016 BCCA 148).
18. Finally, while the consideration of the RGS Amendment Application is important to 3L Developments, it is also important to the public at large, whose interest the Regional Board represents.
19. In the alternative, if a duty of procedural fairness was owed to 3L Developments, a review of the procedural steps taken by the Regional District since it received the RGS Amendment Application makes clear that 3L Developments was consulted throughout the process, and was provided with significant time and numerous opportunities to provide information in support of the RGS Application, and to be heard in relation to the same. The Regional District provided 3L Developments with a number of opportunities to provide information and make submissions to the Regional District in relation to the RGS Amendment Application. Specifically, 3L Developments had numerous opportunities to present to the RGS Technical Advisory Committee, the RGS Steering Committee, the Regional District Committee of the Whole and the Regional Board.
20. Based on the foregoing, and the applicable case law, including *Smith, supra*, *Maple Ridge, supra*, *Green Dragon, supra*, *1139652 B.C. Ltd., supra*, it cannot be said that the Regional District breached any duty of procedural fairness owed to 3L Developments.

#### *Reasonable Apprehension of Bias*

21. With respect to the fifth basis on which 3L Developments seeks to have the Denial Decision set aside, several matters must be noted.

22. First, neither Mr. Grieve nor Ms. MacDonald, who 3L Developments alleges were biased against the RGS Amendment Application, were involved in the Denial Decision.
23. Second, Mr. Scoville, who 3L Developments alleges was also biased against the RGS Amendment Application, while involved in the Denial Decision, was entitled to hold a political view in relation to the RGS Amendment Application. The fact that Mr. Scoville stated his political position in advance of the vote of the Regional Board as to whether the RGS Amendment Application should be processed as a minor amendment is not sufficient evidence that Mr. Scoville had a disqualifying bias. Mr. Scoville, as a member of the Committee of the Whole had already voted twice on the same issue. Moreover, Mr. Scoville voted in favour of initiating the Amendment so that it could be reviewed on its merits. His doing so is clear evidence that he was not biased against the RGS Amendment Application.
24. Third, Mr. Scoville's clear evidence is that he has maintained an open mind in relation to the RGS Amendment Application.
25. Finally, it must be kept in mind that the Denial Decision was made by the Regional Board as a whole, based on the recommendations of the RGS Technical Advisory and Steering Committees, which committees included representatives of the Regional District's member municipalities. The decision was not that of Mr. Scoville alone.
26. In the result, it cannot be said that there was a reasonable apprehension of bias on the part of the Regional Board in making the Denial Decision.

*Conclusion*

27. In all the circumstances, the Regional District submits that the Petition should be dismissed in its entirety, with costs to the Regional District.

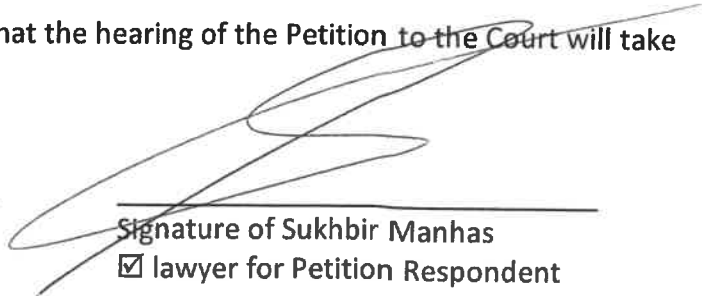
**Part 6: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of James Andrew Warren made 20/Dec/2018;
2. Affidavit #2 of James Andrew Warren made 12/Dec/2018;
3. Affidavit #1 of Russell Dyson made 19/Dec/2018;
4. Affidavit #1 of Alana Mullaly made 19/Dec/2018;
5. Affidavit #1 of Edwin Grieve made 18/Dec/2018;

- 6. Affidavit #1 of Curtis Scoville made 19/Dec/2018; and,
- 7. Such further and other material as this Honourable Court may permit.

The Petition Respondent estimates that the hearing of the Petition to the Court will take two days.

Dated: 21/Dec/2018



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 Signature of Sukhbir Manhas  
 lawyer for Petition Respondent

The ADDRESS FOR SERVICE of the Petition Respondent:  Fax number address for service <i>(if any)</i> : Email address for service <i>(if any)</i> :	c/o Young Anderson 1616 - 808 Nelson Street Box 12147, Nelson Square Vancouver, BC V6Z 2H2  604.689.3444  Not applicable.
The name and office address of the Petition Respondent's lawyer is:	Sukhbir Manhas Young Anderson 1616 - 808 Nelson Street Box 12147, Nelson Square Vancouver, BC V6Z 2H2